EB-2018-0270

ONTARIO ENERGY BOARD

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

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

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

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

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

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

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

MOTION RECORD AND BOOK OF AUTHORITIES OF HYDRO ONE NETWORKS INC.

(School Energy Coalition Motion to dismiss Hydro One Networks Inc.'s Application under section 86(2)(b) of the *Ontario Energy Board Act,* 1998)

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TAB 1

The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Interveners*

INDEXED AS: BLENCOE *v.* BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

File No.: 26789.

2000: January 24; 2000: October 5.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ: BLENCOE *c.* COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Référence neutre: 2000 CSC 44.

N° du greffe: 26789.

2000: 24 janvier; 2000: 5 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

from government and acting judicially — Whether Canadian Charter of Rights and Freedoms applicable to Commission's actions — Canadian Charter of Rights and Freedoms, s. 32.

Constitutional law — Charter of Rights — Liberty and security of person — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's constitutional rights to liberty and security of person engaged — Canadian Charter of Rights and Freedoms, s. 7.

Administrative law — Abuse of process — Delay — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's ability to have fair hearing compromised — Whether lengthy delay amounted to denial of natural justice or abuse of process.

In March 1995, while serving as a minister in the Government of British Columbia, the respondent was accused by one of his assistants of sexual harassment. A month later, the premier removed the respondent from Cabinet and dismissed him from the NDP caucus. In July and August of 1995, two complaints of discriminatory conduct in the form of sexual harassment were filed with the British Columbia Council of Human Rights (now the British Columbia Human Rights Commission) against the respondent by two other women, W and S. The complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. The respondent was informed of the first complaint in July 1995 and of the second in September 1995. After the Commission's investigation, hearings were scheduled before the British Columbia Human Rights Tribunal in March 1998, over 30 months after the initial complaints were filed.

Following the allegations against the respondent, media attention was intense. He suffered from severe depression. He did not stand for re-election in 1996. Considering himself "unemployable" in British Columbia due to the outstanding human rights complaints against him, the respondent commenced judicial review proceedings in November 1997 to have the complaints stayed. He claimed that the Commission had lost jurisdiction due to unreasonable delay in processing the complaints. The respondent alleged that the unreasona-

— Commission indépendante du gouvernement et agissant de manière judiciaire — La Charte canadienne des droits et libertés s'applique-t-elle aux actes de la Commission? — Charte canadienne des droits et libertés, art. 32.

Droit constitutionnel — Charte des droits — Liberté et sécurité de la personne — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — Les droits constitutionnels de l'intimé à la liberté et à la sécurité de sa personne s'appliquent-ils? — Charte canadienne des droits et libertés, art. 7.

Droit administratif — Abus de procédure — Délai — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — La capacité de l'intimé d'obtenir une audience équitable a-t-elle été compromise? — Le long délai écoulé constituait-il un déni de justice naturelle ou un abus de procédure?

En mars 1995, alors qu'il était ministre au sein du gouvernement de la Colombie-Britannique, l'intimé a été accusé de harcèlement sexuel par l'une de ses adjointes. Un mois plus tard, le premier ministre l'excluait du Cabinet et du caucus du NPD. En juillet et en août 1995, deux autres femmes, W et S, ont déposé devant le British Columbia Council of Human Rights (maintenant la British Columbia Human Rights Commission) deux plaintes de discrimination sous forme de harcèlement sexuel contre l'intimé. Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. L'intimé a été informé de la première plainte en juillet 1995 et de la seconde en septembre 1995. À la suite de l'enquête de la Commission, des audiences devant le British Columbia Human Rights Tribunal ont été fixées au mois de mars 1998, soit plus de 30 mois après le dépôt des plaintes initiales.

Les allégations formulées contre l'intimé ont suscité une attention intense de la part des médias. Il a fait une grave dépression. Il n'a pas sollicité un nouveau mandat en 1996. Se disant «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pesaient toujours contre lui, l'intimé a présenté, en novembre 1997, une demande de contrôle judiciaire en vue d'obtenir l'arrêt des procédures relatives aux plaintes. Il a fait valoir que la Commission avait perdu compétence en raison d'un délai déraisonna-

ble delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice. His petition was dismissed by the Supreme Court of British Columbia. A majority of the Court of Appeal allowed the respondent's appeal and directed that the human rights proceedings against him be stayed. The majority found that the respondent had been deprived of his right under s. 7 of the *Canadian Charter of Rights and Freedoms* to security of the person in a manner which was not in accordance with the principles of fundamental justice.

Held (Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part): The appeal should be allowed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ.: The *Charter* applies to the actions of the British Columbia Human Rights Commission. The Commission is created by statute and all of its actions are taken pursuant to statutory authority. Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion. Further, the Commission cannot escape *Charter* scrutiny merely because it exercises judicial functions. The ultimate source of authority is government. The Commission is carrying out the legislative scheme of the *Human Rights Code* and must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally. It is the administration of a governmental program that calls for *Charter* scrutiny.

Section 7 of the *Charter* can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration. If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged.

In order for s. 7 to be triggered, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. "Liberty" is engaged where state compulsions or prohibitions affect

ble dans le traitement des plaintes. L'intimé a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle. Sa demande a été rejetée par la Cour suprême de la Colombie-Britannique. La Cour d'appel, à la majorité, a accueilli l'appel de l'intimé et a ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre lui. Les juges majoritaires ont conclu que l'intimé avait été privé, d'une manière non conforme aux principes de justice fondamentale, du droit à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*.

Arrêt (les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie): Le pourvoi est accueilli.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major et Bastarache: La *Charte* s'applique aux actes de la British Columbia Human Rights Commission. La Commission a été créée par une loi et elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause. L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. La Commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi. En outre, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle exerce des fonctions judiciaires. L'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission applique le régime législatif du *Human Rights Code* et doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale». C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*.

L'article 7 de la *Charte* peut déborder le cadre du droit criminel, au moins dans le cas d'un acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice. Rien ne s'oppose à ce que cet article s'applique à une affaire en matière de droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application.

Pour que l'art. 7 s'applique, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. Le droit à la liberté garanti par l'art. 7 ne s'entend plus uniquement de l'absence de toute contrainte physique. La «liberté» est en cause lorsque des contraintes ou des interdictions de l'État influent sur les

important and fundamental life choices. The s. 7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom. Here, the state has not prevented the respondent from making any "fundamental personal choices". Therefore, the interests sought to be protected in this case do not fall within the "liberty" interest protected by s. 7.

The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious. In this case, the direct cause of the harm to the respondent was not the state-caused delay in the human rights process. While the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, for s. 7 to be engaged there must be a sufficient causal connection between the state-caused delay and the prejudice suffered. The most prejudicial impact on the respondent was caused not by the actions of the Commission but rather by the events prior to the complaints — the allegations of the respondent's assistant — which caused the respondent to be ousted from Cabinet and caucus as well as the actions by non-governmental actors such as the press. The harm to the respondent resulted from the publicity surrounding the allegations themselves, coupled with the political fallout which ensued. When the respondent began to experience stigma, the human rights proceedings had yet to commence. Further, there is a pending civil suit against the respondent for sexual harassment and W's complaint against the Government on these very same issues. The prolongation of stigma from ongoing publicity was likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name. Lastly, the human rights process did not seriously exacerbate the respondent's prejudice. It is difficult to see how procedural delay could have seriously increased damage already done to the respondent's reputation.

Even accepting that the outstanding complaints may have contributed to the respondent's stigma to some degree, thereby causing some of his suffering, and assuming without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to the respondent, the state interference with the respon-

choix importants et fondamentaux qu'une personne peut faire dans sa vie. Le droit à la liberté garanti par l'art. 7 protège l'autonomie personnelle. Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d'importance fondamentale sans intervention de l'État. Cette autonomie personnelle n'est toutefois pas synonyme de liberté illimitée. Dans la présente affaire, l'État n'a pas empêché l'intimé de faire des «choix personnels fondamentaux». Par conséquent, les droits que l'on cherche à protéger en l'espèce ne font pas partie du droit «à la liberté» garanti par l'art. 7.

Le droit à la sécurité de la personne garanti par l'art. 7 protège l'intégrité psychologique d'une personne. Cependant, pour que ce droit soit en cause, le préjudice psychologique doit résulter d'un acte de l'État et doit être grave. En l'espèce, la cause directe du préjudice subi par l'intimé n'était pas le délai imputable à l'État dans le déroulement du processus en matière de droits de la personne. Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi pour que l'art. 7 s'applique. L'effet le plus préjudiciable sur l'intimé résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes — les allégations de l'adjointe de l'intimé — qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi. Les procédures en matière de droits de la personne n'avaient pas encore commencé lorsque l'intimé a commencé à être victime d'une stigmatisation. En outre, l'intimé fait toujours l'objet de poursuites civiles pour harcèlement sexuel et W a déposé une plainte contre le gouvernement pour les mêmes motifs. Il était probable que la stigmatisation résultant de la publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement. Enfin, le processus en matière de droits de la personne n'a pas sérieusement aggravé le préjudice subi par l'intimé. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé.

Même si on reconnaît que les plaintes dont l'intimé faisait l'objet peuvent avoir contribué jusqu'à un certain point à sa stigmatisation et avoir ainsi causé certaines de ses souffrances, et même si on présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé,

dent's psychological integrity did not amount to a violation of his right to security of the person. First, the s. 7 rights of "liberty and security of the person" do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*, this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7. The notion of "dignity" is better understood as an underlying value. Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent is essentially confined to his personal hardship.

There is no constitutional right outside the criminal context to be "tried" within a reasonable time. The majority of the Court of Appeal erred in transplanting s. 11(*b*) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal and human rights proceedings, but, more importantly, s. 11(*b*) of the *Charter* is restricted to a pending criminal case.

There are remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. There must be proof of significant prejudice which results from an unacceptable delay. Here, the respondent's ability to have a fair hearing has

l'atteinte de l'État à l'intégrité psychologique de l'intimé ne constituait pas une atteinte à son droit à la sécurité de sa personne. Premièrement, les droits «à la liberté et à la sécurité de [l]a personne» garantis par l'art. 7 ne comportent pas un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne. Bien que le respect de la dignité inhérente des gens soit nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*, cela ne signifie pas pour autant que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7. Il vaut mieux considérer la notion de «dignité» comme une valeur sous-jacente. À l'instar de la dignité, la réputation n'est pas un droit distinct. La protection contre la stigmatisation ne l'est pas non plus. Deuxièmement, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des choix essentiels dans leur vie. Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé. Ce n'est que dans les cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'application du droit à la sécurité de la personne garanti par l'art. 7. En l'espèce, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Le préjudice subi par l'intimé se limite essentiellement à ses difficultés personnelles.

Le droit constitutionnel d'être «jugé» dans un délai raisonnable ne s'applique qu'en matière criminelle. La Cour d'appel à la majorité a eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11*b*) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, mais encore l'al. 11*b*) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes.

Le droit administratif offre des réparations en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Il faut prouver qu'un délai inacceptable a causé un préjudice important. Dans la présente affaire, la capacité de l'intimé d'obte-

not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice. There may also be abuse of process where conduct is oppressive. A stay is not the only remedy available for abuse of process in administrative law proceedings and a respondent asking for a stay bears a heavy burden. In this case, the respondent did not demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, the delay in processing the complaints was not inordinate.

The determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay. Here, although the Commission took longer than is desirable to process the complaints, the delay was not so inordinate as to amount to an abuse of process. The case may not have been an extremely complicated one, but the various steps necessary to protect the respondents in the context of the human rights complaints system take time. The trial judge found that only the 24-month period between the filing of the complaints and the end of the investigation process should be considered for the delay, stating that the Human Rights Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates. During that 24-month period, there was no extended period without any activity in the processing of the complaints, except for an inexplicable five months of inaction. The respondent challenged the lateness of the complaints and brought forward allegations of bad faith and, as a result, the process was delayed by eight months. The Commission should not be held responsible for contributing to this part of the delay. When all the relevant factors are taken into account, in particular the ongoing communication between the par-

nir une audience équitable n'a pas été compromise. Il n'a pas été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience. Un délai inacceptable peut également constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La cour doit être convaincue que les procédures sont contraires à l'intérêt de la justice. Il peut également y avoir abus de procédure lorsque la conduite est oppressive. L'arrêt des procédures n'est pas la seule réparation possible dans le cas d'un abus de procédure en matière de droit administratif, et la personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. En l'espèce, l'intimé n'a pas établi que le délai était inacceptable au point d'être oppressif et de vicier les procédures. Même si le stress et la stigmatisation résultant d'un délai excessif peuvent entraîner un abus de procédure, le délai écoulé dans le traitement des plaintes n'était pas excessif.

La question de savoir si un délai est excessif dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels, dont la nature de l'affaire et sa complexité, de l'objet et de la nature des procédures ainsi que de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai. Dans la présente affaire, même si la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, le délai écoulé n'était pas excessif au point de constituer un abus de procédure. Même s'il se peut que l'affaire n'ait pas été extrêmement compliquée, les diverses étapes nécessaires pour assurer la protection de la personne qui fait l'objet d'une plainte fondée sur les droits de la personne allongent d'autant le processus. Le juge de première instance a conclu que seule la période de 24 mois comprise entre le dépôt des plaintes et la fin de l'enquête pouvait être prise en considération pour calculer le délai, disant qu'on ne pouvait reprocher au Tribunal des droits de la personne de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire. Au cours de ces 24 mois, il n'y a pas eu de période prolongée d'inactivité dans le traitement des plaintes, si ce n'est une période inexplicable de cinq mois d'inactivité. L'intimé a présenté une contestation fondée sur le caractère tardif des plaintes et a allégué la mauvaise foi, de sorte que le processus a été retardé de huit mois. La Commis-

ties, the delay in processing the complaints is not one that would offend the community's sense of decency and fairness. Nevertheless, in light of the lack of diligence displayed by the Commission, the Court's discretion under s. 47 of the *Supreme Court Act* should be exercised to award costs against the Commission in favour of the respondent and the complainants.

sion ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Lorsque tous les facteurs pertinents sont pris en considération, notamment la communication constante entre les parties, le délai écoulé dans le traitement des plaintes n'est pas de ceux qui heurteraient le sens de la justice et de la décence de la société. Néanmoins, vu l'absence de diligence manifestée par la Commission, il y a lieu de lui ordonner de payer les dépens de l'intimé et des plaignantes en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême* confère à notre Cour.

Per Iacobucci, Binnie, Arbour and LeBel JJ. (dissenting in part): This matter should be resolved on the basis of administrative law principles. It is therefore unnecessary to express a definite opinion on the application of s. 7 of the *Charter*.

Les juges Iacobucci, Binnie, Arbour et LeBel (dissidents en partie): La présente affaire devrait être réglée en fonction des principes du droit administratif. Il est donc inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte*.

Administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to administrative law principles. Unreasonable delays must be identified within the specific circumstances of every case because not all delay is the same and not all administrative bodies are the same. In order to differentiate reasonable and unreasonable delay, courts must remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. In assessing the reasonableness of an administrative delay, three main factors should be balanced: (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay. A consideration of these factors imposes a contextual analysis.

Le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif. Il faut déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas, car les délais ne sont pas tous les mêmes et les organismes administratifs diffèrent les uns des autres. Pour distinguer un délai raisonnable d'un délai déraisonnable, les tribunaux doivent être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu'ils déploient de bonne foi en vue d'offrir des protections procédurales aux présumés contrevenants. Pour évaluer le caractère raisonnable d'un délai administratif, trois facteurs principaux doivent être appréciés: (1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, (2) les causes de la prolongation du délai inhérent à l'affaire, et (3) l'incidence du délai. L'examen de ces facteurs commande une analyse contextuelle.

Here, inefficiency in the Human Rights Commission's handling of this matter has led to abuse of process. First, although serious, the allegations of sexual discrimination against the respondent did not raise complex issues and were not of a nature that could justify a prolonged investigation. There was little to investigate. Even though the inherent time requirements were minimal, in all it took the Commission approximately two years to determine that the complaints should go to a hearing. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, nothing in the inherent time requirements of the case came close to requiring the delay that occurred. Second, although the respondent sought to use the

La façon inefficace dont la Commission des droits de la personne a traité la présente affaire a donné lieu à un abus de procédure. Premièrement, quoique graves, les allégations de discrimination sexuelle dont faisait l'objet l'intimé ne soulevaient pas des questions complexes et n'étaient pas de nature à justifier la tenue d'une enquête prolongée. Il y avait peu matière à enquête. Même si le délai inhérent était minime, il a fallu environ deux ans en tout à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé. Deuxièmement, même si l'intimé a tenté

defences available to him, he did not become responsible for the sheer inefficiency of the Commission in dealing with these matters. There was serious delay on both complaints despite the respondent's efforts to find a way to end it. The Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against the respondent. This five-month lapse is the high mark of the Commission's ineptitude. Third, although the administrative delay was not the only cause of the prejudice suffered by the respondent, it contributed significantly to its aggravation and the Commission did nothing to minimize the impact of the delay. The Commission's conduct in dealing with this matter was less than acceptable. Further, the inefficient and delay-filled process at the Commission harmed all parties involved in the process, including the complainants. In the end, the specific and unexplained delay entitles the respondent to a remedy.

The choice of the appropriate remedy requires a careful analysis of the circumstances of the case and imposes a balancing exercise between competing interests. In human rights proceedings, the interest of the respondent, that of the complainants, and the public interest of the community itself must be considered. The courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process. A stay of proceedings should not generally appear as the sole or even the preferred form of redress. It should be limited to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to the hearing would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. More limited and narrowly focused remedies will be appropriate when it appears that the hearing will remain fair, in spite of the delay, and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. The first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing would be the most practical and effective means of judicial action.

d'invoquer les moyens de défense dont il disposait, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces questions. Les deux plaintes ont fait l'objet d'un délai important malgré les efforts de l'intimé pour y mettre fin. La Commission reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre l'intimé. Cet intervalle de cinq mois est le paroxysme de l'ineptie dont la Commission a fait preuve. Troisièmement, même si le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé, il a beaucoup contribué à son aggravation et la Commission n'a rien fait pour réduire au minimum l'incidence du délai. La conduite adoptée par la Commission en traitant cette affaire était moins qu'acceptable. En outre, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission ont lésé toutes les parties à ce processus, y compris les plaignantes. En définitive, le délai inexpliqué en cause justifie d'accorder une réparation à l'intimé.

Le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire et commande une évaluation d'intérêts opposés. Dans les procédures en matière de droits de la personne, il faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et de celui de la collectivité même. Les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée. Il devrait être limité aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. Des réparations plus limitées et mieux ciblées sont appropriées lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une

An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences.

In this case, a stay of proceedings appears both excessive and unfair. First, in spite of the seriousness of the problems faced by the respondent, the delay does not seem to compromise the fairness of the hearing. The delay rather concerns the process leading to the hearing. This delay arises from a variety of causes that do not evince an intent on the part of the Commission to harm the respondent wilfully, but rather demonstrate grave negligence and significant structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing or amount to shocking or gross abuse requires the consideration of the interest of the complainants. The Court of Appeal completely omitted any consideration of this interest. Here, an order for an expedited hearing should have been considered as the remedy of choice. The stay should be lifted and the Commission should be ordered to pay costs on a party-to-party basis to the respondent in this Court and in the British Columbia courts. It is fair and appropriate to use the power conferred by s. 47 of the *Supreme Court Act*, as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law.

Cases Cited

By Bastarache J.

Not followed: *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744; *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638; *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143; **considered:** *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; **referred to:** *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *New Brunswick (Minister of Health and*

audience accélérée. L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences.

En l'espèce, l'arrêt des procédures paraît à la fois excessif et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par l'intimé, le délai ne semble pas compromettre l'équité de l'audience. Il concerne plutôt les procédures menant à l'audience. Ce délai est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise ou dans celui où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte de l'intérêt du plaignant. La Cour d'appel a complètement omis de tenir compte de cet intérêt. En l'espèce, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il y a lieu d'annuler l'arrêt des procédures et d'ordonner à la Commission de payer à l'intimé des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique. Il est juste et opportun d'exercer le pouvoir conféré par l'art. 47 de la *Loi sur la Cour suprême*, étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins fondée sur le droit administratif.

Jurisprudence

Citée par le juge Bastarache

Arrêts non suivis: *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744; *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638; *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143; **arrêts examinés:** *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; **arrêts mentionnés:** *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Rahey*, [1987] 1 R.C.S.

Community Services) v. G. (J.), [1999] 3 S.C.R. 46, rev'g (1997), 187 N.B.R. (2d) 81; *R. v. Beare*, [1988] 2 S.C.R. 387; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Heywood*, [1994] 3 S.C.R. 761; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R. v. Mills*, [1999] 3 S.C.R. 668; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464; *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Young* (1984), 40 C.R. (3d) 289; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543; *R. v. Morin*, [1992] 1 S.C.R. 771.

By LeBel J. (dissenting in part)

Nisbett v. Manitoba (Human Rights Commission) (1993), 101 D.L.R. (4th) 744; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Askov*, [1990] 2 S.C.R. 1199; *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143; *R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823; *The King ex rel. Lee v. Workmen's Compensation Board*, [1942] 2 D.L.R. 665; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *R. v. Bradley*, [1941] S.C.R. 270; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021; *Muia v. Canada*

588; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, inf. (1997), 187 R.N.-B. (2e) 81; *R. c. Beare*, [1988] 2 R.C.S. 387; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *R. c. Heywood*, [1994] 3 R.C.S. 761; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *R. c. Mills*, [1999] 3 R.C.S. 668; *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892; *R. c. L. (W.K.)*, [1991] 1 R.C.S. 1091; *Akthar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1991] 3 C.F. 32; *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464; *Freedman c. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *R. c. Askov*, [1990] 2 R.C.S. 1199; *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. Young* (1984), 40 C.R. (3d) 289; *R. c. Potvin*, [1993] 2 R.C.S. 880; *R. c. Scott*, [1990] 3 R.C.S. 979; *R. c. Conway*, [1989] 1 R.C.S. 1659; *Allen c. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543; *R. c. Morin*, [1992] 1 R.C.S. 771.

Citée par le juge LeBel (dissident en partie)

Nisbett c. Manitoba (Human Rights Commission) (1993), 101 D.L.R. (4th) 744; *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *R. c. Rahey*, [1987] 1 R.C.S. 588; *R. c. Askov*, [1990] 2 R.C.S. 1199; *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143; *R. c. Barker* (1762), 3 Burr. 1265, 97 E.R. 823; *The King ex rel. Lee c. Workmen's Compensation Board*, [1942] 2 D.L.R. 665; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *R. c. Bradley*, [1941] R.C.S. 270; *Rourke c. La Reine*, [1978] 1 R.C.S. 1021;

(Minister of Citizenship and Immigration) (1996), 113 F.T.R. 234; *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278; *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81; *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315; *R. v. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606; *Re Preston*, [1985] A.C. 835; *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424; *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(*b*), 24, 32.
Human Rights Act, S.B.C. 1984, c. 22, s. 13(1)(d).
Human Rights Code, R.S.B.C. 1996, c. 210, ss. 24, 27.
Magna Carta (1215).
Supreme Court Act, R.S.C., 1985, c. S-26, s. 47.

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, Book III, 4th ed. Oxford: Clarendon Press, 1768.
Brookings Task Force on Civil Justice Reform. *Justice for All: Reducing Costs and Delay in Civil Litigation*. Washington: Brookings Institution, 1989.
Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf).
Bryden, Philip. "*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment" (1999), 33 *U.B.C. L. Rev*. 153.

Muia c. Canada (Ministre de la Citoyenneté et de l'Immigration) (1996), 113 F.T.R. 234; *Dass c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1996] 2 C.F. 410; *Dee c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1998), 46 Imm. L.R. (2d) 278; *Kiani c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1999), 50 Imm. L.R. (2d) 81; *Bhatnager c. Ministre de l'Emploi et de l'Immigration*, [1985] 2 C.F. 315; *R. c. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606; *Re Preston*, [1985] A.C. 835; *R. c. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424; *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; *R. c. Conway*, [1989] 1 R.C.S. 1659; *Saskatchewan (Human Rights Commission) c. Kodellas* (1989), 60 D.L.R. (4th) 143; *R. c. Morin*, [1992] 1 R.C.S. 771; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 8, 11*b*), 24, 32.
Human Rights Act, S.B.C. 1984, ch. 22, art. 13(1)d).
Human Rights Code, R.S.B.C. 1996, ch. 210, art. 24, 27.
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 47.
Magna Carta (1215).

Doctrine citée

Blackstone, William. *Commentaries on the Law of England*, Book III, 4th ed. Oxford: Clarendon Press, 1768.
Brookings Task Force on Civil Justice Reform. *Justice for All: Reducing Costs and Delay in Civil Litigation*. Washington: Brookings Institution, 1989.
Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf).
Bryden, Philip. «*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment» (1999), 33 *U.B.C. L. Rev*. 153.

Evans, J. M., H. N. Janisch and David J. Mullan. *Administrative Law: Cases, Text, and Materials*, 4th ed. Toronto: Edmond Montgomery, 1995.

Hawkins, Robert E. "Reputational Review III: Delay, Disrepute and Human Rights Commissions" (2000), 25 *Queen's L.J.* 599.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (update 1999, release 1).

Holdsworth, Sir William. *A History of English Law*, 7th ed., vol. I. Revised under the general editorship of A. L. Goodhart and H. G. Hanbury. London: Methuen & Co., 1956.

Jones, David Phillip, and Anne S. de Villars. *Principles of Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1999.

McMurtrie, Sheena N. "The Waiting Game — The Parliamentary Commissioner's Response to Delay in Administrative Procedures", [1997] *Public Law* 159.

Ontario. Human Rights Commission. *Annual Report 1997-1998*. Toronto: The Commission, 1998.

Simpson, J. "Human Rights Commission Mill Grinds Slowly", *The Globe & Mail*, October 1, 1998, p. A18.

Skiffington, Lawrence S. "Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context" (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.

Wade, Sir William, and Christopher Forsyth. *Administrative Law*, 7th ed. Oxford, Clarendon Press, 1994.

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), allowing an appeal from a decision of the British Columbia Supreme Court (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), dismissing the respondent's petition for judicial review and order that proceedings be terminated due to delay. Appeal allowed, Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part.

John J. L. Hunter, *Q.C.*, *Thomas F. Beasley*, *K. Michael Stephens* and *Stephanie L. McHugh*, for the appellants the British Columbia Human Rights

Evans, J. M., H. N. Janisch and David J. Mullan. *Administrative Law: Cases, Text, and Materials*, 4th ed. Toronto: Edmond Montgomery, 1995.

Hawkins, Robert E. «Reputational Review III: Delay, Disrepute and Human Rights Commissions» (2000), 25 *Queen's L.J.* 599.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (update 1999, release 1).

Holdsworth, Sir William. *A History of English Law*, 7th ed., vol. I. Revised under the general editorship of A. L. Goodhart and H. G. Hanbury. London: Methuen & Co., 1956.

Jones, David Phillip, and Anne S. de Villars. *Principles of Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1999.

McMurtrie, Sheena N. «The Waiting Game — The Parliamentary Commissioner's Response to Delay in Administrative Procedures», [1997] *Public Law* 159.

Ontario. Commission des droits de la personne. *Rapport annuel 1997-1998*. Toronto: La Commission, 1998.

Simpson, J. «Human Rights Commission Mill Grinds Slowly», *The Globe & Mail*, 1998, p. A18.

Skiffington, Lawrence S. «Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context» (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.

Wade, Sir William, and Christopher Forsyth. *Administrative Law*, 7th ed. Oxford, Clarendon Press, 1994.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), qui a accueilli un appel interjeté contre une décision de la Cour suprême de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), qui avait rejeté la demande de contrôle judiciaire et d'ordonnance mettant fin aux procédures pour cause de délai, que l'intimé avait présentée. Pourvoi accueilli, les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie.

John J. L. Hunter, *c.r.*, *Thomas F. Beasley*, *K. Michael Stephens* et *Stephanie L. McHugh*, pour les appelants la British Columbia Human Rights

Commission and the Commissioner of Investigation and Mediation.

Written submissions only by *Susan E. Ross*, for the appellant the British Columbia Human Rights Tribunal.

Robert B. Farvolden, for the appellant Andrea Willis.

Joseph J. Arvay, Q.C., for the respondent.

Mark C. Stacey and *Rosy M. Mondin*, for the intervener Irene Schell.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Harvey M. Groberman, Q.C., for the intervener the Attorney General of British Columbia.

Milton Woodard, Q.C., for the intervener the Saskatchewan Human Rights Commission.

Cathryn Pike and *Jennifer Scott*, for the intervener the Ontario Human Rights Commission.

Lara J. Morris and *Maureen E. Shebib*, for the intervener the Nova Scotia Human Rights Commission.

Aaron L. Berg and *Denis Guénette*, for the intervener the Manitoba Human Rights Commission.

Fiona Keith, for the intervener the Canadian Human Rights Commission.

Hélène Tessier, for the intervener the Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly and *James Pozer*, for the intervener the British Columbia Human Rights Coalition.

Jennifer L. Conkie and *Dianne Pothier*, for the intervener the Women's Legal Education and Action Fund.

Commission et le Commissioner of Investigation and Mediation.

Argumentation écrite seulement par *Susan E. Ross*, pour l'appelant le British Columbia Human Rights Tribunal.

Robert B. Farvolden, pour l'appelante Andrea Willis.

Joseph J. Arvay, c.r., pour l'intimé.

Mark C. Stacey et *Rosy M. Mondin*, pour l'intervenante Irene Schell.

Hart Schwartz, pour l'intervenant le procureur général de l'Ontario.

Harvey M. Groberman, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Milton Woodard, c.r., pour l'intervenante la Saskatchewan Human Rights Commission.

Cathryn Pike et *Jennifer Scott*, pour l'intervenante la Commission ontarienne des droits de la personne.

Lara J. Morris et *Maureen E. Shebib*, pour l'intervenante la Nova Scotia Human Rights Commission.

Aaron L. Berg et *Denis Guénette*, pour l'intervenante la Commission des droits de la personne du Manitoba.

Fiona Keith, pour l'intervenante la Commission canadienne des droits de la personne.

Hélène Tessier, pour l'intervenante la Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly et *James Pozer*, pour l'intervenante la British Columbia Human Rights Coalition.

Jennifer L. Conkie et *Dianne Pothier*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. was delivered by

BASTARACHE J. —

I. Introduction

1 This case raises the issue of whether the respondent's rights to "liberty and security of the person" under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated by state-caused delay in the human rights proceedings against him. In the alternative, should this Court find that s. 7 of the *Charter* was not engaged, it must be determined whether the respondent was entitled to a remedy pursuant to principles of administrative law, notwithstanding that he had not been prejudiced in his ability to respond to the complaints against him.

2 I have concluded that the respondent's rights to liberty and security of the person were not implicated in the circumstances of this case. There is therefore no need to determine whether the alleged violation was in accordance with the principles of fundamental justice. While I accept that, under administrative law principles, a denial of natural justice may occur for reasons other than procedural unfairness to the respondent, I find that there has been no denial of natural justice or abuse of process in the circumstances of this case.

II. Factual Background

3 In 1995, the respondent, Robin Blencoe, had been a member of the British Columbia legislature for 12 years. In March of that year the respondent's assistant, Fran Yanor, went public with allegations that the respondent had sexually harassed her. Following this allegation, the respondent stepped down as Minister, but remained in Cabinet pending the results of an inquiry. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the New Democratic Party caucus. Subsequently, in July and August of 1995, two sexual harassment complaints were filed with the British Columbia Coun-

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major et Bastarache rendu par

LE JUGE BASTARACHE —

I. Introduction

Le présent pourvoi porte sur la question de savoir si le délai imputable à l'État dans les procédures en matière de droits de la personne engagées contre l'intimé a porté atteinte aux droits de ce dernier «à la liberté et à la sécurité de sa personne», que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*. Subsidiairement, si jamais notre Cour ne conclut pas à l'application de l'art. 7 de la *Charte* en l'espèce, il faudra déterminer si l'intimé a droit à une réparation fondée sur les principes du droit administratif, même s'il n'a pas été porté atteinte à sa capacité de répondre aux plaintes portées contre lui.

J'arrive à la conclusion que les droits de l'intimé à la liberté et à la sécurité de sa personne ne sont pas en cause dans la présente affaire. Il est donc inutile de déterminer si l'atteinte alléguée est conforme aux principes de justice fondamentale. Bien que je convienne que, selon les principes du droit administratif, il peut y avoir déni de justice naturelle pour des raisons autres que l'iniquité procédurale, je juge qu'il n'y a eu ni déni de justice naturelle ni abus de procédure dans les circonstances de la présente affaire.

II. Les faits

En 1995, l'intimé, Robin Blencoe, était député à l'assemblée législative de la Colombie-Britannique depuis 12 ans. En mars de la même année, son adjointe, Fran Yanor, l'a accusé publiquement de harcèlement sexuel. L'intimé a alors abandonné son poste de ministre, mais a continué de faire partie du Cabinet jusqu'à ce que les résultats d'une enquête soient connus. Le 4 avril suivant, le premier ministre Harcourt a exclu l'intimé du Cabinet et du caucus du Nouveau Parti Démocratique. En juillet et en août 1995, l'appelante Andrea Willis et l'intervenante Irene Schell ont déposé devant le British Columbia Council of Human Rights (le

cil of Human Rights ("Council" or "Commission") against the respondent and the provincial Crown under the *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210, since January 1, 1997) (also referred to as the "Act" or the "Code") by the appellant Andrea Willis and the intervener, Irene Schell ("Complaints" or "Complaint").

The Complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. It is not necessary, for the purposes of this appeal, that I comment on the particulars of the Complaints in any detail. In brief, Ms. Willis worked as a senior clerk in the respondent's ministerial office and alleged that the respondent discriminated against her because of her sex with respect to terms and conditions of her employment, causing her to resign. The alleged incidents occurred in August 1994 and March 1995. Ms. Schell represented a government-funded sports association with which the respondent had contact in his ministerial capacity. She alleged that the respondent had discriminated against her because of her sex with respect to a service or facility customarily available to the public. The alleged incidents occurred in March 1993 and on several occasions in July 1993 and July 1994.

While the events that followed in the human rights proceedings are lengthy, they nevertheless merit recitation in some detail in order to adequately address the alleged delay in the process. The following are what I consider to be the most relevant facts regarding each of the Complaints.

A. *The Schell Complaint*

The Schell Complaint dealt with conduct which allegedly occurred more than six months before the Complaint was filed. For this reason, a threshold issue of timeliness arose pursuant to s. 13(1)(d) of the Act. By letter dated July 20, 1995, the respondent's counsel was informed that the Commission was considering whether to proceed with the investigation of the Schell Complaint and that timeliness submissions should be made. Letters were sent by the respondent on July 21 and July

«Conseil» ou la «Commission») deux plaintes de harcèlement sexuel contre l'intimé et Sa Majesté du chef de la province en application de la *Human Rights Act*, S.B.C. 1984, ch. 22 (désormais le *Human Rights Code*, R.S.B.C. 1996, ch. 210, depuis le 1er janvier 1997) (également désigné sous le nom de «Loi» ou de «Code») (les «plaintes» ou la «plainte»).

4 Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. Il n'est pas nécessaire, aux fins du présent pourvoi, que je m'attarde aux détails des plaintes. En résumé, Mme Willis occupait le poste de commis principal au bureau du ministre Blencoe et elle a allégué que ce dernier avait fait preuve de discrimination sexuelle à son égard relativement à ses conditions de travail, ce qui l'aurait amenée à démissionner. Les épisodes en cause se seraient produits en août 1994 et en mars 1995. Pour sa part, Mme Schell représentait une association sportive financée par l'État, avec laquelle l'intimé était en rapport en sa qualité de ministre. Elle a prétendu que l'intimé avait fait preuve de discrimination sexuelle à son égard relativement à des services ou à des installations habituellement accessibles au public. Les épisodes en question se seraient produits en mars 1993 et à maintes reprises en juillet 1993 et en juillet 1994.

5 Malgré la longueur des procédures en matière de droits de la personne qui ont suivi, il y a lieu néanmoins de les relater de façon assez détaillée pour bien examiner l'allégation de délai. Les faits qui suivent sont, à mon avis, les plus pertinents en ce qui concerne chacune des plaintes.

A. *La plainte de Mme Schell*

6 La plainte de Mme Schell porte sur une conduite qui aurait été adoptée plus de six mois avant le dépôt de ladite plainte, ce qui soulève la question préliminaire du respect du délai imparti à l'al. 13(1)d) de la Loi. Dans une lettre datée du 20 juillet 1995, la Commission a informé l'avocat de l'intimé qu'elle se demandait si elle devait enquêter sur la plainte de Mme Schell, et que des observations devraient être formulées concernant la question du respect du délai imparti. Les 21 et 28

28, 1995, requesting particulars of the Complaint. Particulars were provided by the Commission by letter dated August 2, 1995.

7 On August 31, 1995, the respondent's counsel notified the Commission that the respondent would not provide a detailed submission on the timeliness issue until Ms. Schell discharged the onus of proving that her Complaint was filed in good faith. The Commission informed the respondent that it was not necessary for Ms. Schell to adduce further material on this matter. The respondent subsequently provided substantive submissions on the timeliness issue on September 22, 1995.

8 On November 14, 1995, the respondent was informed that the Commission had received Ms. Schell's submissions on October 11, 1995, and that the submissions of both parties were being considered. The respondent had not been forwarded a copy of Ms. Schell's submissions. Following two requests for such by Mr. Blencoe, the Commission provided him with a copy of this document on December 15, 1995, stating that the production of such document was a departure from normal procedures. On February 8, 1996, the respondent provided the Commission with a response to Ms. Schell's timeliness submissions.

9 On February 21, 1996, the respondent was informed that the Council had decided to proceed with the investigation and that he had 30 days to provide a full response to the allegations. In letters dated March 1 and March 27, 1996, the respondent requested the initial correspondence between Ms. Schell and the Commission. The respondent maintained that he would not respond to the particulars of allegation until such correspondence was produced. On April 1, 1996, the respondent was informed that such documents would not be disclosed and that the investigation would continue on the basis of existing materials if no response was received by April 10, 1996. A general denial to the allegations was given by the respondent on April 10, 1996. On June 19, 1996, the respondent received a letter from the Commission in response to his request regarding how long he would be required to wait for a hearing date. He was

juillet 1995, l'intimé a envoyé des lettres dans lesquelles il demandait des précisions sur la plainte. La Commission a accédé à sa demande par lettre datée du 2 août 1995.

Le 31 août 1995, l'avocat de l'intimé a informé la Commission que son client ne présenterait des observations détaillées sur la question du respect du délai que lorsque M^me^ Schell se serait acquittée de son obligation de prouver que la plainte avait été portée de bonne foi. La Commission a avisé l'intimé que M^me^ Schell n'avait pas à produire d'autres documents à ce propos. Par la suite, le 22 septembre 1995, l'intimé a fourni des observations de fond sur la question du respect du délai imparti.

Le 14 novembre 1995, l'intimé a appris que la Commission avait reçu les observations de M^me^ Schell le 11 octobre 1995 et que les observations des deux parties étaient examinées. L'intimé n'avait pas obtenu copie des observations de M^me^ Schell. Le 15 décembre 1995, après deux demandes formulées en ce sens par M. Blencoe, la Commission lui a fait parvenir une copie du document demandé en lui précisant qu'il s'agissait d'une entorse à la procédure habituelle. Le 8 février 1996, l'intimé a fait parvenir à la Commission une réponse aux observations de M^me^ Schell concernant le respect du délai imparti.

Le 21 février 1996, l'intimé a appris que le Conseil avait décidé d'enquêter sur la plainte et qu'il disposait de 30 jours pour fournir une réponse complète aux allégations. Dans des lettres datées du 1^er^ et du 27 mars 1996, l'intimé a réclamé la correspondance initiale entre M^me^ Schell et la Commission. L'intimé a maintenu qu'il ne répondrait aux détails des allégations que lorsque cette correspondance aurait été produite. Le 1^er^ avril 1996, l'intimé a été informé que ces documents ne seraient pas communiqués et que l'enquête se poursuivrait en fonction des documents existants si aucune réponse n'était reçue au plus tard le 10 avril 1996. L'intimé a présenté une dénégation générale des allégations le 10 avril 1996. Le 19 juin de la même année, l'intimé a reçu une lettre dans laquelle la Commission répondait à sa demande concernant le temps qu'il lui faudrait attendre avant qu'une date d'audience soit fixée. Il

informed that a hearing could not be scheduled until the Commission determined that a hearing was required.

On September 6, 1996, the respondent was notified that an investigator had been assigned to the Schell Complaint. By letter dated November 8, 1996, the Commission wrote to the respondent, requesting a response to certain information obtained in the course of investigating the Schell Complaint. Such information was provided by the respondent on December 23, 1996. On March 4, 1997, Mr. Blencoe's counsel was provided with a copy of the investigation report and asked for a written response by April 8, 1997. Such response was given on March 27, 1997. On April 15, 1997, the respondent was provided with the submissions received from Ms. Schell in response to the investigation report. Mr. Blencoe was requested to reply by May 15, 1997. Such response was provided on May 14, 1997.

By letter dated July 3, 1997, the respondent was notified that the Schell Complaint would be referred to the British Columbia Human Rights Tribunal ("Tribunal") for a hearing, without specifying the hearing date. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was informed that the hearing was set for March 4, 5 and 6, 1998 and a pre-hearing conference in November of 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

B. *The Willis Complaint*

The respondent was informed of the Willis Complaint by letter dated September 11, 1995. The respondent challenged the timeliness of the Complaint and asked the Council to make a decision pursuant to s. 13(1)(d) of the Act. The respondent was asked to provide submissions on timeliness within 15 days of the letter dated September 21, 1995. Such submissions were provided by Mr. Blencoe on October 11, 1995 with respect to both Complaints. On December 21, 1995, the respondent was sent a copy of Ms. Willis's submissions on timeliness which were dated October

a appris qu'une telle date ne pourrait être fixée que lorsque la Commission aurait conclu à la nécessité de tenir une audience.

10 Le 6 septembre 1996, l'intimé a été avisé qu'un enquêteur avait été chargé d'examiner la plainte de M^me^ Schell. Le 8 novembre 1996, la Commission a fait parvenir à l'intimé une lettre dans laquelle elle lui demandait de réagir à certains renseignements obtenus pendant l'enquête relative à la plainte de M^me^ Schell. L'intimé a accédé à cette demande le 23 décembre 1996. Le 4 mars 1997, on a remis à l'avocat de M. Blencoe un exemplaire du rapport d'enquête et on lui a demandé d'y répondre par écrit au plus tard le 8 avril 1997, ce qu'il a fait le 27 mars de la même année. Le 15 avril 1997, l'intimé a obtenu copie des observations que M^me^ Schell avait transmises en réponse au rapport d'enquête. On a demandé à M. Blencoe d'y répliquer au plus tard le 15 mai 1997, ce qu'il a fait le 14 mai de la même année.

11 Dans une lettre datée du 3 juillet 1997, l'intimé a été avisé que la plainte de M^me^ Schell serait renvoyée au British Columbia Human Rights Tribunal (le «Tribunal») pour qu'il tienne une audience, sans que la date de cette audience ne soit toutefois précisée. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a appris que l'audience se déroulerait les 4, 5 et 6 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

B. *La plainte de M^me^ Willis*

12 Dans une lettre datée du 11 septembre 1995, l'intimé a été informé de la plainte de M^me^ Willis. L'intimé a fait valoir que la plainte n'avait pas été déposée dans le délai imparti et a demandé au Conseil de rendre une décision fondée sur l'al. 13(1)d) de la Loi. Dans une lettre datée du 21 septembre 1995, on lui a demandé de présenter dans les 15 jours suivants des observations sur la question du respect du délai imparti. Monsieur Blencoe a présenté des observations sur les deux plaintes le 11 octobre 1995. Le 21 décembre suivant, l'intimé a obtenu copie des observations de M^me^ Willis sur

16, 1995. It was standard practice of the Council not to give respondents the complainant's response submissions.

13 On January 9, 1996, the respondent wrote to the Council, requesting that it refrain from making a decision regarding timeliness until he could reply to Ms. Willis's submissions. The respondent challenged both the timeliness of the Complaints and whether they were made in good faith. He declined to provide his response until such preliminary issues were addressed, contending that the Complaints should not be addressed at all. The Council concluded that the Complaints were timely, that there was no evidence of bad faith, and that the Complaints should be fully investigated. On January 11, 1996, the respondent was notified that the Commission was proceeding with its investigation of the Willis Complaint. The decision to proceed with this Complaint had been reached by the Council more than three weeks earlier, on December 18, 1995. The delay was said to have resulted from Council not returning the decision on timeliness file to the case management secretary and a temporary backlog in the clerical area.

14 On January 29, 1996, the respondent informed the Council that he was prepared to waive the investigation stage of the process and asked that the Council set the matter for hearing. However, this waiver was not feasible since the respondent was not prepared to concede that there was a sufficient evidentiary basis to warrant a hearing.

15 In April 1996, Mr. Blencoe's counsel inquired as to when the hearing was expected to occur. In June 1996, he was informed that this could not be determined until the investigation was completed. The respondent was also informed that no investigator had been assigned to the Willis Complaint at that time and that there was a backlog of investigation files. By letter dated September 6, 1996, Mr. Blencoe was informed that an investigator had been assigned to the Willis Complaint. On November 8, 1996, Mr. Blencoe was asked to respond to

le respect du délai imparti, lesquelles étaient datées du 16 octobre 1995. Le Conseil n'avait pas coutume de communiquer les observations d'un plaignant à la personne qui fait l'objet de la plainte.

Le 9 janvier 1996, l'intimé a écrit au Conseil pour lui demander de s'abstenir de rendre une décision concernant le respect du délai imparti jusqu'à ce qu'il puisse répondre aux observations de M^me^ Willis. Il soutenait que les plaintes n'avaient pas été déposées dans le délai imparti et qu'elles n'avaient pas été portées de bonne foi. Il refusait de produire sa réponse tant que ces questions préliminaires n'auraient pas été tranchées et il prétendait qu'il n'y avait absolument pas lieu d'examiner les plaintes. Le Conseil a conclu que les plaintes avaient été déposées à temps, qu'il n'y avait aucune preuve de mauvaise foi et que les plaintes devraient faire l'objet d'une enquête complète. Le 11 janvier 1996, l'intimé a été avisé que la Commission enquêtait sur la plainte de M^me^ Willis. La décision d'enquêter sur la plainte avait été prise par le Conseil plus de trois semaines auparavant, soit le 18 décembre 1995. On a expliqué le délai écoulé par l'omission du Conseil de retourner le dossier de la décision sur le respect du délai imparti au fonctionnaire responsable de la gestion des dossiers et par un retard temporaire dans l'exécution des fonctions administratives.

Le 29 janvier 1996, l'intimé a informé le Conseil qu'il était disposé à renoncer à l'étape de l'enquête et il lui a demandé d'inscrire l'affaire à son rôle. Cependant, cette renonciation n'était pas possible puisque l'intimé n'était pas prêt à reconnaître qu'il y avait une preuve suffisante pour justifier la tenue d'une audience.

En avril 1996, l'avocat de M. Blencoe s'est informé de la date à laquelle l'audience était censée avoir lieu. En juin de la même année, il a appris que cette date ne pourrait être fixée que lorsque l'enquête serait terminée. Il a également appris qu'aucun enquêteur n'avait encore été chargé d'examiner la plainte de M^me^ Willis et que le traitement des dossiers d'enquête accusait un retard. Dans une lettre datée du 6 septembre 1996, on a informé l'intimé qu'un enquêteur avait été chargé d'examiner la plainte de M^me^ Willis.

certain information obtained during the investigation. Such response was given on December 23, 1996. On March 3, 1997, the respondent was provided with a completed investigation report and asked for written responses which were provided by the respondent on March 27, 1997. In April 1997, the respondent was sent the submissions of Ms. Willis. He replied to them on May 14, 1997.

Le 8 novembre 1996, on a demandé à M. Blencoe de réagir à certains renseignements obtenus pendant l'enquête, ce qu'il a fait le 23 décembre suivant. Le 3 mars 1997, on a remis à l'intimé une copie du rapport d'enquête et on lui a demandé d'y répondre par écrit, ce qu'il a fait le 27 mars suivant. En avril 1997, l'intimé a obtenu copie des observations de M^me^ Willis, et il y a répondu le 14 mai suivant.

On July 3, 1997, the respondent was informed that the Willis Complaint would be referred to the Tribunal for hearing. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was notified that the hearing was set for March 18, 19 and 20, 1998 and a pre-hearing conference in November 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

16 Le 3 juillet 1997, l'intimé a appris que la plainte de M^me^ Willis serait renvoyée au Tribunal pour qu'il tienne une audience. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a été avisé que l'audience se déroulerait les 18, 19 et 20 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

Subsequent to the allegations of sex discrimination, the respondent and his family have been hounded by the media. Mr. Blencoe has suffered from severe depression and both he and his wife have sought psychological counselling. The respondent did not stand for re-election when his province went to the polls in 1996. Mr. Blencoe and his wife decided to move their family to Ontario in August 1996, in order to escape the media attention and seek employment. In May 1997, the family returned to Victoria, allegedly because they could not escape the harassment of the media which followed them to Ontario and because the respondent's wife received an excellent job offer in British Columbia. The respondent continues to be clinically depressed and has been prescribed medication. He was prevented from coaching his youngest son's soccer team on the grounds that the soccer association did not want him working with children. The respondent considers himself "unemployable" in British Columbia, due to the outstanding human rights Complaints against him.

17 À la suite des allégations de discrimination sexuelle, l'intimé et les membres de sa famille ont été traqués par les médias. Monsieur Blencoe a fait une grave dépression, et son épouse et lui ont tous les deux eu recours aux services d'un psychologue. L'intimé n'a pas sollicité un nouveau mandat lors du scrutin provincial de 1996. En août 1996, M. Blencoe et son épouse ont décidé d'aller s'établir en Ontario afin d'échapper à l'attention des médias et de trouver du travail. En mai 1997, la famille est revenue à Victoria, apparemment parce qu'elle ne pouvait pas échapper au harcèlement des médias qui les avaient suivis jusqu'en Ontario et que l'épouse de l'intimé s'était vu offrir un emploi très intéressant en Colombie-Britannique. L'intimé souffre toujours de dépression clinique et consomme des médicaments sur ordonnance. Il n'a pas pu entraîner l'équipe de soccer de son fils cadet parce que l'association responsable ne voulait pas qu'il côtoie des enfants. L'intimé se dit «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pèsent toujours contre lui.

On November 27, 1997, the respondent commenced proceedings for judicial review, claiming that the Commission had lost jurisdiction due to unreasonable delay in processing the human rights

18 Le 27 novembre 1997, l'intimé a présenté une demande de contrôle judiciaire en faisant valoir que la Commission avait perdu compétence en raison d'un délai déraisonnable dans le traitement des

Complaints. The respondent alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

III. Judicial History

A. *British Columbia Supreme Court* (1998), 49 B.C.L.R. (3d) 201

19 The respondent's application for judicial review was dismissed by Lowry J. on February 11, 1998. The question before the court was whether, given the time that had elapsed since the Complaints were first made to the Commission, personal hardship attributable to the stigma attached to the allegations justified the supervisory intervention of the court. The respondent also alleged that, because two prospective witnesses had died and the memories of other witnesses had faded, he would be unable to obtain a fair hearing. The respondent did not make an express s. 7 argument before the lower court, but relied instead on principles of natural justice, pursuant to administrative law jurisprudence and common law protections against undue delay. The respondent did however cite s. 7 jurisprudence to support his claim that the prejudice he suffered was analogous to the prejudice that justifies a stay of proceedings in the s. 7 context.

20 Lowry J. recognized that the allegations of sexual harassment had significantly affected the respondent's life and that his political career appeared to be finished. However, he added that it was difficult to determine to what extent such prejudice could be fairly attributed to any delay in the proceedings.

21 Lowry J. rejected the contention that, absent any application of the *Charter*, personal hardship attributable to unacceptable delay in an administrative process could, standing alone, constitute prejudice that entitled a respondent to prerogative relief. He held that delay will only constitute a denial of natural justice if the result of the delay is to directly prejudice the ability of an affected party

plaintes fondées sur les droits de la personne. Il a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle.

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 201

Le 11 février 1998, le juge Lowry a rejeté la demande de contrôle judiciaire de l'intimé. La cour était appelée à décider si, en raison du délai écoulé depuis le dépôt initial des plaintes à la Commission, les difficultés personnelles imputables à la stigmatisation liée aux allégations justifiaient un contrôle judiciaire. L'intimé prétendait également que, du fait que deux témoins éventuels étaient décédés et que la mémoire d'autres témoins avait décliné, il ne pourrait pas obtenir une audience équitable. Il n'a avancé aucun argument explicitement fondé sur l'art. 7 devant le tribunal inférieur, préférant invoquer les principes de justice naturelle, conformément à la jurisprudence en matière de droit administratif et aux protections que la common law offre contre les délais injustifiés. Il a cependant invoqué la jurisprudence relative à l'art. 7 à l'appui de son allégation que le préjudice qu'il subissait s'apparentait à celui qui justifie un arrêt des procédures dans le contexte de l'art. 7.

Le juge Lowry a reconnu que les allégations de harcèlement sexuel avaient sensiblement perturbé l'existence de l'intimé et semblaient avoir mis un terme à sa carrière politique. Il a toutefois ajouté qu'il était difficile de déterminer dans quelle mesure le préjudice subi pouvait être attribué, à juste titre, à un délai dans le déroulement des procédures.

Le juge Lowry a rejeté la prétention que, en l'absence de toute application de la *Charte*, les difficultés personnelles imputables à un délai inacceptable dans le déroulement d'un processus administratif pouvaient, à elles seules, conférer à l'intimé le droit à un bref de prérogative. Il a conclu qu'un délai ne constitue un déni de justice naturelle pour une partie que s'il porte atteinte

to respond. He concluded that Mr. Blencoe's ability to have a fair hearing had not been prejudiced, since he was able to respond to the Complaints in an evidentiary sense.

Apart from an unexplained five-month period in the human rights process, Lowry J. found that there had been no extended period of inactivity in the processing of the Complaints from receipt to referral. Communication had been ongoing between the Commission, solicitors and complainants, and the respondent had not been ignored. Lowry J. thus concluded that there had been no "unacceptable delay" in the human rights process. He also noted that the respondent had not brought any of his personal hardship to the Commission's attention, nor had he requested a prioritization of the Complaints on that basis.

directement à sa capacité de se défendre. Il a conclu qu'il n'y avait eu aucune atteinte à la capacité de M. Blencoe d'obtenir une audience équitable étant donné qu'il était en mesure de répondre aux plaintes en produisant des éléments de preuve.

22 Outre le délai inexpliqué de cinq mois dans le déroulement du processus en matière de droits de la personne, le juge Lowry a estimé qu'il n'y avait eu aucune période d'inactivité prolongée dans le traitement des plaintes entre leur dépôt et leur renvoi pour audience. La communication avait été constante entre la Commission, les avocats et les plaignantes, et l'intimé n'avait pas été tenu à l'écart. Le juge Lowry a donc conclu qu'il n'y avait pas eu de «délai inacceptable» dans le déroulement du processus en cause. Il a également souligné que l'intimé n'avait ni fait part de ses difficultés personnelles à la Commission ni demandé que l'on donne la priorité aux plaintes pour ce motif.

B. *British Columbia Court of Appeal* (1998), 49 B.C.L.R. (3d) 216

Before the Court of Appeal, Mr. Blencoe expressly argued that his s. 7 rights to liberty and security of the person were violated due to the length of the delay in resolving the Complaints against him. On May 11, 1998, the Court of Appeal (McEachern C.J.B.C. and Prowse J.A. for the majority, in separate concurring reasons) allowed the appeal and directed that the human rights proceedings against the respondent be stayed. Lambert J.A., in dissent, would have upheld the judgment of the British Columbia Supreme Court.

B. *Cour d'appel de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 216

23 En Cour d'appel, M. Blencoe a expressément soutenu que les droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 ont été violés en raison de la longueur du délai écoulé sans que les plaintes portées contre lui n'aient été réglées. Le 11 mai 1998, la Cour d'appel (le juge en chef McEachern et le juge Prowse s'exprimant, au nom de la majorité, dans des motifs concordants distincts) a accueilli l'appel et ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre l'intimé. Le juge Lambert, dissident, aurait confirmé le jugement de la Cour suprême de la Colombie-Britannique.

(a) Majority Decision of McEachern C.J.B.C.

McEachern C.J.B.C. concluded that the undue delay and the continued prejudice to privacy and human dignity could not be in accordance with the principles of fundamental justice (para. 104). McEachern C.J.B.C. found that the delay could not be attributed to Mr. Blencoe since he was unable to

a) La décision majoritaire du juge en chef McEachern

24 Le juge en chef McEachern a conclu que le délai injustifié et l'atteinte constante à la vie privée et à la dignité de la personne ne pouvaient pas être conformes aux principes de justice fondamentale (par. 104). Il a jugé que le délai ne pouvait pas être imputé à M. Blencoe étant donné qu'il ne pouvait

identify any steps taken by the respondent to which he was not entitled in defending himself. McEachern C.J.B.C. opined that the Complaints were not complex, but were rather of the type that are "quickly resolved by courts and tribunals all the time" (para. 37), such that "a week at the outside would have sufficed" to complete the investigation (para. 51). He added (at paras. 47 and 51):

> . . . a delay of over 30 months from the date of the complaints to a hearing on the merits is far too long. If Mr. Blencoe had been charged in the criminal courts with this type of sexual assault, the charge would very likely be dismissed on grounds of delay . . . .
>
> As I have already commented, the investigation was necessarily one-dimensional as there were no eyewitnesses, and a week at the outside would have sufficed.

25 Turning to the issue of prejudice, McEachern C.J.B.C. found that but for these proceedings, "it might reasonably be expected that the overwhelming [media] attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives" (para. 53). He considered the contention that the prejudice suffered by the respondent was not caused by the delay, but rather by his dismissal from Cabinet. In this connection McEachern C.J.B.C. held that the Supreme Court of Canada has elevated the "exacerbation" of an existing deprivation to the same level as the creation of the deprivation itself. He held that the excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs, thus triggering the s. 7 right to security of the person.

26 McEachern C.J.B.C. noted that the jurisprudence surrounding the application of s. 7 in a non-penal context was "fraught with considerable difficulty" (para. 60). He identified two competing streams of jurisprudence as to the scope of s. 7 in the Supreme Court. First, McEachern C.J.B.C. described what he referred to as the "judicial domain" school, which limits s. 7 protection to criminal proceedings. This approach was then contrasted with a broader approach to s. 7 which pro-

pas dire que ce dernier avait pris des mesures qu'il n'avait pas le droit de prendre pour se défendre. Il s'est dit d'avis que les plaintes n'étaient pas complexes, mais qu'elles étaient plutôt du genre de celles que [TRADUCTION] «les tribunaux judiciaires et les tribunaux administratifs règlent toujours rapidement» (par. 37), de sorte qu'«il aurait suffi tout au plus d'une semaine» pour effectuer l'enquête (par. 51). Il a ajouté ce qui suit (aux par. 47 et 51):

> [TRADUCTION] . . . un délai de plus de 30 mois entre le dépôt des plaintes et la tenue d'une audience au fond est beaucoup trop long. Si M. Blencoe avait été accusé au criminel de ce genre d'agression sexuelle, l'accusation serait fort probablement rejetée pour des raisons de délai . . .
>
> Comme je l'ai déjà expliqué, l'enquête était nécessairement unidimensionnelle puisqu'il n'y avait aucun témoin oculaire, et il aurait suffi tout au plus d'une semaine.

Au sujet de la question du préjudice, le juge en chef McEachern a conclu que, n'eût été de ces procédures, [TRADUCTION] «on aurait pu raisonnablement s'attendre à ce que l'attention [médiatique] considérable s'estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale» (par. 53). Il a examiné la prétention que le préjudice subi par l'intimé résultait non pas du délai, mais plutôt de son exclusion du Cabinet. Le juge en chef McEachern a conclu, à cet égard, que la Cour suprême du Canada a placé sur un pied d'égalité l'«aggravation» d'une atteinte existante et le fait de porter atteinte. Il a estimé que le délai excessif avait à la fois considérablement stigmatisé l'accusé et aggravé une situation déjà existante, de sorte que le droit à la sécurité de la personne garanti par l'art. 7 s'appliquait.

Le juge en chef McEachern a fait remarquer que la jurisprudence entourant l'application de l'art. 7 dans un contexte non pénal [TRADUCTION] «posait de grandes difficultés» (par. 60). Il a relevé, au sujet de la portée de l'art. 7, deux courants opposés dans la jurisprudence de la Cour suprême. Premièrement, le juge en chef McEachern a parlé de ce qu'il a appelé l'école du «domaine judiciaire» qui limite la protection de l'art. 7 aux procédures criminelles. Il a ensuite comparé ce point de vue avec

tects an individual's right to "human dignity" and "privacy" outside the arena of criminal proceedings. McEachern C.J.B.C. adopted the more expansive approach (at para. 101):

> . . . I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that s. 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by [Blencoe] here. Everyone can be made answerable, according to law, for his or her conduct or misconduct, but a process established by law to provide accountability and appropriate remedies cannot be completely open-ended in the sense that human dignity, even for wrongdoers if such is the case, can be compromised for as long as it has occurred in this case.

une interprétation plus large de l'art. 7 qui protège le droit de chacun à la «dignité» et à la «vie privée» ailleurs que dans le seul contexte de procédures criminelles. Le juge en chef McEachern s'est dit favorable à l'interprétation plus libérale (au par. 101):

> [TRADUCTION] . . . je me sens contraint à suivre ce qui me semble être la nouvelle interprétation préconisée par la Cour suprême du Canada, selon laquelle, au chapitre de la liberté et de la sécurité de la personne, l'art. 7 a pour effet de protéger à la fois la vie privée et la dignité des citoyens contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont [M. Blencoe] a été victime. Suivant la loi, n'importe qui peut être tenu responsable de sa conduite ou de son inconduite, mais le processus établi par la loi pour statuer sur la responsabilité et accorder un redressement approprié ne peut avoir une durée totalement indéterminée au point où la dignité d'une personne, même fautive, peut être compromise aussi longtemps qu'elle l'a été en l'espèce.

(b) Concurring Majority Judgment of Prowse J.A.

Prowse J.A. held that the allegations in this case were analogous to allegations of sexual assault and thus engaged s. 7 of the *Charter*. Having regard to the nature of the allegations and the extent of the prejudice suffered by Mr. Blencoe, she agreed with McEachern C.J.B.C. that the delay of over 30 months was unreasonable and breached the respondent's right to security of the person in a manner not in accordance with the principles of fundamental justice.

b) Le jugement majoritaire concordant du juge Prowse

27 Le juge Prowse a conclu que les allégations formulées en l'espèce s'apparentaient à des allégations d'agression sexuelle et faisaient donc intervenir l'art. 7 de la *Charte*. Compte tenu de la nature des allégations et de l'étendue du préjudice subi par M. Blencoe, elle a convenu avec le juge en chef McEachern que le délai de plus de 30 mois était déraisonnable et portait atteinte, d'une manière non conforme aux principes de justice fondamentale, au droit de l'intimé à la sécurité de sa personne.

(c) Dissenting Reasons of Lambert J.A.

In determining whether the delay was unacceptable, for the purposes of an assessment of natural justice, Lambert J.A. held that such decision was an issue of fact which was decided by the lower court. Consequently, he stated that Lowry J.'s decision should only be interfered with if there was a misconception of the evidence or if the decision was palpably wrong, neither of which had occurred in this case. On the legal question of which sorts of

c) Les motifs dissidents du juge Lambert

28 La question de savoir si le délai était inacceptable au regard des principes de justice naturelle était, selon le juge Lambert, une question de fait que le tribunal inférieur avait tranchée. Il a donc affirmé qu'il n'y aurait lieu de modifier la décision du juge Lowry que s'il y avait eu mauvaise interprétation de la preuve ou décision manifestement erronée, ce qui n'était pas le cas en l'espèce. Quant à la question de droit qui est de savoir quels genres

prejudice affect natural justice, Lambert J.A. agreed with Lowry J. that prejudice arising from delay must go to the intrinsic fairness of the hearing process and not merely to extrinsic factors such as stigma, stress or other forms of suffering.

29 Turning to the *Charter* issue, Lambert J.A. found it unnecessary to decide whether s. 7 of the *Charter* applies to non-criminal proceedings or whether suffering induced by stigmatization, stress and disruption of family life can constitute a deprivation of liberty or security of the person in the human rights context. He found that the stigma suffered by Mr. Blencoe, the stress and anxiety related thereto, the media publicity, and Mr. Blencoe's lack of employment, could not be attributed to the human rights process, nor were they exacerbated by a breach of the principles of fundamental justice. Lambert J.A. emphasized that Mr. Blencoe's rights and expectations had to be balanced against those of the two complainants, in the context of the public interest in upholding an effective human rights process. Concluding that the principles of fundamental justice arising in the human rights process were not breached, Lambert J.A. would have found that the respondent was not entitled to relief under ss. 7 and 24 of the *Charter*.

IV. Relevant Constitutional Provisions

30 *Canadian Charter of Rights and Freedoms*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

. . .

(*b*) to be tried within a reasonable time;

de préjudice sont contraires aux principes de justice naturelle, le juge Lambert a convenu avec le juge Lowry que le préjudice découlant d'un délai doit se rapporter à l'équité intrinsèque de la procédure d'audition et non seulement à un facteur extrinsèque comme la stigmatisation, le stress ou d'autres formes de souffrance.

En ce qui concerne la question relative à la *Charte*, le juge Lambert a décidé qu'il était inutile de déterminer si l'art. 7 de la *Charte* s'applique dans des procédures non criminelles ou si les souffrances dues à la stigmatisation, au stress et à la perturbation de la vie familiale peuvent constituer une atteinte à la liberté ou à la sécurité de la personne dans le contexte des droits de la personne. Il a conclu que la stigmatisation dont M. Blencoe a été victime, le stress et l'angoisse qui en ont résulté, la couverture médiatique et le fait que M. Blencoe n'avait plus d'emploi n'étaient pas attribuables au processus en matière de droits de la personne et n'avaient pas été aggravés par une violation des principes de justice fondamentale. Le juge Lambert a souligné que les droits et les attentes de M. Blencoe devaient être soupesés en fonction de ceux des deux plaignantes et de l'intérêt du public dans le maintien d'un processus efficace en matière de droits de la personne. Après avoir conclu qu'il n'y avait eu aucune violation des principes de justice fondamentale qui s'appliquent en matière de droits de la personne, le juge Lambert aurait conclu que l'intimé n'avait pas droit à une réparation fondée sur les art. 7 et 24 de la *Charte*.

IV. Dispositions constitutionnelles pertinentes

Charte canadienne des droits et libertés

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Tout inculpé a le droit:

. . .

b) d'être jugé dans un délai raisonnable;

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

V. Issues

The following are the central issues to be determined for the disposition of this appeal:

A. Does the *Charter* apply to the actions of the British Columbia Human Rights Commission?

B. Have the respondent's s. 7 rights to liberty and security of the person been violated by state-caused delay in the human rights proceedings?

C. If the respondent's s. 7 rights were not engaged, or if the state's actions were in accordance with the principles of fundamental justice, was the respondent entitled to a remedy pursuant to administrative law principles where the delay did not interfere with the right to a fair hearing?

D. If the respondent is entitled to a *Charter* or administrative law remedy, was the stay of proceedings an appropriate remedy in the circumstances of this case?

V. Questions en litige

Notre Cour est appelée, aux fins du présent pourvoi, à trancher les questions centrales suivantes: 31

A. La *Charte* s'applique-t-elle aux actes de la British Columbia Human Rights Commission?

B. Le délai imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?

C. Si les droits garantis à l'intimé par l'art. 7 n'étaient pas en cause ou si les actes de l'État étaient conformes aux principes de justice fondamentale, l'intimé avait-il droit à une réparation fondée sur les principes du droit administratif dans la mesure où le délai écoulé n'a pas porté atteinte à son droit à une audience équitable?

D. Si l'intimé a droit à une réparation fondée sur la *Charte* ou sur le droit administratif, l'arrêt des procédures était-il la réparation appropriée eu égard aux circonstances de la présente affaire?

VI. Analysis

A. *Does the Charter Apply to the Actions of the British Columbia Human Rights Commission?*

The scope of the *Charter*'s application is delineated by s. 32(1) of the *Charter* which states:

VI. Analyse

A. *La Charte s'applique-t-elle aux actes de la British Columbia Human Rights Commission?*

La portée de la *Charte* est délimitée par son par. 32(1), dont voici le libellé: 32

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

It is clear that both the federal Parliament and provincial legislatures are bound by the *Charter*. However, one threshold issue which has been raised in this case is whether the Commission and the Tribunal are agents of government pursuant to s. 32 of the *Charter*. The following three factors have been put forth to support the argument that these bodies are not bound by the *Charter*: (i) the organizations in question are required to be independent of government; (ii) the challenge in this case is not to any statutory provisions that might be said to be within the legislative sphere; and (iii) the organizations in question must act judicially since their functions are analogous to those exercised by courts of law.

Il est clair que le Parlement du Canada et les législatures provinciales sont assujettis à la *Charte*. Cependant, une question préliminaire que soulève la présente affaire est de savoir si la Commission et le Tribunal sont des mandataires du gouvernement aux fins de l'art. 32 de la *Charte*. Les trois facteurs suivants ont été avancés à l'appui de l'argument voulant que ces organismes ne soient pas assujettis à la *Charte*: (i) les organismes en cause doivent être indépendants du gouvernement, (ii) la contestation en l'espèce ne vise pas une disposition dont on pourrait dire qu'elle ressortit au pouvoir législatif et (iii) les organismes en question doivent agir d'une manière judiciaire, étant donné que leurs fonctions sont analogues à celles d'une cour de justice.

33 For the reasons I address below, these claims are misguided with respect to their approach to the application of the *Charter*. Furthermore, for the purposes of this appeal, it is only necessary to address the *Charter*'s applicability to the actions of the Commission since the prejudice suffered by the respondent is alleged to have resulted from unreasonable delay in the actions of the Commission.

Pour les raisons exposées ci-après, ces prétentions s'appuient sur une façon erronée d'aborder l'application de la *Charte*. De plus, aux fins du présent pourvoi, il est seulement nécessaire d'examiner l'applicabilité de la *Charte* aux actes de la Commission, étant donné que le préjudice subi par l'intimé serait imputable au fait que la Commission n'a pas agi dans un délai raisonnable.

34 The mere fact that a body is independent of government is not determinative of the *Charter*'s application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

Le seul fait qu'un organisme soit indépendant du gouvernement n'est pas décisif en ce qui concerne l'application de la *Charte*, pas plus que ne l'est le fait qu'aucune disposition législative n'est contestée. L'autonomie ou l'indépendance vis-à-vis du gouvernement ne permet pas de conclure à l'inapplication de la *Charte*.

35 Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by

L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. Le juge La Forest

La Forest J., speaking for a unanimous Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 21:

> There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:
>
> > Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

There is no doubt that the Commission is created by statute and that all of its actions are taken pursuant to statutory authority.

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents. The relevant portions of this section state:

> **24** (1) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may

l'a confirmé en rendant l'arrêt unanime de notre Cour *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 21:

> Toutefois, il ne fait aucun doute que la *Charte* s'applique aussi aux actes accomplis en vertu de pouvoirs conférés par la loi. La justification de cette règle découle inexorablement de la structure logique de l'art. 32. Comme l'explique le professeur Hogg dans *Constitutional Law of Canada* (3e éd. 1992 (feuilles mobiles)), vol. 1, aux pp. 34-8.3 et 34-9:
>
> > [TRADUCTION] Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administratives ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il ne fait aucun doute que la Commission a été créée par une loi et qu'elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause.

36 L'un des traits distinctifs des actes accomplis en vertu d'un pouvoir conféré par la loi est qu'ils comportent un pouvoir de contrainte que n'ont pas les particuliers (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, à la p. 34-12). Il est clair que les pouvoirs de la Commission sont plus étendus que ceux d'une personne physique. Sa compétence ne découle pas du consentement des parties. Le *Human Rights Code* habilite, de diverses manières, la Commission à enquêter sur des plaintes et à décider de la façon de les traiter. L'article 24 du Code permet expressément au commissaire d'exiger la production de documents. En voici les extraits pertinents:

[TRADUCTION]

> **24** (1) Lorsqu'il l'enquête relative à une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut

(a) require the production of books, documents, correspondence or other records that relate or may relate to the complaint, and

(b) make any inquiry relating to the complaint of any person, in writing or orally.

(2) If a person refuses to

(a) comply with a demand under subsection (1) (a) for the production of books, documents, correspondence or other records, or

(b) respond to an inquiry made under subsection (1) (b),

the commissioner of investigation and mediation or a human rights officer may apply to the Supreme Court for an order requiring the person to comply with the demand or respond to the inquiry.

. . .

(4) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may, with the consent of the owner or occupier, enter and inspect any premises that in the opinion of that commissioner or the human rights officer may provide information relating to the complaint.

37 The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion.

38 With respect to the claim that the Commission exercises judicial functions and is thereby not subject to the *Charter*, the decision of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, is conclusive. Lamer J. (as he then was), in partial dissent but speaking for a unanimous Court on this point, held that the *Charter* applies to the orders of a statutorily appointed labour arbitrator. This determination was not open

a) exiger la production de livres, documents, lettres ou autres dossiers qui se rapportent ou peuvent se rapporter à la plainte, et

b) poser des questions par écrit ou de vive voix relativement à la plainte.

(2) Si une personne refuse

a) d'obtempérer à une demande de production de livres, documents, lettres ou autres dossiers, fondée sur l'alinéa (1)a), ou

b) de répondre à une question posée en vertu de l'alinéa (1)b),

le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut demander à la Cour suprême d'ordonner à la personne en cause d'obtempérer à la demande ou de répondre à la question.

. . .

(4) Lorsqu'il enquête sur une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut, avec le consentement du propriétaire ou de l'occupant, inspecter des locaux si, à son avis, cette inspection peut permettre d'obtenir des renseignements concernant la plainte.

En l'espèce, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle ne fait pas partie du gouvernement ou qu'elle n'est pas sous son contrôle. Dans l'arrêt *Eldridge*, notre Cour a conclu à l'unanimité qu'un hôpital était assujetti à la *Charte* parce qu'il mettait en œuvre une politique ou un programme gouvernemental particulier. La commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi.

L'arrêt de notre Cour *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, est concluant en ce qui concerne la prétention que la Commission exerce des fonctions judiciaires et n'est donc pas assujettie à la *Charte*. Le juge Lamer (plus tard Juge en chef), dissident en partie, mais s'exprimant au nom de toute la Cour sur ce point, a décidé que la *Charte* s'applique aux ordonnances d'un arbitre en matière de relations

to challenge, as expressed by Lamer J., at pp. 1077-78:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. [Emphasis added.]

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy (see *Eldridge*, *supra*, at paras. 37 and 44, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 584). The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory

du travail désigné en application d'une loi. Cette décision était incontestable, comme l'a dit le juge Lamer à la p. 1077:

> Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. [Je souligne.]

39 Les faits de l'affaire *Slaight* et ceux de la présente affaire ont au moins une caractéristique commune prédominante: l'arbitre en matière de relations du travail (dans *Slaight*) et la Commission (en l'espèce) exercent tous les deux des pouvoirs gouvernementaux conférés par un corps législatif. Dans chaque cas, l'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission tire tous ses pouvoirs de la loi. Elle applique le régime législatif du *Human Rights Code*. Elle met en œuvre un programme gouvernemental ou un régime législatif particulier établi par le gouvernement pour l'application de sa politique (voir *Eldridge*, précité, aux par. 37 et 44, et *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, à la p. 584). La Commission doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale».

40 Donc, même si elle peut avoir certaines caractéristiques d'un tribunal, la Commission est une créature de la loi et ses actes sont assujettis au *Human Rights Code*. L'État a créé par voie législative un organisme administratif chargé de mettre en œuvre un programme gouvernemental destiné à remédier à la discrimination. C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*. Une fois la Commission saisie d'une plainte, les procédures administratives qui suivent doivent respecter la *Charte*. L'exercice des fonctions de telles entités peut faire l'objet d'un examen fondé sur la *Charte* tout comme pourrait le faire l'exercice des fonctions d'un gouvernement dans les mêmes circonstances. Conclure le contraire permettrait au pouvoir légis-

bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

B. *Have the Respondent's Section 7 Rights to Liberty and Security of the Person Been Violated by State-caused Delay in Human Rights Proceedings?*

(a) Court of Appeal Decisions on This Issue

41 Four appellate courts have dealt with the issue of whether s. 7 of the *Charter* applies in circumstances similar to the case at bar, including the decision under appeal. The majority of the Court of Appeal in *Blencoe* followed the decision in *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), to hold that s. 7 of the *Charter* was violated. However, the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, and the Federal Court of Appeal in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638, refused to follow *Kodellas*, holding that s. 7 cannot be applied to the consequences of delays in human rights proceedings.

42 In *Kodellas*, between the date of the first complaint and the date fixed for the hearing, almost four years had elapsed and three years and two months had elapsed with respect to the second complaint. Bayda C.J.S., dissenting in part with respect to the appropriate remedy, held that the delay violated Mr. Kodellas's s. 7 security of the person. In reaching this conclusion, Bayda C.J.S. referred to the dissenting judgment of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863 (hereinafter "*Mills* (1986)"), at p. 919, and reiterated in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 605, where, in the context of s. 11(*b*) of the *Charter*, security of the person encompasses protection against

latif de contourner la *Charte* en créant des organismes qui ne peuvent pas faire l'objet d'un tel examen. L'analyse qui précède mène inexorablement à la conclusion que la *Charte* s'applique aux actes de la Commission.

B. *Le retard imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?*

a) La jurisprudence des cours d'appel sur ce point

Quatre cours d'appel ont statué sur la question de savoir si l'art. 7 de la *Charte* s'applique dans des circonstances semblables à celles de la présente affaire, y compris la cour d'appel dans l'arrêt qui fait l'objet du présent pourvoi. Dans l'affaire *Blencoe*, les juges majoritaires de la Cour d'appel ont suivi l'arrêt *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.), et ont conclu qu'il y avait violation de l'art. 7 de la *Charte*. Toutefois, la Cour d'appel du Manitoba dans *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, et la Cour d'appel fédérale dans *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638, ont refusé de suivre l'arrêt *Kodellas* et ont conclu que l'art. 7 ne peut pas s'appliquer aux conséquences d'un délai dans des procédures en matière de droits de la personne.

Dans l'affaire *Kodellas*, près de quatre années s'étaient écoulées entre le dépôt de la première plainte et la date fixée pour la tenue de l'audience, alors que trois années et deux mois s'étaient écoulées dans le cas de la deuxième plainte. Le juge en chef Bayda, dissident en partie au sujet de la réparation appropriée, a conclu que le délai écoulé portait atteinte au droit de M. Kodellas à la sécurité de sa personne garanti par l'art. 7. En tirant cette conclusion, le juge en chef Bayda a mentionné les motifs dissidents du juge Lamer dans *Mills c. La Reine*, [1986] 1 R.C.S. 863 (ci-après l'«arrêt *Mills* de 1986»), à la p. 919, repris dans *R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 605, selon lesquels la

"overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (*Kodellas*, at p. 152). The unreasonable delay in *Kodellas* was found to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas's chances of a fair hearing (*Kodellas*, at p. 161).

sécurité de la personne, dans le contexte de l'al. 11*b*) de la *Charte*, englobe la protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d'une accusation criminelle pendante» (*Kodellas*, à la p. 152). Il a été jugé, dans *Kodellas*, que le délai déraisonnable avait causé deux formes de préjudice à M. Kodellas: premièrement, il avait prolongé son traumatisme psychologique et, deuxièmement, il avait réduit les chances de M. Kodellas d'obtenir une audience équitable (*Kodellas*, à la p. 161).

In *Nisbett*, the Manitoba Court of Appeal denied relief sought by a medical doctor to prohibit the hearing of his employee's complaint of sexual harassment that had been outstanding for over three years. This decision was reached despite the stigma attached to the allegations which was described as "anxiety, the strain on family life, the disruption of his professional practice, the quest for evidence of similar conduct from former employees, the damage to his personal dignity and professional standing, the loss of self-esteem, and the continuing uncertainty as to the final outcome of the proceedings" (*Nisbett*, at p. 749) (quoting from the trial judgment (1992), 90 D.L.R. (4th) 672, at p. 679). The Manitoba Court of Appeal refused to follow *Kodellas*, questioning whether the impact of a criminal proceeding for sexual assault can be equated with a human rights proceeding on allegations of sex discrimination for the purposes of s. 7. The Court of Appeal concluded that s. 7 had no application to non-penal proceedings under human rights legislation and that s. 11 of the *Charter* was restricted to criminal cases.

43 Dans l'arrêt *Nisbett*, la Cour d'appel du Manitoba a refusé d'interdire, à la demande d'un médecin, l'audition de la plainte de harcèlement sexuel que l'employée de ce dernier avait déposée plus de trois ans auparavant. Elle a rendu cette décision malgré les stigmates liés aux allégations, qui avait été décrits comme étant [TRADUCTION] «l'angoisse, la perturbation de la vie familiale et de la vie professionnelle, la recherche d'une preuve de comportement similaire auprès d'anciennes employées, l'atteinte à la dignité personnelle et à la réputation professionnelle, la perte d'estime de soi et l'incertitude continuelle quant à l'issue finale des procédures» (*Nisbett*, à la p. 749 (citation provenant du jugement de première instance (1992), 90 D.L.R. (4th) 672, à la p. 679)). Doutant que l'incidence de procédures criminelles en matière d'agression sexuelle puisse être assimilée, aux fins de l'application de l'art. 7, à celle de procédures en matière de droits de la personne relatives à des allégations de discrimination sexuelle, la Cour d'appel du Manitoba a refusé de suivre l'arrêt *Kodellas*. Elle a statué que l'art. 7 ne s'appliquait pas à des procédures non pénales fondées sur une loi relative aux droits de la personne et que l'art. 11 de la *Charte* ne s'appliquait qu'en matière criminelle.

In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of a tribunal to investigate. The Federal Court of Appeal also refused to follow *Kodellas*, and concluded that s. 7 did not apply to administrative proceedings of a non-criminal nature.

44 Dans *Lignes aériennes Canadien*, un délai de 50 mois s'était écoulé entre le dépôt de la plainte et la désignation des membres du tribunal chargé de faire enquête. La Cour d'appel fédérale y a également refusé de suivre l'arrêt *Kodellas* et a conclu que l'art. 7 ne s'appliquait pas à des procédures administratives de nature non criminelle.

(b) Applicability of Section 7 Outside the Criminal Context

45 Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. This was most recently affirmed by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):

> . . . s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.)*, *supra*, at para. 22.

46 Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (*G. (J.)*, at para. 66). If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged. The question to be addressed, however, is not whether delays in human rights proceedings can engage s. 7 of the *Charter* but rather, whether the respondent's s. 7 rights were actually engaged by delays in the circumstances of this case. Various parties in this case seem to have conflated the delay issue with the threshold s. 7 issue. However, whether the respondent's s. 7 rights to life, liberty and security of the person are engaged is a separate issue from whether the delay itself was unreasonable. I will now examine whether the s. 7 threshold requirements have been met and whether the

b) Applicabilité de l'art. 7 dans un contexte autre que celui du droit criminel

Même si, dans certains arrêts, notre Cour a pu adhérer au point de vue que l'art. 7 de la *Charte* ne s'applique que dans le domaine du droit criminel, il ne fait plus aucun doute que cette disposition n'est pas limitée au contexte pénal. C'est ce que confirmait tout récemment notre Cour dans *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, où le juge en chef Lamer a affirmé que la protection de la sécurité de la personne déborde le cadre du droit criminel (au par. 58). Plus loin, il a ajouté ce qui suit (au par. 65):

> . . . l'art. 7 n'est pas limité aux affaires purement criminelles ou pénales. Dans le cours de l'administration de la justice, il existe d'autres façons par lesquelles l'État peut priver un individu du droit à la liberté et à la sécurité de la personne garanti à l'art. 7, par exemple l'internement dans un établissement psychiatrique: voir *B. (R.)*, précité, au par. 22.

Ainsi, les arrêts *Nisbett* et *Lignes aériennes Canadien*, précités, sont erronés dans la mesure où ils permettent d'affirmer que l'art. 7 ne s'applique qu'en matière criminelle. L'article 7 peut déborder le cadre du droit criminel, au moins dans le cas d'un «acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice» (*G. (J.)*, au par. 66). Rien ne s'oppose à ce que cet article s'applique à une affaire en matière des droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application. La question qui se pose toutefois est de savoir non pas si des délais dans des procédures en matière de droits de la personne peuvent déclencher l'application de l'art. 7 de la *Charte*, mais plutôt si, dans les circonstances de la présente affaire, des délais ont porté atteinte aux droits garantis à l'intimé par l'art. 7. Différentes parties à la présente affaire semblent avoir confondu la question du délai avec la question préliminaire de l'art. 7. Toutefois, la question de savoir si les droits de l'intimé à la vie, à la liberté et à la sécurité de sa personne s'appliquent est distincte de celle de savoir si le délai lui-même était déraisonnable. Je vais maintenant examiner si les conditions préliminaires

respondent has demonstrated a breach of his s. 7 rights.

(c) Section 7 — General Principles

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 401, as follows:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there. It is at the first stage in the s. 7 analysis that I have the greatest problem with the respondent's s. 7 arguments.

McEachern C.J.B.C. collapsed the s. 7 interests of "liberty" and "security of the person" into a single right protecting a person's dignity against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the respondent. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 204-5, Wilson J. emphasized that "life, liberty and security of the person" are three distinct interests, and that it is incumbent on the Court to give meaning to each of these elements. This statement was endorsed by Lamer J. for a majority of this Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. In addressing the issue of whether the respondent's s. 7 rights have been breached in this case, I also prefer to keep the interests protected by s. 7 analytically distinct to the extent possible. For the

naires de l'application de l'art. 7 sont remplies et si l'intimé a démontré qu'il y a eu violation des droits que lui garantit cet article.

c) Article 7 — Principes généraux

47 L'article 7 de la *Charte* prévoit ceci: «[c]hacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.» Ainsi, avant même que l'on puisse se demander si les droits garantis à l'intimé par l'art. 7 ont fait l'objet d'une atteinte non conforme aux principes de justice fondamentale, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. Dans l'arrêt *R. c. Beare*, [1988] 2 R.C.S. 387, à la p. 401, le juge La Forest a énoncé ainsi ces deux étapes de l'analyse fondée sur l'art. 7:

> Pour que l'article puisse entrer en jeu, il faut constater d'abord qu'il a été porté atteinte au droit «à la vie, à la liberté et à la sécurité [d'une] personne» et, en second lieu, que cette atteinte est contraire aux principes de justice fondamentale.

Par conséquent, si le droit de l'intimé à la vie, à la liberté ou à la sécurité de sa personne n'est pas en cause, l'analyse fondée sur l'art. 7 prend fin. C'est à la première étape de cette analyse que les arguments de l'intimé relatifs à l'art. 7 me posent le plus de difficultés.

48 Le juge en chef McEachern a fondu le droit «à la liberté» et le droit «à la sécurité de [l]a personne» en un seul droit à la protection de la dignité de la personne contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont l'intimé a été victime. Dans *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, aux pp. 204 et 205, le juge Wilson a insisté sur le fait que «la vie, la liberté et la sécurité de la personne» constituent trois droits distincts et qu'il incombe à notre Cour de préciser le sens de chacun de ces droits. Le juge Lamer a souscrit à cet énoncé au nom de notre Cour à la majorité dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 500. Pour déterminer si, en l'espèce, il a été porté atteinte aux droits de l'intimé garantis par l'art. 7, je préfère, dans la mesure du

purposes of this appeal, the outcome is dependent upon the meaning to be given to the interests of "liberty" and "security of the person".

(d) Liberty Interest

49 The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:

> . . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

50 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., speaking for herself alone, was of the opinion that s. 251 of the *Criminal Code* violated not only a woman's right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and

possible, cloisonner ces droits aux fins de l'analyse. L'issue du présent pourvoi dépend du sens donné aux droits «à la liberté» et «à la sécurité de [l]a personne».

d) Droit à la liberté

Le droit à la liberté garanti par l'art. 7 de la *Charte* ne s'entend plus uniquement de l'absence de toute contrainte physique. Des juges de notre Cour ont conclu que la «liberté» est en cause lorsque des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie. Une telle situation existe, par exemple, lorsque des personnes doivent se présenter à un endroit et à un moment précis pour faire prendre leurs empreintes digitales (*Beare*, précité), produire des documents ou témoigner (*Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425), et lorsque des personnes doivent s'abstenir de flâner dans certains lieux (*R. c. Heywood*, [1994] 3 R.C.S. 761). Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d'importance fondamentale sans intervention de l'État. Dans *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, au par. 80, le juge La Forest, avec l'assentiment des juges L'Heureux-Dubé, Gonthier et McLachlin, souligne que le droit à la liberté garanti par l'art. 7 protège l'autonomie personnelle et qu'il doit être interprété largement et en conformité avec les principes et les valeurs qui sous-tendent la *Charte* dans son ensemble:

> . . . la liberté ne signifie pas simplement l'absence de toute contrainte physique. Dans une société libre et démocratique, l'individu doit avoir suffisamment d'autonomie personnelle pour vivre sa propre vie et prendre des décisions qui sont d'importance fondamentale pour sa personne.

Dans *R. c. Morgentaler*, [1988] 1 R.C.S. 30, le juge Wilson, s'exprimant uniquement en son propre nom, était d'avis que l'art. 251 du *Code criminel* violait non seulement le droit d'une femme à la sécurité de sa personne, mais également son droit à la liberté garanti par l'art. 7. Elle a indiqué que le droit à la liberté prend racine dans les concepts

choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

The above passage was endorsed by La Forest J. in *B. (R.)*, *supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), reiterated his position that the right to liberty in s. 7 protects the individual's right to make inherently private choices and that choosing where to establish one's home is one such inherently personal choice:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its

fondamentaux de la dignité humaine, de l'autonomie personnelle, de la vie privée et du choix des décisions concernant l'être fondamental de l'individu. Voici ce qu'elle a dit, à la p. 166:

> Ainsi, un aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh*, est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

Le juge La Forest a adopté cet extrait dans l'arrêt *B. (R.)*, précité, au par. 80. Dans cette affaire, notre Cour était appelée à décider si le droit à la liberté garanti par l'art. 7 protège le droit des parents de choisir un traitement médical pour leurs enfants. Le juge La Forest a appliqué l'extrait précité des motifs du juge Wilson aux droits individuels qui revêtent une importance fondamentale dans notre société, comme le droit des parents de prendre soin de leurs enfants.

Dans l'arrêt *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, au par. 66, le juge La Forest, s'exprimant au nom du juge L'Heureux-Dubé et du juge McLachlin (maintenant Juge en chef), a réitéré son point de vue selon lequel le droit à la liberté garanti par l'art. 7 protège le droit de chacun de faire des choix intrinsèquement privés, y compris le choix d'un lieu pour établir sa demeure: 51

> L'analyse qui précède ne fait que répéter mon opinion générale selon laquelle la protection du droit à la liberté garanti par l'art. 7 de la *Charte* s'étend au droit à une sphère irréductible d'autonomie personnelle où les individus peuvent prendre des décisions intrinsèquement privées sans intervention de l'État. Comme les propos que j'ai tenus dans l'arrêt *B. (R.)* l'indiquent, je n'entends pas par là, je le précise, que cette sphère d'autonomie est vaste au point d'englober toute décision qu'un individu peut prendre dans la conduite de ses affaires. Une telle opinion, en effet, irait à l'encontre du principe fondamental que j'ai formulé au début des présents motifs et dans les motifs de l'arrêt *B. (R.)*, selon lequel nul ne peut, dans une société organisée, prétendre à la garantie de la liberté absolue d'agir comme il lui plaît. J'estime même que cette sphère d'autonomie ne protège

scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy. [Emphasis added.]

pas tout ce qui peut, même vaguement, être qualifié de «privé». Je suis plutôt d'avis que l'autonomie protégée par le droit à la liberté garanti par l'art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou d'essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l'essence même de ce que signifie la jouissance de la dignité et de l'indépendance individuelles. Comme je l'ai déjà mentionné, j'ai exprimé, dans l'arrêt *B.(R.)*, l'opinion voulant que les décisions des parents quant aux soins médicaux administrés à leurs enfants appartiennent à cette catégorie limitée de sujets fondamentalement personnels. À mon avis, le choix d'un lieu pour établir sa demeure est, de la même façon, une décision essentiellement privée qui tient de la nature même de l'autonomie personnelle. [Je souligne.]

La Forest J. therefore spoke in *Godbout* of a narrow sphere of inherently personal decision-making deserving of the law's protection. Choosing where to establish one's home fell within that narrow class according to three members of this Court.

Dans l'arrêt *Godbout*, le juge La Forest a donc parlé d'une catégorie limitée de décisions intrinsèquement personnelles qui méritent la protection de la loi. Selon trois juges de notre Cour, le choix d'un lieu pour établir sa demeure faisait partie de cette catégorie limitée.

52 Dissenting at the New Brunswick Court of Appeal in *G. (J.)*, I also favoured a more generous approach to the liberty interest that would protect personal rights that are inherent to the individual and consistent with the essential values of our society (*New Brunswick (Minister of Health and Community Services) v. J.G.* (1997), 187 N.B.R. (2d) 81, at para. 49). In this vein, the parental interest in raising and caring for one's children would be protected. I however agreed with La Forest J.'s caution that the liberty interest would encompass only those decisions that are of fundamental importance.

Dissident en Cour d'appel du Nouveau Brunswick dans l'affaire *G. (J.)*, j'ai également préconisé une interprétation plus généreuse du droit à la liberté qui protégerait les droits personnels qui sont inhérents à l'individu et conformes aux valeurs essentielles de notre société (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. J.G.* (1997), 187 R.N.-B. (2e) 81, au par. 49). Dans le même ordre d'idées, le droit des parents d'éduquer leurs enfants et d'en prendre soin serait protégé. J'ai cependant souscrit à la mise en garde du juge La Forest selon laquelle le droit à la liberté n'engloberait que les décisions qui revêtent une importance fondamentale.

53 Professor Hogg, *supra*, at p. 44-9, supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelopes all of the legal rights in the *Charter*. Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at p. 44-12:

Le professeur Hogg, *op. cit.*, à la p. 44-9, préconise une interprétation plus prudente de l'art. 7 de manière à éviter que cet article confère un droit résiduel englobant toutes les garanties juridiques de la *Charte*. Le professeur Hogg aborde aussi la question de l'omission délibérée de garantir, à l'art. 7, le droit à la «propriété», en sus du droit «à la vie, à la liberté et à la sécurité de [l]a personne», et affirme, à la p. 44-12:

It also requires . . . that those terms [liberty and security of the person] be interpreted as excluding economic lib-

[TRADUCTION] Cela exige en outre [. . .] que ces termes [liberté et sécurité de [l]a personne] soient interprétés

erty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices". The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.

(e) Security of the Person

In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler*, *supra*, at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 587, *per* Sopinka J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. At issue in *G. (J.)* was whether relieving a parent of the custody of his or her children restricts a parent's right to security of the person. Lamer C.J. held that the parental interest in raising one's children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate sphere of the parent-child

comme excluant la liberté et la sécurité économiques; sinon, refoulée à la porte avant, la propriété entrerait par la porte arrière.

54 Même si un individu a le droit de faire des choix personnels fondamentaux sans intervention de l'État, cette autonomie personnelle n'est pas synonyme de liberté illimitée. Dans les circonstances de la présente affaire, l'État n'a pas empêché l'intimé de faire des «choix personnels fondamentaux». À mon avis, les droits que l'on cherche à protéger en l'espèce ne font pas partie du droit «à la liberté» garanti par l'art. 7.

e) Sécurité de la personne

55 Notre Cour a statué, en matière criminelle, que l'atteinte de l'État à l'intégrité corporelle et la tension psychologique grave causée par l'État constituent une atteinte à la sécurité de la personne. Dans ce contexte, il a été jugé que la sécurité de la personne vise à la fois l'intégrité physique et l'intégrité psychologique (*Morgentaler*, précité, à la p. 56, le juge en chef Dickson, et à la p. 173, le juge Wilson; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, à la p. 587, le juge Sopinka; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, à la p. 1177, le juge Lamer). Ces arrêts concernent des situations où l'État a légiféré au criminel dans le but de s'ingérer dans l'autonomie personnelle et la capacité d'une personne de maîtriser sa propre intégrité physique ou psychologique, en interdisant notamment l'aide au suicide et en réglementant l'avortement.

56 Récemment, dans l'arrêt *G. (J.)*, précité, notre Cour a réitéré le principe voulant que le droit à la sécurité de la personne vise la tension psychologique grave causée par l'État. La question en litige dans cette affaire était de savoir si le retrait de la garde d'un enfant portait atteinte au droit du parent à la sécurité de sa personne. Le juge en chef Lamer a conclu que le droit des parents d'élever leurs enfants est un droit personnel d'une importance fondamentale. Le retrait de la garde d'un enfant par l'État constitue donc une atteinte directe à l'intégrité psychologique du parent équivalant à une «intrusion flagrante» dans le domaine privé et

relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in *G. (J.)* for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).

57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.

(i) *Was the Harm to Mr. Blencoe the Result of State-Caused the Human Rights Process?*

58 In *G. (J.)*, Lamer C.J. found direct state interference with the psychological integrity of the parent, describing the government action in that case as "direct state interference with the parent-child relationship" (para. 61). Later, at para. 66, Lamer C.J. referred to a child custody application as "an example of state action which directly engages the justice system and its administration" (emphasis added). He stressed that not every state action

intime du lien parent-enfant (au par. 61). Le juge en chef Lamer a conclu que l'art. 7 garantit aux parents le droit à une audience équitable lorsque l'État demande la garde de leurs enfants (au par. 55). Cependant, il a également établi, dans l'arrêt *G. (J.)*, des limites applicables aux cas où il y a atteinte à l'intégrité psychologique d'une personne. Il a affirmé que la tentative d'établir de telles limites n'est pas une «science exacte» (par. 59).

Les atteintes de l'État à l'intégrité psychologique d'une personne ne font pas toutes intervenir l'art. 7. Lorsque l'intégrité physique d'une personne est en cause, la sécurité de la personne se limite à la «tension psychologique grave causée par l'État» (le juge en chef Dickson dans *Morgentaler*, précité, à la p. 56). Je crois que le juge en chef Lamer a eu raison de dire que le juge en chef Dickson tentait d'exprimer en termes qualitatifs le type d'ingérence de l'État susceptible de violer l'art. 7 (*G. (J.)*, au par. 59). Selon l'expression «tension psychologique grave causée par l'État», deux conditions doivent être remplies que la sécurité de la personne soit en cause. Premièrement, le préjudice psychologique doit être causé par l'État, c'est-à-dire qu'il doit résulter d'un acte de l'État. Deuxièmement, le préjudice psychologique doit être grave. Les formes que prend le préjudice psychologique causé par le gouvernement n'entraînent pas toutes automatiquement des violations de l'art. 7. Je vais examiner successivement ces deux conditions.

(i) *Le préjudice subi par M. Blencoe résulte-t-il d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne?*

Dans *G. (J.)*, le juge en chef Lamer a conclu qu'il y avait eu atteinte directe de l'État à l'intégrité psychologique du parent, qualifiant la mesure prise dans cette affaire par le gouvernement d'«ingérence directe de l'État dans le lien parent-enfant» (par. 61). Plus loin, au par. 66, il a dit que les demandes de garde d'enfants sont «un exemple d'acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice»

which interferes with the parent-child relationship would have triggered s. 7.

Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged *Charter* violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:

> It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

(je souligne). Il a souligné que les actes de l'État qui constituent une ingérence dans le lien parent-enfant ne déclenchent pas tous l'application de l'art. 7.

59 Un procès criminel, une allégation en matière de droits de la personne ou même une action au civil peut être une cause de stress, d'angoisse et de stigmatisation même lorsque le procès ou les procédures se déroulent dans un délai raisonnable. Ce qui nous intéresse en l'espèce n'est pas tout préjudice de cette nature, mais seulement l'atteinte qui, peut-on dire, résulte du délai écoulé dans le déroulement du processus en matière de droits de la personne. Il serait inopportun de tenir le gouvernement responsable du préjudice causé par un tiers qui n'est aucunement un mandataire de l'État.

60 Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient indéniablement causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé pour que l'art. 7 s'applique. Dans *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, à la p. 447, le juge Dickson (plus tard Juge en chef) a conclu que le lien de causalité entre les actes du gouvernement et la violation alléguée de la *Charte* était «trop incertain, trop conjectural et trop hypothétique pour étayer une cause d'action». Dans des motifs concordants distincts, le juge Wilson a également fait état de la nécessité d'un lien direct quelconque entre les actes de l'État et l'atteinte qui en a résulté. Voici ce qu'elle a dit, à la p. 490:

> Il n'est pas nécessaire de souscrire à l'interprétation restrictive avancée par le juge Pratte, qui limiterait l'art. 7 à une protection contre les arrestations ou les détentions arbitraires, pour convenir que l'article a pour objet central l'ingérence directe du gouvernement dans la vie, la liberté et la sécurité personnelle des citoyens. À tout le moins, me semble-t-il, il doit y avoir une forte présomption qu'on n'a jamais voulu qu'une action gouvernementale relative aux relations de l'État avec d'autres États, et qui donc n'est dirigée contre aucun membre de la collectivité politique immédiate, tombe sous le coup de l'art. 7 même si cette action peut avoir l'effet incident d'accroître le risque de mort ou de préjudice auquel les gens doivent faire face en général. [Je souligne.]

61 The appellants submit that the nexus between the harm to the respondent and the alleged delay in processing the Complaints is remote. They assert that the largest measure of prejudice to Mr. Blencoe resulted not from any delay but from the publicity surrounding the events, especially his dismissal from Cabinet and later from the NDP caucus. They add that the respondent himself fought the allegations against him in the public domain. For the reasons I set out below, I also have doubts whether, on the facts, the psychological harm suffered by the respondent can be seen as the result of state-caused delay in the human rights process.

Les appelants soutiennent que le lien entre le préjudice subi par l'intimé et le délai qui se serait écoulé dans le traitement des plaintes est ténu. Selon eux, la majeure partie du préjudice causé à M. Blencoe résultait non pas d'un délai mais de la publicité qui a entouré, plus particulièrement, son exclusion du Cabinet et, par la suite, du caucus du NPD. Ils ajoutent que l'intimé a lui-même réfuté publiquement les allégations dont il faisait l'objet. Pour les motifs indiqués ci-après, je doute également qu'il soit possible, d'après les faits, de considérer que le préjudice psychologique subi par l'intimé a résulté d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne.

62 On March 1, 1995, the respondent was informed by Premier Harcourt that his former assistant, Fran Yanor, made sexual harassment allegations against him. This allegation was made public one week later. On March 9, 1995, Mr. Blencoe stepped down as Minister but remained in Cabinet, pending the results of an inquiry. He issued a press release, "vehemently denying the harassment allegations". On March 10, 1995, the national and provincial press began running stories about the respondent's resignation and allegations against him by Ms. Yanor and two other women. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the NDP caucus.

Le 1er mars 1995, l'intimé a été informé par le premier ministre Harcourt que son ancienne adjointe, Fran Yanor, avait formulé des allégations de harcèlement sexuel contre lui. Ces allégations ont été rendues publiques une semaine plus tard. Le 9 mars 1995, M. Blencoe a démissionné de son poste de ministre, tout en continuant de faire partie du Cabinet, jusqu'à ce que les résultats de l'enquête soient connus. Il a diffusé un communiqué de presse dans lequel il [TRADUCTION] «niait catégoriquement les allégations de harcèlement». Le 10 mars 1995, la presse nationale et la presse provinciale ont commencé à faire état de la démission de l'intimé et des allégations formulées contre lui par Mme Yanor et deux autres femmes. Le 4 avril de la même année, le premier ministre Harcourt a exclu l'intimé du Cabinet et, ensuite, du caucus du NPD.

63 While the respondent was only notified of the Schell and Willis Complaints in July and September of 1995, the record demonstrates that Mr. Blencoe had suffered the following prejudice or "stigmatization" prior to that time: Mr. Blencoe and his family were hounded by the media from the time that the Yanor harassment allegations were made public; the respondent and his wife feared press leaks and stopped speaking to persons outside their close circle of family and friends; Mr. Blencoe's children were subjected to insults and name-calling at school; and Mr. Blencoe was under the care of a physician and was prescribed

Quoique l'intimé Blencoe n'ait été avisé des plaintes de Mmes Schell et Willis qu'en juillet et en septembre 1995, il ressort du dossier qu'il avait déjà été victime d'un préjudice ou d'une «stigmatisation»: M. Blencoe et les membres de sa famille ont été traqués par les médias dès que les allégations de harcèlement de Mme Yanor eurent été rendues publiques; craignant les indiscrétions de la presse, l'intimé et son épouse n'ont plus parlé qu'à leurs proches; les enfants de M. Blencoe ont fait l'objet d'insultes et de railleries à l'école; M. Blencoe a été suivi par un médecin qui lui a prescrit des antidépresseurs dès avril 1995.

antidepressants by April of 1995. The respondent himself admits that from mid-March 1995 until August 1995, he was "extremely unwell". From April 11, 1995, to September 7, 1995, the respondent was on medical leave from the legislature. In the Fall of 1995, Mr. Blencoe considered whether to run in the upcoming election. Since he suspected that Premier Harcourt would refuse to sign his nomination papers, he decided not to seek the NDP nomination in his riding and resigned from the party on December 29, 1995**.** All of these events had occurred prior to any delays in the proceedings.

L'intimé lui-même reconnaît que, à partir de la mimars jusqu'au mois d'août 1995, il allait [TRADUCTION] «très mal». Du 11 avril au 7 septembre 1995, il s'est absenté de l'assemblée législative pour cause de maladie. À l'automne de 1995, M. Blencoe s'est demandé s'il solliciterait un nouveau mandat lors du prochain scrutin. Comme il s'attendait à ce que le premier ministre Harcourt refuse de signer sa mise en candidature, il a décidé de ne pas se porter candidat du NPD dans sa circonscription et a démissionné du parti le 29 décembre 1995. Tous ces événements ont précédé quelque délai que ce soit dans les procédures.

There is no question that the respondent's life and that of his family have been terribly affected by the allegations of sexual harassment against him. His political career appears to be finished and, as professed by Lowry J., "[t]he impact on his family of what has seemed at times an unrelenting media coverage has been traumatic" (para. 12). The respondent attributes this prejudice to the delay in the human rights proceedings. McEachern C.J.B.C. agreed, stating (at para. 53) that:

64 Il ne fait aucun doute que les allégations de harcèlement sexuel ont terriblement nui à la vie personnelle de l'intimé et à celle des membres de sa famille. Sa carrière politique semble terminée et, comme l'a affirmé le juge Lowry, [TRADUCTION] «ce qui s'apparentait par moments à un acharnement médiatique a été traumatisant pour les membres de sa famille» (par. 12). L'intimé attribue ce préjudice au délai écoulé dans le déroulement des procédures en matière de droits de la personne. Le juge en chef McEachern lui a donné raison (au par. 53):

> There can be no doubt that [Blencoe] was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives. [Emphasis added.]

> [TRADUCTION] On ne saurait douter que [Blencoe] a profondément souffert de la publicité qui a entouré son exclusion du Cabinet. Tels sont les aléas de la vie publique. Or, n'eût été des procédures, on aurait pu raisonnablement s'attendre à ce que l'attention considérable s'estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale. [Je souligne.]

With respect, I cannot agree with McEachern C.J.B.C.'s speculation that the respondent would have been able to reconstruct his life but for the proceedings (or I should say, delay in the proceedings). A higher level of certainty is required than "might reasonably be expected" in order to find that government has caused a deprivation of an individual's *Charter* rights.

En toute déférence, je ne puis souscrire à la supposition du juge en chef McEachern que l'intimé aurait pu retrouver une vie normale n'eût été des procédures (ou, devrais-je dire, du délai écoulé dans les procédures). Pour conclure que le gouvernement a porté atteinte aux droits d'une personne garantis par la *Charte*, il faut plus de certitude que ce à quoi [TRADUCTION] «on aurait pu raisonnablement s'attendre».

Based on the above facts, the Willis and Schell allegations were clearly not the first events in the sexual harassment claims against the respondent. Lambert J.A. asserted that "[t]he human rights pro-

65 D'après les faits susmentionnés, les allégations de M^mes^ Willis et Schell ne constituaient manifestement pas les premiers maillons de la chaîne des événements relatifs aux plaintes de harcèlement

cess started with the complaints in *April, 1995*" (para. 5 (emphasis in original)). Based on the record, however, it is clear that the Willis and Schell Complaints were only filed with the Commission in July and August of that year. The respondent himself asserts that the complaints to the Premier's office are what resulted in his removal from Cabinet and caucus. He makes this assertion to support his contention that the date from which the delay should be computed should pre-date the official Complaints to the Commission. This argument rather undermines the respondent's assertion that the state caused his prejudice. The central event leading to the intense media scrutiny was the dismissal of the respondent from Cabinet and caucus in April 1995, following the allegations of Fran Yanor. At that time, there had been no complaints to the Commission. The Yanor allegations are thus more closely tied to the dismissal from Cabinet, and consequently the stigma. I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

sexuel contre l'intimé. Le juge Lambert a dit que [TRADUCTION] «[l]e processus en matière de droits de la personne a été enclenché par le dépôt des plaintes en *avril 1995*» (par. 5 (en italique dans l'original)). Toutefois, selon le dossier, il est clair que la Commission n'a été saisie des plaintes de M^mes^ Willis et Schell qu'en juillet et en août de la même année. L'intimé lui-même affirme que ce sont les plaintes reçues au bureau du premier ministre qui ont entraîné son exclusion du Cabinet et du caucus. Cette affirmation vise à étayer sa prétention que la date à partir de laquelle le délai devrait être calculé est antérieure au dépôt officiel des plaintes à la Commission. Cet argument mine plutôt sa prétention que l'État est à l'origine du préjudice qu'il a subi. L'événement central à l'origine de la grande couverture médiatique a été l'exclusion de l'intimé du Cabinet et du caucus en avril 1995, à la suite des allégations de Fran Yanor. À l'époque, la Commission n'avait encore été saisie d'aucune plainte. Les allégations de M^me^ Yanor sont donc plus étroitement liées à l'exclusion du Cabinet et, par conséquent, à la stigmatisation. Je conclus donc que l'effet le plus préjudiciable sur M. Blencoe résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes, les employeurs et une association de soccer. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi, et non pas à un délai dans les procédures en matière de droit de la personne qui n'avait pas encore commencé à s'écouler lorsque l'intimé a commencé à être victime d'une stigmatisation.

66 Lambert J.A. rejected the connection between the delay and the prejudice. Although recognizing that the respondent and his family had suffered dreadfully, Lambert J.A. found that "[n]one of that stigma was brought about by the processes under the *Human Rights Act* or the *Human Rights Code*. Nor, in my opinion, was it much exacerbated by those processes" (para. 29). Lambert J.A. was also of the opinion that the stigma would not come to

Le juge Lambert a écarté tout lien entre le délai écoulé et le préjudice subi. Tout en reconnaissant que l'intimé et les membres de sa famille avaient souffert terriblement, il a conclu que [TRADUCTION] «[c]ette stigmatisation n'était aucunement imputable aux procédures fondées sur la *Human Rights Act* ou le *Human Rights Code*. À mon sens, ces procédures ne l'ont pas beaucoup aggravée non plus» (par. 29). Le juge Lambert était aussi d'avis

an end after the Tribunal had made its decision, "no matter the content of that decision" (para. 29).

I am in agreement with Lowry J. and Lambert J.A. on this issue. My understanding is that there remains a civil suit pending against Mr. Blencoe for sexual harassment and that Ms. Willis's Complaint against the Government on these very same issues has not been stayed. The prolongation of stigma from this ongoing publicity was therefore likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name.

While I conclude that the delay in the human rights process was not the direct cause of the respondent's prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and exacerbated an existing prejudice, which, according to the majority of the Court of Appeal, is tantamount to the creation of the prejudice itself. McEachern C.J.B.C. relied on the decision of this Court in *Rodriguez*, *supra*, to find that the Commission's exacerbation of the deprivation of security of the person that Mr. Blencoe suffered at the hands of the media, triggered s. 7 (at para. 56). The respondent similarly argues that the delay exacerbated the stigmatization, claiming that additional media stories surfaced each time there was a new development in the processing of the Complaints. He relies on this Court's decision in *Morgentaler*, *supra*, to support the position that it is sufficient if the delay is "a contributing cause" of the prejudice.

First, with respect to this "contributing cause" argument, I find it very difficult to equate the situations in *Rodriguez* and *Morgentaler* with that in the case at bar. In *Rodriguez*, the Crown had erroneously characterized Mrs. Rodriguez's deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument, Sopinka J. held that the *Criminal Code* prohibition at s. 241(*b*) would conque la stigmatisation ne prendrait pas fin dès que le Tribunal aurait rendu sa décision [TRADUCTION] «quelle qu'elle soit» (par. 29).

67 Je partage l'avis des juges Lowry et Lambert à cet égard. Si je comprends bien, M. Blencoe fait toujours l'objet de poursuites civiles pour harcèlement sexuel, et la plainte que M^me^ Willis a déposée contre le gouvernement pour les mêmes motifs n'a pas été suspendue. Il était donc probable que la stigmatisation résultant de cette publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement.

68 Même si je conclus que le délai écoulé dans le déroulement du processus en matière de droits de la personne n'a pas été la cause directe du préjudice subi par l'intimé, une autre question qui se pose est de savoir s'il a aggravé ce préjudice. Selon le juge en chef McEachern, le délai excessif dans les procédures en matière de droits de la personne a à la fois stigmatisé M. Blencoe et aggravé un préjudice existant, ce qui, selon la Cour d'appel à la majorité, équivaut au fait même de causer le préjudice. Le juge en chef McEachern s'est fondé sur l'arrêt *Rodriguez*, précité, de notre Cour pour conclure que l'aggravation, par la Commission, de l'atteinte que les médias portaient à la sécurité de la personne de M. Blencoe déclenchait l'application de l'art. 7 (au par. 56). De même, l'intimé fait valoir que le délai a aggravé la stigmatisation du fait que l'affaire refaisait surface dans les médias chaque fois qu'il y avait du nouveau dans le traitement des plaintes. Il s'appuie sur l'arrêt *Morgentaler*, précité, de notre Cour pour affirmer qu'il suffit que le délai écoulé soit un «facteur qui a contribué» au préjudice.

69 Premièrement, en ce qui concerne l'argument du «facteur qui a contribué», il me semble très difficile d'assimiler les situations dans les affaires *Rodriguez* et *Morgentaler* à celle qui existe en l'espèce. Dans l'affaire *Rodriguez*, le ministère public avait imputé à tort l'atteinte à la sécurité de la personne de M^me^ Rodriguez non pas au gouvernement, mais à ses déficiences physiques. En rejetant cet argument, le juge Sopinka a conclu que l'inter-

tribute to Mrs. Rodriguez's distress if she was prevented from managing her death (at p. 584). A *Criminal Code* prohibition therefore directly deprived Mrs. Rodriguez of the ability to terminate her life. The Court in *Rodriguez* surely did not eliminate the need to establish a relationship between the harm complained of and the state action. In *Rodriguez*, all of the members of the Court agreed that government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights. The same cannot be said of the facts in the case at bar.

diction prévue à l'al. 241*b*) du *Code criminel* contribuerait à la souffrance de M^me^ Rodriguez si on l'empêchait de gérer sa mort (à la p. 584). Une interdiction du *Code criminel* empêchait donc directement M^me^ Rodriguez de mettre fin à ses jours. Dans l'affaire *Rodriguez*, notre Cour n'a sûrement pas éliminé la nécessité d'établir l'existence d'un lien entre le préjudice reproché et l'acte de l'État. Tous les juges de notre Cour ont reconnu que des actes de l'État portaient atteinte au droit de M^me^ Rodriguez de mettre fin à ses jours au moment qu'elle jugerait opportun. N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à M^me^ Rodriguez par l'art. 7. On ne peut en dire autant des circonstances de la présente affaire.

70 In the same vein, the *Morgentaler* case dealt with direct state interference with a woman's bodily integrity in that the delays in obtaining therapeutic abortions were caused by the mandatory procedures in s. 251 of the *Criminal Code* and resulted in a higher probability of complications and greater health risks to women. In that case, it could not have been argued that the cause of the deprivation is a woman's pregnancy rather than the *Criminal Code* prohibition. The decisions in *Morgentaler* and *Rodriguez* do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the *Charter*.

Dans le même ordre d'idées, l'affaire *Morgentaler* portait sur l'atteinte directe de l'État à l'intégrité corporelle des femmes, étant donné que le délai requis pour obtenir un avortement thérapeutique résultait de la procédure prescrite par l'art. 251 du *Code criminel* et augmentait le risque de complications et le danger pour la santé des femmes. Dans cette affaire, on n'aurait pas pu faire valoir que l'atteinte était imputable à la grossesse plutôt qu'à l'interdiction du *Code criminel*. Les arrêts *Morgentaler* et *Rodriguez* ne permettent pas, à mon avis, d'échapper à l'obligation d'établir l'existence d'un lien important entre le préjudice et l'acte reproché à l'État pour pouvoir invoquer la *Charte*.

71 Moreover, even accepting this exacerbation argument, it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays. In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating. As previously mentioned, the continuation of the concurrent complaint and civil action must also be considered. As professed by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4

En outre, même si l'argument de l'aggravation est retenu, il est difficile de voir comment le délai a aggravé sérieusement le préjudice subi par l'intimé. Même en l'absence de tout délai dans les procédures, l'intimé aurait fait face à des allégations non prouvées de harcèlement et de discrimination sexuels et aurait été stigmatisé en conséquence. Il est donc clair qu'il y a eu atteinte à la réputation de l'intimé avant le dépôt des plaintes devant la Commission. Le délai dans les procédures n'a pu contribuer qu'à prolonger la période pendant laquelle des rumeurs ont circulé. Comme je l'ai déjà mentionné, il faut également prendre en considération le fait que la plainte et les poursuites au civil concomitantes avaient toujours cours.

S.C.R. 411, at para. 119, with respect to privacy, "once invaded, it can seldom be regained". Much the same is true of reputation; it is quickly ruined and difficult to re-establish. It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done. The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly.

Comme le juge L'Heureux-Dubé l'a affirmé, au sujet de la vie privée, dans *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 119, «dès qu'on y a porté atteinte, on peut rarement la regagner dans son intégralité». Il en va généralement de même de la réputation; elle peut être ternie rapidement, mais elle est difficile à rétablir. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé. Il se peut que le véritable préjudice qui a été causé à l'intimé en l'espèce ait seulement été la perte de la possibilité de se disculper rapidement.

At trial, Lowry J. made the following finding concerning the cause of Mr. Blencoe's suffering (at para. 13):

> The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.

72 En première instance, le juge Lowry a conclu ce qui suit au sujet de la cause des souffrances de M. Blencoe (au par. 13):

> [TRADUCTION] La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté.

Perhaps this statement supports the view that the outstanding Complaints did contribute to the stigma to some degree and that it was therefore a cause of the respondent's suffering. Because I find in the next section that the state has not directly intruded into a private and intimate sphere of the respondent's life, I assume without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe. I now turn to the question of whether this interference amounts to a violation of the respondent's security of the person.

73 Cet énoncé confirme peut-être que les plaintes dont M. Blencoe faisait l'objet ont jusqu'à un certain point contribué à la stigmatisation et qu'elles ont donc été l'une des causes de ses souffrances. Étant donné que je conclus ci-après que l'État ne s'est pas directement immiscé dans la vie privée et intime de l'intimé, je présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par M. Blencoe. Je vais maintenant passer à la question de savoir si cette immixtion constitue une atteinte à la sécurité de la personne de l'intimé.

(ii) *Quality of the Interference*

(ii) *Qualité de l'immixtion*

74 McEachern C.J.B.C. concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administra-

Le juge en chef McEachern a conclu que le droit à la liberté et à la sécurité de la personne garanti par l'art. 7 protège à la fois la vie privée et la dignité de l'individu contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont M. Blencoe a été victime (au par. 101). Il a donc considéré que l'art. 7 confère un droit général à la dignité et à la protection contre l'opprobre prolongé et injustifié qui résulte de

tive proceeding. The question which arises is whether the rights of "liberty and security of the person" protected by s. 7 of the *Charter* include a generalized right to dignity, or more specifically, a right to be free from stigma associated with a human rights complaint? In my opinion, they do not.

75 The "right to dignity" accepted by McEachern C.J.B.C. essentially rests on several ideas. First, it is based on previous statements by this Court as to the importance and value of dignity. Second, it is based on the recognition in cases such as *Morgentaler* and *O'Connor* that state-induced psychological stress can infringe s. 7. Third, McEachern C.J.B.C. imports the notion of "stigma" as developed under s. 11(*b*) of the *Charter* in the criminal law context. Each of these bases for a generalized right to dignity under s. 7 will be addressed in turn.

1. Dignity

76 The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter* (*Morgentaler*, *supra*, at pp. 164-66, *per* Wilson J.). As professed by Dickson C.J. in his discussion of s. 1 of the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

procédures administratives. La question qui se pose est de savoir si les droits «à la liberté et à [l]a sécurité de la personne» garantis par l'art. 7 de la *Charte* comportent un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne? Selon moi, ils ne comportent pas un tel droit.

Le «droit à la dignité» reconnu par le juge en chef McEachern repose essentiellement sur diverses idées. Premièrement, il s'appuie sur les propos que notre Cour a déjà tenus au sujet de l'importance et de la valeur de la dignité. Deuxièmement, il est fondé sur la reconnaissance, dans des affaires comme *Morgentaler* et *O'Connor*, que la tension psychologique causée par l'État peut violer l'art. 7. Troisièmement, le juge en chef McEachern transpose dans le contexte du droit criminel la notion de «stigmatisation» conçue sous le régime de l'al. 11*b*) de la *Charte*. Ces trois fondements d'un droit général à la dignité sous le régime de l'art. 7 seront examinés successivement.

1. Dignité

La *Charte* et les droits qu'elle garantit sont inextricablement liés à la notion de dignité humaine. En fait, cette notion sous-tend presque tous les droits garantis par la *Charte* (*Morgentaler*, précité, aux pp. 164 à 166, le juge Wilson). Comme le juge en chef Dickson l'a dit en analysant l'article premier de la *Charte* dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136:

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer. [Je souligne.]

In *Rodriguez*, *supra*, Sopinka J. states that it is unquestioned that respect for human dignity is an underlying principle upon which our society is based (at p. 592). In *O'Connor*, *supra*, at para. 63, L'Heureux-Dubé J. states that, "[t]his Court has repeatedly recognized that human dignity is at the heart of the *Charter*". More recently, this Court has stated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51, that the purpose of s. 15(1) of the *Charter*, "is to prevent the violation of essential human dignity and freedom". Respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*. This does not mean, however, that dignity is elevated to a free-standing constitutional right protected by s. 7 of the *Charter*. Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. In cases such as *Morgentaler*, *Rodriguez* and *B. (R.)*, dignity was linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake.

77 Dans l'arrêt *Rodriguez*, précité, le juge Sopinka affirme qu'on ne conteste pas que le respect de la dignité humaine est un principe fondamental de notre société (à la p. 592). Dans l'arrêt *O'Connor*, précité, au par. 63, le juge L'Heureux-Dubé précise que «[n]otre Cour a reconnu à plusieurs reprises que la dignité humaine est au cœur de la *Charte*». Plus récemment, dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, au par. 51, notre Cour a statué que le par. 15(1) de la *Charte* a pour objet «d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles». Le respect de la dignité inhérente des gens est nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*. Cela ne signifie pas, cependant, que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7 de la *Charte*. La dignité n'a jamais été reconnue comme un droit indépendant par notre Cour, mais a plutôt été perçue comme s'exprimant dans des droits comme celui à l'égalité, à la vie privée ou à la protection contre la contrainte de l'État. Dans des affaires comme *Morgentaler*, *Rodriguez* et *B. (R.)*, la dignité était liée à l'autonomie de la personne relativement à la maîtrise de son corps ou à l'ingérence dans des choix personnels fondamentaux. En fait, la dignité est souvent en cause lorsque la capacité de faire des choix fondamentaux est compromise.

In my view, the notion of "dignity" in the decisions of this Court is better understood not as an autonomous *Charter* right, but rather, as an underlying value. In *Beare*, *supra*, at p. 401, La Forest J. cautions that s. 7 must not be interpreted too broadly, stating that:

78 À mon sens, il vaut mieux considérer la notion de «dignité» que l'on trouve dans la jurisprudence de notre Cour comme une valeur sous-jacente que comme un droit autonome garanti par la *Charte*. Dans l'arrêt *Beare*, précité, à la p. 401, le juge La Forest prévient que l'art. 7 ne doit pas être interprété de façon trop large:

> Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question. . . .

> Comme d'autres dispositions de la *Charte*, l'art. 7 doit être interprété en fonction des intérêts qu'il est censé protéger. Il doit recevoir une interprétation généreuse, mais il est important de ne pas outrepasser le but réel du droit en question . . .

While this statement may have been *obiter* since the case was decided on the principles of fundamental justice, this caution with respect to the interpretation of "life, liberty and security of the person" is relevant nevertheless. La Forest J. chose

Bien qu'elle ait pu être faite de manière incidente étant donné que l'affaire était tranchée en fonction des principes de justice fondamentale, cette mise en garde concernant l'interprétation du droit «à la vie, à la liberté et à la sécurité de [l]a personne» est

not to base his finding of a s. 7 deprivation on any principle of "dignity or self-respect", as did Bayda C.J.S. of the Court of Appeal in that case. La Forest J. chose instead to find a deprivation of liberty and security of the person for the reasons of Cameron J.A. in the court below, based on the statutory requirement that a person surrender himself into the custody of the authorities and submit to bodily intrusions on pain of arrest and prosecution. La Forest J. conveys this, at p. 402:

> The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the "dignity and self-respect" of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. This approach appears to be broad and indefinite and to introduce an undesirable notion of differentiation among those subjected to the procedure. For my part, I prefer the more specific finding of Cameron J.A. that the impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. [Emphasis added.]

néanmoins pertinente. Dans cette affaire, le juge La Forest n'a pas choisi, comme l'avait fait le juge en chef Bayda de la Cour d'appel, de fonder sa conclusion à une violation de l'art. 7 sur un principe quelconque de «dignité ou de respect de soi». Il a plutôt conclu à l'existence d'une atteinte à la liberté et à la sécurité de la personne pour les motifs exprimés par le juge Cameron de la Cour d'appel, compte tenu de l'exigence légale qu'une personne se rende aux autorités, se soumette à la détention et subisse des atteintes physiques sous peine d'emprisonnement et de poursuites. Le juge La Forest dit ceci, à la p. 402:

> La Cour d'appel, nous l'avons vu, a jugé que les dispositions attaquées portaient atteinte au droit garanti par la première partie de l'art. 7, la majorité estimant que la prise des empreintes digitales est une atteinte «à la dignité et au respect de soi» dans le cas, à tout le moins, des personnes qui, à cause de leur propre perception ou de la perception de la collectivité se sentent humiliées par un tel traitement. En bref, la majorité pensait qu'être soumis à la prise d'empreintes digitales, c'était être traité comme un criminel. Cette vision des choses est large et indéfinie et introduit un élément regrettable de différenciation entre les diverses personnes qui sont soumises à la procédure. Pour ma part, je préfère la constatation plus précise du juge Cameron, que les dispositions attaquées enfreignent les droits garantis par l'art. 7 parce qu'elles obligent une personne à comparaître à une date et dans un lieu précis, et à subir une procédure d'identification sous peine d'emprisonnement en cas de refus d'obtempérer. [Je souligne.]

79 According to the respondent, the human dignity of a person is closely tied to a person's reputation and privacy interests. Indeed, much of the harm which has been suffered by Mr. Blencoe in this case has been the damage which has been done to his reputation. Essentially, the respondent argues that his reputation has been ruined through the stigma he has suffered as a result of the publicity relating to the human rights proceedings against him. While this Court found in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, that reputation was a concept underlying *Charter* rights, it too is not an independent *Charter* right in and of itself (at para. 120):

Selon l'intimé, la dignité d'une personne est étroitement liée à sa réputation et à son droit à la vie privée. En réalité, l'atteinte à la réputation représente une bonne partie du préjudice subi par M. Blencoe en l'espèce. L'intimé fait essentiellement valoir que la stigmatisation résultant de la publicité qui a entouré les procédures en matière de droit de la personne engagées contre lui a contribué à ruiner sa réputation. Même si notre Cour a conclu, dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, que la réputation est un concept qui sous-tend les droits garantis par la *Charte*, elle n'est pas non plus elle-même un droit indépendant garanti par la *Charte* (au par. 120):

Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. [Emphasis added.]

Bien qu'elle ne soit pas expressément mentionnée dans la *Charte*, la bonne réputation de l'individu représente et reflète sa dignité inhérente, concept qui sous-tend tous les droits garantis par la *Charte*. La protection de la bonne réputation d'un individu est donc d'importance fondamentale dans notre société démocratique. [Je souligne.]

Respect for a person's reputation, like respect for dignity of the person, is a value that underlies the *Charter*. These two values do not support the respondent's proposition that protection of reputation or freedom from the stigma associated with human rights complaints are independent constitutional s. 7 rights. Moreover, the above passages from *Hill* regarding the protection of reputation were made in the context of a defamation case. Defamation laws are intended to protect reputation. Dignity and reputation are not self-standing rights. Neither is freedom from stigma. I would therefore agree with the following passage from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, at p. 1170, wherein Lamer J. cautioned: 80

Le respect de la réputation d'une personne, tout comme le respect de sa dignité, est une valeur qui sous-tend la *Charte*. Ces deux valeurs n'étayent pas l'argument de l'intimé que la protection de la réputation ou la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne constitue un droit constitutionnel indépendant garanti par l'art. 7. En outre, les extraits précités de l'arrêt *Hill* concernant la protection de la réputation ont pour contexte une poursuite en diffamation. Les règles en matière de diffamation visent à protéger la réputation. La dignité et la réputation ne sont pas des droits distincts. La protection contre la stigmatisation ne l'est pas non plus. Je souscrirais donc à l'extrait suivant du *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel*, précité, à la p. 1170, où le juge Lamer a fait la mise en garde suivante:

If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

Si la liberté ou la sécurité de la personne en vertu de l'art. 7 de la *Charte* étaient définies en fonction d'attributs comme la dignité, la valorisation et le bien-être sur le plan émotionnel, il semble que la liberté en vertu de l'art. 7 aurait une portée illimitée. Si tel était le cas, on pourrait sérieusement mettre en doute l'existence indépendante, dans la *Charte*, d'autres droits et libertés comme la liberté de conscience et de religion ou la liberté d'expression.

2. State Interference with Psychological Integrity

2. Atteinte de l'État à l'intégrité psychologique

In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity (*G. (J.)*, *supra*, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in *G. (J.)*, at para. 59: 81

Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé (*G. (J.)*, précité, au par. 60). L'État doit avoir porté atteinte à un droit individuel d'importance fondamentale (au par. 61). Dans l'arrêt *G. (J.)*, précité, au par. 59, le juge en chef Lamer a dit ce qui suit:

It is clear that the right to security of the person does not protect the individual from the ordinary stresses and

Il est manifeste que le droit à la sécurité de la personne ne protège pas l'individu contre les tensions et les

anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

He went on to state (at paras. 63-64):

> Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.
>
> While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged. [Emphasis added.]

82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.

83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these funda-

angoisses ordinaires qu'une personne ayant une sensibilité raisonnable éprouverait par suite d'un acte gouvernemental. Si le droit était interprété de manière aussi large, d'innombrables initiatives gouvernementales pourraient être contestées au motif qu'elles violent le droit à la sécurité de la personne, ce qui élargirait considérablement l'étendue du contrôle judiciaire, et partant, banaliserait la protection constitutionnelle des droits.

Il a ajouté ceci (aux par. 63 et 64):

> Les actes par lesquels l'État s'ingère dans le lien parent-enfant ne restreignent pas tous le droit d'un parent à la sécurité de sa personne. Par exemple, ce droit n'est pas restreint du seul fait que l'enfant est condamné à la prison ou enrôlé dans l'armée par conscription. Pas plus qu'il ne l'est lorsque l'enfant est abattu par négligence par un agent de police: *Augustus c. Gosset*, [1996] 3 R.C.S. 268.
>
> Bien que l'ingérence de l'État puisse constituer une source de tension et d'angoisse importantes pour le parent, la nature du «préjudice» causé au parent par ces actes peut être distinguée de celle qui est visée dans la présente affaire. Dans les exemples susmentionnés, l'État ne se prononce pas sur l'aptitude du père ou de la mère ni sur sa qualité de parent, il n'usurpe pas non plus sur le rôle parental ni ne cherche à s'ingérer dans l'intimité du lien parent-enfant. En résumé, l'État ne porte pas directement atteinte à l'intégrité psychologique du parent en tant que parent. La répercussion différente sur l'intégrité psychologique des parents dans les exemples susmentionnés m'amène à conclure que les droits constitutionnels des parents n'entrent pas en jeu. [Je souligne.]

Le préjudice doit donc être évalué sur le plan qualitatif. À mon avis, la présente affaire, en raison des droits qui sont en cause, diffère sensiblement de toutes les affaires non pénales que l'on a considérées comme n'étant pas visées par la notion de «sécurité de la personne», à l'issue d'une interprétation large de cette notion. L'atteinte à la sécurité de la personne dans le présent contexte n'englobe que l'atteinte grave à l'intégrité psychologique résultant de l'atteinte de l'État à un droit individuel d'importance fondamentale.

Ce n'est que dans des cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'ap-

mental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

In *O'Connor*, *supra*, this Court dealt with the disclosure of therapeutic records of a complainant in a sexual assault case. L'Heureux-Dubé J. described the psychological trauma that could be faced by sexual assault victims if forced to disclose their therapeutic records, at para. 112:

These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

Such a situation amounts to direct state interference with a complainant's psychological integrity. Moreover, *O'Connor* was reached primarily on the basis of privacy concerns and animated by principles protected by s. 8 of the *Charter*. In *O'Connor*, at para. 110, L'Heureux-Dubé J. listed the cases in which the Court "expressed sympathy" for the idea that s. 7 includes a right to privacy. But she concluded that people have only a "reasonable expectation of privacy" (emphasis deleted) because privacy "must be balanced against legitimate societal needs" (para. 117). However, unlike sexual assault victims who may be said to have a reasonable expectation of privacy in their therapeutic records, the Commission in this case has not invaded any of the respondent's privacy interests. If there was any invasion of the respondent's privacy, it cannot be said to have resulted from state action. Moreover, when one assumes a very prominent public office as the respondent has, it is arguable that a certain amount of public scrutiny is to be expected. The respondent injected himself into the public realm and the public scrutiny that it entailed. An individ-

plication du droit à la sécurité de la personne garanti par l'art. 7. Même si ces choix personnels fondamentaux comprenaient le droit de prendre des décisions concernant son propre corps sans intervention de l'État ou sans risque de perdre la garde d'un enfant, ils pourraient difficilement inclure le genre de stress, d'angoisse et de stigmatisation qui résulte de procédures administratives ou civiles.

84 Dans l'arrêt *O'Connor*, précité, notre Cour était appelée à se prononcer sur la communication du dossier thérapeutique d'une plaignante dans une affaire d'agression sexuelle. Le juge L'Heureux-Dubé a décrit le traumatisme psychique auquel pouvaient faire face les victimes d'agression sexuelle tenues de communiquer leurs dossiers thérapeutiques (au par. 112):

Elles doivent envisager la menace de divulguer à la personne accusée de les avoir agressées en premier lieu, et très probablement en pleine cour, des dossiers contenant des aspects totalement privés de leur vie, contenant probablement des pensées et des déclarations qui n'ont jamais été partagées avec leurs amis les plus intimes ou leur famille.

Il s'agit là d'une atteinte directe de l'État à l'intégrité psychologique d'une plaignante. De plus, l'arrêt *O'Connor* était fondé principalement sur des préoccupations en matière de vie privée et s'inspirait de principes protégés par l'art. 8 de la *Charte*. Dans cet arrêt, au par. 110, le juge L'Heureux-Dubé a énuméré les affaires dans lesquelles notre Cour «a favorisé» l'idée que l'art. 7 garantit notamment un droit à la vie privée. Elle a cependant conclu que les gens n'ont qu'une «attente raisonnable en matière de protection de la vie privée» (soulignement omis), car la protection de la vie privée «doit être pondérée en tenant compte des besoins légitimes de la société» (par. 117). Toutefois, à la différence des victimes d'agression sexuelle dont on peut dire qu'elles ont, à l'égard de leurs dossiers thérapeutiques, une attente raisonnable en matière de protection de leur vie privée, la Commission en l'espèce n'a pas porté atteinte au droit à la vie privée de l'intimé. S'il y a eu atteinte au droit à la vie privée de l'intimé, on ne saurait dire qu'elle résulte d'un acte de l'État. En outre, on peut soutenir que la personne

ual can have no more than a reasonable expectation of privacy.

qui occupe une charge publique aussi importante que celle de l'intimé peut s'attendre à être exposée, dans une certaine mesure, à l'attention du public. L'intimé s'est lancé lui-même dans le domaine des affaires publiques et s'est exposé lui-même à l'attention qui s'y rattache. Nul ne peut avoir davantage qu'une attente raisonnable en matière de protection de la vie privée.

85 Where the therapeutic relationship between a sexual assault complainant and his or her physician is threatened by the disclosure of private records, this Court has recently held that security of the person is implicated (*R. v. Mills*, [1999] 3 S.C.R. 668 (hereinafter "*Mills* (1999)"), at para. 85). However, this is because the therapeutic relationship between doctor and patient is crucial to the patient's psychological integrity. This relationship must be protected to safeguard the mental integrity of patients and to thereby aid victims in recovering from their trauma. To disclose confidential records would undermine this relationship and jeopardize the victim's psychological integrity.

Notre Cour a récemment statué que la sécurité de la personne est en cause lorsque la relation thérapeutique entre l'auteur d'une plainte d'agression sexuelle et son médecin est compromise par la communication de dossiers privés (*R. c. Mills*, [1999] 3 R.C.S. 668 (ci-après l'«arrêt *Mills* de 1999»), au par. 85). Il en est cependant ainsi parce que la relation thérapeutique entre le médecin et le patient est essentielle à l'intégrité psychologique de ce dernier. Cette relation doit être protégée afin de préserver l'intégrité mentale des patients et d'aider ainsi les victimes à se remettre de leur traumatisme. La communication de dossiers confidentiels minerait la relation et compromettrait l'intégrité psychologique de la victime.

86 Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J., at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security

Peu d'intérêts sont aussi impérieux et essentiels à l'autonomie individuelle que le choix d'une femme d'interrompre sa grossesse, la décision d'une personne de mettre fin à ses jours, le droit d'élever ses enfants et la capacité des victimes d'agression sexuelle de recourir à une thérapie sans craindre que leurs dossiers privés soient communiqués. Ces intérêts sont vraiment essentiels à la dignité individuelle. Toutefois, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Comme l'a reconnu le juge Lowry au par. 10, le préjudice subi par l'intimé en l'espèce se limite essentiellement à ses difficultés personnelles. Il est «inapte au travail» de politicien, sa famille et lui ont changé de lieu de résidence deux fois, il a épuisé ses ressources financières et il a souffert tant physiquement que psychologiquement. Cependant, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des

of the person would be to stretch the meaning of this right.

3. Importing the Notion of "Stigma" from the Criminal Law Context

In *Mills* (1986), *supra*, at pp. 919-20, Lamer J., in dissent, found that the combination of loss of privacy, stigma, and disruption of family life engaged an individual's security of the person in the context of s. 11(*b*) of the *Charter*, stating that:

> . . . security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

However, it must be emphasized that this statement was made in the context of s. 11(*b*) of the *Charter* which provides that a person charged with an offence has the right "to be tried within a reasonable time". The qualifier to this right is that it applies to individuals who have been "charged with an offence". The s. 11(*b*) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(*b*) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(*b*) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time.

Lamer C.J. later reiterated this statement from *Mills* (1986) in *G. (J.)*, at para. 62. In so doing, however, this Court did not make freedom from stigma a free-standing right. Nor did it establish

choix essentiels dans leur vie. Accepter que le préjudice subi par l'intimé en l'espèce équivaut à une atteinte de l'État au droit qu'il a à la sécurité de sa personne serait forcer le sens de ce droit.

3. Transposition de la notion de «stigmatisation» dans le contexte du droit criminel

87 Dans l'arrêt *Mills* de 1986, précité, aux pp. 919 et 920, le juge Lamer, dissident, a conclu que, prises ensemble, l'atteinte à la vie privée, la stigmatisation et les perturbations de la vie familiale mettaient en cause la sécurité de la personne dans le contexte de l'al. 11*b*) de la *Charte*:

> . . . la notion de sécurité de la personne ne se limite pas à l'intégrité physique; elle englobe aussi celle de protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d'une accusation criminelle pendante». [. . .] Celles-ci comprennent la stigmatisation de l'accusé, l'atteinte à la vie privée, la tension et l'angoisse résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et face à la peine.

88 Il faut cependant souligner que ces propos ont été tenus dans le contexte de l'al. 11*b*) de la *Charte*, qui prévoit que tout inculpé a le droit «d'être jugé dans un délai raisonnable». Pour que ce droit s'applique, il faut que la personne en question soit «inculpée». Le droit garanti par l'al. 11*b*) ne s'applique donc pas dans le cas de procédures civiles ou administratives. Notre Cour a souvent fait des mises en garde contre l'application directe en droit administratif des normes de la justice criminelle. Nous devrions éviter de confondre des notions qui, suivant notre *Charte*, sont clairement distinctes. Le droit d'être jugé dans un délai raisonnable que l'al. 11*b*) garantit à tout inculpé ne peut être transposé dans l'art. 7. Aucune disposition analogue à l'al. 11*b*) ne s'applique aux procédures administratives, et le droit constitutionnel d'être «jugé» dans un délai raisonnable ne s'applique qu'en matière criminelle.

89 Par la suite, le juge en chef Lamer a réitéré, au par. 62 de l'arrêt *G. (J.)*, cet énoncé tiré de l'arrêt *Mills* de 1986. Ce faisant, notre Cour n'a toutefois pas fait de la protection contre la stigmatisation un

that respondents in sexual harassment proceedings suffer so greatly that s. 11(*b*) principles should apply to them. As will be demonstrated below, the nature of the harm caused by human rights delay is different.

90 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal clearly equated criminal sexual assault charges with human rights sex discrimination complaints. Bayda C.J.S. (dissenting on another issue) conveyed this as follows, at pp. 152-53:

> For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e., quasi*-criminal) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case) the "vexations and vicissitudes" will invariably "include stigmatization of the (alleged discriminator), loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the

droit distinct. Elle n'a pas non plus décidé que les personnes visées par des procédures en matière de harcèlement sexuel souffrent à tel point que les principes de l'al. 11*b*) devraient s'appliquer à elles. Comme nous le verrons plus loin, le préjudice causé par un délai dans des procédures en matière de droits de la personne diffère sur le plan de sa nature.

Dans l'arrêt *Kodellas*, précité, la Cour d'appel de la Saskatchewan a clairement assimilé les accusations criminelles d'agression sexuelle à des plaintes de discrimination sexuelle fondées sur les droits de la personne. Le juge en chef Bayda (dissident sur un autre point) s'est exprimé ainsi, aux pp. 152 et 153:

> [TRADUCTION] Pour déterminer l'incidence sur la «sécurité de la personne», je ne vois aucune distinction logique, sur le plan du fond, entre l'assujettissement aux vexations et aux vicissitudes d'une «accusation criminelle pendante» fondée sur le harcèlement sexuel et l'agression sexuelle, et l'assujettissement aux vexations et aux vicissitudes d'une accusation pendante de discrimination fondée sur le harcèlement sexuel et l'agression sexuelle, qui a été portée en matière pénale (c'est-à-dire quasi criminelle) en vertu du par. 35(2) du Code. Partant, il n'y a qu'un pas à faire pour conclure que, à des fins identiques, aucune distinction de fond ne peut être établie entre une accusation portée dans des procédures pénales fondées sur le Code et une accusation identique portée dans des procédures engagées en vertu des art. 27 à 33 du Code dans le but d'obtenir un redressement. Qu'elles soient occasionnées dans le contexte de procédures criminelles ou dans celui de procédures pénales, comme celles que prévoit le Code, ou encore dans celui de procédures visant l'obtention d'un redressement (qui, nous le verrons plus loin, est le contexte pertinent en l'espèce), les «vexations» et les «vicissitudes» comprennent immanquablement «la stigmatisation de (l'auteur allégué de la discrimination), l'atteinte à la vie privée, la tension et l'angoisse résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et à la peine». Il en est ainsi parce que le mal causé à l'auteur allégué de la discrimination découle de l'accusation, et non du genre de procédures dans lesquelles l'accusation est portée. Après tout, il est parfaitement égal à tous les acteurs pertinents — le public, les personnes qui sont à l'origine du mal causé, celles qui sont indirectement touchées par ce mal (comme les membres de la famille de l'auteur

accusation is made in one procedural forum or another. What matters is the *fact* of the accusation. . . .

In determining whether prejudice occurred in a given situation, it is important to note that it is in the very nature of this form of prejudice (*i.e.*, feelings of mental hurt or "stigmatization") that it arises automatically upon a formal accusation being made. Lamer J. in *Rahey*, while elucidating this form of prejudice (in the context of s. 11(*b*) of the Charter), recognized this when he said at p. [609]:

> With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well-being, a matter which can only be established with considerable difficulty at considerable cost. [Underlining added; italics in original.]

The majority of the Court of Appeal in the case at bar followed the above reasoning in *Kodellas*. The effect of the Appeal Court decision in *Blencoe* was to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Although the majority of the Court of Appeal disclaimed a direct s. 11(*b*) right, numerous references were made in its reasons, equating sexual harassment proceedings to criminal proceedings for sexual assault where s. 11(*b*) would apply. Indeed, the majority speaks of "this type of sexual assault" (para. 47), "stigma against the accused" (para. 56), "prosecution of these complaints" (para. 58), a "straightforward case of sexual assault" (para. 102), "[allegations] which are tantamount to . . . sexual assault" (para. 108), and "unproven charges of sexual harassment" (para. 57). The basis for the majority of the Court of Appeal's reasons in this case is the treatment of

allégué de la discrimination) et l'auteur allégué de la discrimination, qui est directement touché par le mal et qui en est directement victime — que l'accusation soit portée dans le cadre de l'une ou l'autre instance. Ce qui importe, c'est le *fait* de l'accusation. . .

Pour déterminer si un préjudice a été causé dans une situation donnée, il importe de souligner qu'il est dans la nature même de cette forme de préjudice (c'est-à-dire le sentiment de souffrance morale ou de «stigmatisation») qu'elle prenne naissance dès qu'une accusation officielle est portée. Dans *Rahey*, le juge Lamer l'a reconnu en expliquant cette forme de préjudice (dans le contexte de l'application de l'al. 11*b*) de la Charte), à la p. [609]:

> Au sujet de la sécurité de la personne, je ne crois pas que ce soit à l'inculpé qu'il incombe de prouver qu'il y a effectivement eu atteinte pour que l'article soit applicable. Une norme objective est le seul moyen réaliste de protéger, en vertu de cet article, l'intérêt du prévenu en matière de sécurité. Autrement, chaque prévenu aurait la charge de démontrer qu'il ou elle a subjectivement souffert d'angoisse, de tension ou de stigmates par suite d'une accusation criminelle. Nous avons largement affaire à un préjudice moral, ce qui ne peut être établi qu'au prix de difficultés et de frais considérables. [Je souligne; en italique dans l'original.]

91 Dans la présente affaire, la Cour d'appel à la majorité a suivi le raisonnement susmentionné de l'arrêt *Kodellas*. L'arrêt *Blencoe* de la Cour d'appel a eu pour effet de transposer dans le traitement d'une plainte en matière de droits de la personne l'exigence qu'une audience ait lieu dans un délai raisonnable. Bien qu'elle ait écarté l'application directe d'un droit garanti par l'al. 11*b*), la Cour d'appel à la majorité a assimilé, à maintes reprises dans ses motifs, les procédures relatives au harcèlement sexuel à des procédures criminelles en matière d'agression sexuelle où l'al. 11*b*) s'appliquerait. En fait, les juges majoritaires parlent de [TRADUCTION] «ce genre d'agression sexuelle» (par. 47), de «stigmatisation de l'accusé» (par. 56), de «poursuites relatives à ces plaintes» (par. 58), de «simple cas d'agression sexuelle» (par. 102), d'«[allégations] équivalant à [. . .] une accusation d'agression sexuelle» (par. 108) et d'«accusations non prouvées de harcèlement sexuel» (par. 57). En l'espèce, les motifs majoritaires de la Cour d'appel reposent sur l'assimilation des plaintes de harcèle-

sexual harassment human rights complaints as akin to a pending criminal sexual assault charge.

92 With respect, the Court of Appeal in *Kodellas* and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(*b*) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(*b*) of the *Charter* is restricted to a pending criminal case. The effect of the Court of Appeal's decision was to extract an element of s. 11(*b*) — the element of stigma, which may be sufficient in the context of criminal proceedings and s. 11(*b*), to create a deprivation of the security of the person — and apply it to a process that differs with respect to objectives, consequences and procedures. As this Court has recently confirmed in *Mills* (1999), *supra*, at paras. 61 and 64, *Charter* rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case.

93 In the criminal law context, the test to be applied under s. 11(*b*) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s. 7 of the *Charter*, where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s. 11(*b*) of the *Charter*. In this regard, Lamer J.'s comments in *Mills* (1986), *supra*, are premised on the fact that there has already been an "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (p. 919). This is a finding that would be made not at the threshold stage of the s. 7 analysis but is rather to be examined at the principles of fundamental justice

ment sexuel fondées sur les droits de la personne à une accusation criminelle pendante d'agression sexuelle.

En toute déférence, la Cour d'appel dans l'arrêt *Kodellas* et la Cour d'appel à la majorité en l'espèce ont eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11*b*) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, que les juges majoritaires n'ont pas reconnues, mais encore l'al. 11*b*) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes. L'arrêt de la Cour d'appel a eu pour effet d'extirper un élément de l'al. 11*b*) — celui de la stigmatisation qui peut suffire, dans le contexte de procédures criminelles et de l'al. 11*b*), pour qu'il y ait atteinte à la sécurité de la personne — et de l'appliquer à un processus différent sur le plan des objectifs, des conséquences et de la procédure. Comme notre Cour l'a récemment confirmé dans l'arrêt *Mills* de 1999, précité, aux par. 61 et 64, les droits garantis par la *Charte* doivent être interprétés et définis en fonction du contexte, car ils sous-tendent ou s'inspirent souvent d'autres droits ou valeurs aussi louables qui sont en jeu dans des circonstances particulières. La Cour d'appel n'a pas examiné les droits garantis par l'art. 7 dans le contexte de la présente affaire.

Dans le contexte du droit criminel, le critère applicable suivant l'al. 11*b*) est objectif et il est possible de déduire qu'un délai déraisonnable a causé un préjudice. Cela contraste fortement avec l'interprétation en deux étapes de l'art. 7 de la *Charte*, selon laquelle le seul fait qu'un délai s'écoule entre le dépôt de la plainte et son règlement ne cause pas automatiquement le genre de préjudice qui est présumé résulter du dépôt d'une accusation fondée sur l'al. 11*b*) de la *Charte*. À cet égard, dans les observations qu'il formule dans l'arrêt *Mills* de 1986, précité, le juge Lamer tient pour acquis qu'il y a déjà eu «assujettissement trop long aux vexations et au vicissitudes d'une accusation criminelle pendante» (p. 919). Il s'agit là d'une conclusion qui serait tirée non pas à l'étape

stage. The Court of Appeal in *Kodellas* and in the case at bar erred in conflating the two stages of the s. 7 analysis. Philip Bryden similarly concluded that the two stages of the s. 7 analysis were merged by the majority of the Court of Appeal in this case ("*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment" (1999), 33 *U.B.C. L. Rev.* 153, at p. 158):

> In my view, Chief Justice McEachern's formulation of when s. 7 applies tends to conflate the threshold question of whether liberty or personal security have been denied with the ultimate question of whether the process in place satisfies the requirements of fundamental justice. The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situations where we believe the special safeguards associated with constitutional protection are needed.

In discussing the nature and purpose of s. 11(*b*), Lamer J. emphasized in *Mills* (1986), *supra*, that the need for protecting the individual in such cases arises "from the nature of the criminal justice system and of our society" (p. 920). He described the criminal justice process as "adversarial and conflictual" and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission "prosecutes" the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada*

préliminaire de l'analyse de l'art. 7, mais plutôt à l'étape de l'examen des principes de justice fondamentale. Dans l'arrêt *Kodellas* et en l'espèce, la Cour d'appel a commis une erreur en confondant les deux étapes de l'analyse de l'art. 7. Philip Bryden a lui aussi conclu que la Cour d'appel à la majorité en l'espèce avait confondu les deux étapes de l'analyse de l'art. 7 («*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment» (1999), 33 *U.B.C. L. Rev.* 153, à la p. 158):

> [TRADUCTION] À mon avis, en précisant les cas où l'art. 7 s'applique, le juge en chef McEachern tend à confondre la question préliminaire de savoir s'il y a eu atteinte au droit à la liberté ou à la sécurité de la personne avec la question de savoir, en fin de compte, si la procédure établie satisfait aux exigences de la justice fondamentale. Si nous utilisons des critères préliminaires d'applicabilité de la protection constitutionnelle, c'est principalement pour nous concentrer sur les situations où, croyons-nous, les garanties spéciales liées à la protection constitutionnelle sont requises.

94

En analysant la nature et l'objet de l'al. 11*b*) dans l'arrêt *Mills* de 1986, précité, le juge Lamer a souligné que la nécessité de protéger l'individu en pareils cas «tient à la nature même du système de la justice criminelle et de notre société» (p. 920). Il a dit que la justice criminelle procède selon une procédure «contradictoire et conflictuelle» et que la nature même du processus en matière criminelle intensifie le stress et l'angoisse résultant d'une accusation criminelle. Contrairement à ce qui se passe en matière criminelle, le dépôt d'une plainte fondée sur les droits de la personne n'implique aucun soupçon de méfait de la part de l'État. L'enquête menée par la Commission vise uniquement à déterminer ce qui s'est passé et, en fin de compte, à régler l'affaire selon une procédure non contradictoire. L'objectif des procédures en matière de droits de la personne est non pas de punir, mais de mettre fin à la discrimination. Les ordonnances du Tribunal sont de nature compensatoire et non punitive. Lors de l'enquête liée au processus en matière de droits de la personne, la Commission ne «poursuit» pas la personne qui fait l'objet d'une plainte. Elle joue un rôle d'enquêteur et de médiateur jusqu'au moment où il y a lieu de recommander ou non de renvoyer la plainte au Tribunal pour qu'il

(Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, at p. 917:

> It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

95 In criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused — including potential loss of physical liberty, subjection to social stigma and ostracism from the community — which are the unavoidable consequences of an open and adversarial judicial system. However, this Court in *Taylor*, *supra*, at pp. 932-33, has commented directly on the diminished role of stigma in the human rights context:

> . . . the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime:
>
> > It is the (discriminatory) practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

tienne une audience. Ces procédures en matière de droits de la personne sont conçues pour faire valoir des droits privés et redresser des torts. Comme l'a dit le juge en chef Dickson dans *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892, à la p. 917:

> Il est essentiel toutefois de reconnaître qu'en tant qu'outil expressément conçu pour empêcher la propagation des préjugés et pour favoriser la tolérance et l'égalité au sein de la collectivité, la *Loi canadienne sur les droits de la personne* diffère nettement du *Code criminel*. La législation sur les droits de la personne, et en particulier le par. 13(1), n'a pas pour objet de faire exercer contre une personne fautive le plein pouvoir de l'État dans le but de lui infliger un châtiment. Au contraire, les dispositions des lois sur les droits de la personne tendent plutôt, en règle générale, à éviter ce genre d'affrontement en permettant autant que possible un règlement par voie de conciliation et, lorsqu'il y a discrimination, en prévoyant des redressements destinés davantage à indemniser la victime.

Dans des procédures criminelles, l'accusation peut à elle seule faire intervenir un droit à la sécurité en raison de ses graves conséquences sociales et personnelles sur l'accusé — dont le risque d'être privé de liberté, ainsi que la stigmatisation et l'exclusion sociales — qu'entraîne inévitablement un système judiciaire public et contradictoire. Toutefois, dans l'arrêt *Taylor*, précité, aux pp. 932 et 933, notre Cour a commenté directement le rôle moins important de la stigmatisation dans le contexte des droits de la personne:

> . . . le présent pourvoi concerne une atteinte à l'al. 2*b*) résultant d'une loi sur les droits de la personne. La paralysie de la libre expression dans un tel contexte sera normalement moins grave que s'il s'agissait d'une loi pénale, car toute déclaration de culpabilité, au pénal, s'accompagne de stigmates et de peines importants, alors que l'opprobre attaché à une conclusion de discrimination est beaucoup moins grand et qu'en outre les mesures réparatrices visent plutôt la compensation et la protection de la victime. Comme le dit l'arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, à la p. 1134, sous le régime d'une loi sur les droits de la personne:
>
> > C'est l'acte discriminatoire lui-même que l'on veut prévenir. La loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in *G. (J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

(f) Conclusion on Liberty and Security of the Person

To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The

Ce dernier point est important et mérite d'être souligné. Rien n'indique que l'objet de la *Loi canadienne sur les droits de la personne* soit d'attribuer une responsabilité morale ou de la punir.

96 Je ne doute pas que les parties à des procédures relatives à des plaintes de discrimination sexuelle fondées sur les droits de la personne éprouvent un certain stress et voient leur existence perturbée en raison des allégations des plaignants. Même en acceptant que le stress et l'angoisse ressentis par l'intimé en l'espèce étaient liés au délai dans les procédures, je suis incapable de conclure que la sécurité de sa personne garantie par l'art. 7 de la *Charte* englobe une telle incidence sur le plan émotif ou que cette incidence est assimilable au genre de stigmatisation prévu dans l'arrêt *Mills* de 1986, précité, qui résulte d'un procès criminel trop long et vexatoire, ou dans l'arrêt *G. (J.)*, précité, où l'État cherchait à retirer la garde d'un enfant à ses parents. Si les procédures contestées visent à fournir un moyen de faire valoir des droits privés, ou à faire fonction d'arbitre en la matière, le stress et la stigmatisation liés à ces procédures sont acceptables jusqu'à un certain point. Il en va également de même lorsqu'il s'agit de réglementer une activité commerciale, professionnelle ou autre. Les poursuites civiles pour fraude, diffamation ou voies de fait de nature sexuelle sont également «stigmatisantes». Les enquêtes menées par la Commission ne sont pas publiques, la personne qui fait l'objet de la plainte est appelée à donner sa version des faits et l'information circule dans les deux sens. Même si la personne qui fait l'objet de la plainte peut être vilipendée par la presse, l'État ne rend, relativement à son «aptitude», aucune décision «stigmatisante» qui aurait des conséquences graves comme dans l'affaire *G. (J.)*. Le droit à la «liberté» ou à la «sécurité de [l]a personne» garanti par l'art. 7 ne comporte donc aucun droit constitutionnel à la protection contre d'une telle stigmatisation.

f) Conclusion relative à la liberté et à la sécurité de la personne

97 En résumé, le stress et l'angoisse que l'intimé a éprouvés et la stigmatisation dont il a été victime n'ont pas porté atteinte à son droit à la liberté ou à

framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

la sécurité de sa personne. Les rédacteurs de la *Charte* ont choisi d'utiliser les termes «vie, [. . .] liberté et [. . .] sécurité de [l]a personne», de sorte que l'art. 7 ne garantit que ces trois droits. Même si des notions de dignité et de réputation sous-tendent maints droits garantis par la *Charte*, ce ne sont pas des droits distincts qui déclenchent en soi l'application de l'art. 7. La protection contre le genre d'angoisse et de stress que l'intimé a éprouvés et contre le genre de stigmatisation dont il a été victime en l'espèce ne devrait pas être élevée au rang de droit constitutionnel garanti par l'art. 7.

98 My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays in human rights proceedings can never trigger an individual's s. 7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances, delays in the human rights process may violate s. 7 of the *Charter*.

Ma conclusion que l'intimé ne peut pas franchir la première étape préliminaire de l'analyse de l'art. 7 de la *Charte* dans les circonstances de la présente affaire ne doit pas être interprétée comme signifiant que les délais imputables à l'État dans des procédures en matière de droits de la personne ne peuvent jamais faire intervenir les droits que l'art. 7 garantit à une personne. Il peut bien arriver, dans certains cas, qu'un processus en matière de droits de la personne fasse intervenir les droits garantis par l'art. 7. Je n'écarte pas la possibilité que, dans d'autres circonstances, les délais dans le processus en matière de droits de la personne violent l'art. 7 de la *Charte*.

99 Because of my conclusion that there was no deprivation of the respondent's right to liberty or security of the person, I need not proceed to the second stage of the analysis to determine whether the alleged deprivation was in accordance with the principles of fundamental justice. However, for the reasons that immediately follow in the administrative law section, I express the view that the delay, in the circumstances of this case, would not have violated the principles of fundamental justice.

Étant donné que j'ai conclu, dans un premier temps, qu'il n'y a eu aucune atteinte au droit de l'intimé à la liberté ou à la sécurité de sa personne, je n'ai pas à décider, dans un deuxième temps, si l'atteinte alléguée était conforme aux principes de justice fondamentale. Toutefois, pour les motifs exposés immédiatement après la partie relative au droit administratif, j'estime que, dans les circonstances de la présente affaire, le délai écoulé n'aurait pas violé les principes de justice fondamentale.

C. *Was the Respondent Entitled to a Remedy Pursuant to Administrative Law Principles?*

C. *L'intimé avait-il droit à une réparation fondée sur les principes du droit administratif?*

100 While I have concluded that the respondent is not entitled to a remedy under the *Charter*, I must still address the issue of whether the respondent is entitled to a remedy under principles of administrative law. This issue was pleaded before Lowry J. of the British Columbia Supreme Court. Counsel

Bien que j'aie conclu que l'intimé n'a droit à aucune réparation fondée sur la *Charte*, il me reste à déterminer s'il a droit à une réparation fondée sur les principes du droit administratif. La question a été débattue devant le juge Lowry de la Cour suprême de la Colombie-Britannique. À l'au-

were advised by us during the hearing that, notwithstanding that pleadings were not made before this Court on administrative law *per se*, we were nevertheless prepared to deal with this issue. The question to be addressed in this section is whether the delay in this case could amount to a denial of natural justice even where the respondent's ability to have a fair hearing has not been compromised.

(a) Prejudice to the Fairness of the Hearing

In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett*, *supra*, at p. 756; *Canadian*

dience, nous avons informé les avocats que, bien que les plaidoiries devant notre Cour n'aient pas porté sur le droit administratif même, nous étions néanmoins disposés à examiner cette question. Il nous faut décider, dans la présente partie, si le délai écoulé en l'espèce peut constituer un déni de justice naturelle même si la capacité de l'intimé d'obtenir une audience équitable n'a pas été compromise.

a) Atteinte à l'équité de l'audience

101 Selon moi, le droit administratif offre des réparations appropriées en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Mettre fin aux procédures simplement en raison du délai écoulé reviendrait à imposer une prescription d'origine judiciaire (voir: *R. c. L. (W.K.)*, [1991] 1 R.C.S. 1091, à la p. 1100; *Akthar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1991] 3 C.F. 32 (C.A.). En droit administratif, il faut prouver qu'un délai inacceptable a causé un préjudice important.

102 Il n'y a aucun doute que les principes de justice naturelle et l'obligation d'agir équitablement s'appliquent à toutes les procédures administratives. Lorsqu'un délai compromet la capacité d'une partie de répondre à la plainte portée contre elle, notamment parce que ses souvenirs se sont estompés, parce que des témoins essentiels sont décédés ou ne sont pas disponibles ou parce que des éléments de preuve ont été perdus, le délai dans les procédures administratives peut être invoqué pour contester la validité de ces procédures et pour justifier réparation (D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), à la p. 9-67; W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), aux pp. 435 et 436). Il est donc reconnu que les principes de justice naturelle et l'obligation d'agir équitablement comprennent le droit à une audience équitable et qu'il est possible de remédier au délai injustifié dans des procédures administratives qui compromettent l'équité de l'audience (voir, par exemple, J. M. Evans, H. N. Janisch et

Airlines, supra; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4e éd. 1995), à la p. 256; Wade et Forsyth, *op. cit.*, aux pp. 435 et 436; *Nisbett*, précité, à la p. 756; *Lignes aériennes Canadien*, précité; *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (C. div. Ont.); *Freedman c. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (B.R.N.-B.)).

103 The respondent argued before the British Columbia Supreme Court that the delay in the administrative process caused him prejudice that amounted to a denial of natural justice in that he could no longer receive a fair hearing. He alleged that two witnesses had died and that the memories of many witnesses might be impaired by the passage of time. Lowry J. referred to these claims as "vague assertions that fall far short of establishing an inability to prove facts necessary to respond to the complaints" (para. 10). Lowry J. concluded that the respondent's opportunity to make full answer and defence had not been compromised and thereby refused to terminate the proceedings.

L'intimé a fait valoir, devant la Cour suprême de la Colombie-Britannique, que le délai écoulé dans le déroulement du processus administratif lui avait causé un préjudice équivalant à un déni de justice naturelle du fait qu'il n'était plus en mesure d'obtenir une audience équitable. Il a allégué que deux témoins étaient décédés et que les souvenirs de bien des témoins avaient pu s'estomper avec le temps. Le juge Lowry a qualifié ces allégations de [TRADUCTION] «vagues assertions n'établissant pas l'incapacité de prouver des faits nécessaires pour répondre aux plaintes» (par. 10). Il a conclu que la possibilité de l'intimé de présenter une défense pleine et entière n'avait pas été compromise et il a donc refusé de mettre fin aux procédures.

104 The respondent also argued before Lowry J. that he was not provided with a copy of Ms. Schell's timeliness submissions for a two-month period and that he had not received proper disclosure. Lowry J. did not consider the respondent prejudiced in this regard. With respect to the alleged failure to disclose information to the respondent, this is not, in my opinion, a case in which the unfairness is so obvious that there would be a denial of natural justice, or in which there was an abuse of process such that it would be inappropriate to put the respondent through hearings before the Tribunal. I would therefore adopt the finding of Lowry J. that the delay in this case is not such that it would necessarily result in a hearing that lacks the essential elements of fairness. The respondent's right to a fair hearing has not been jeopardized. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. This is a finding of fact made by the trial judge that has not, in my opinion, been successfully attacked on appeal. The question which must

L'intimé a aussi fait valoir devant le juge Lowry qu'il avait dû attendre deux mois avant d'obtenir copie des observations de Mme Schell concernant le respect du délai imparti et que la divulgation qui lui avait été faite n'était pas suffisante. Le juge Lowry n'a pas considéré que l'intimé avait subi un préjudice à cet égard. En ce qui concerne l'omission alléguée de divulguer des renseignements à l'intimé, il ne s'agit pas, à mon sens, d'un cas où l'iniquité est si manifeste qu'il y aurait déni de justice naturelle ni d'un cas où il y a eu abus de procédure tel qu'il serait inapproprié de contraindre l'intimé à se présenter à une audience devant le Tribunal. Je suis donc d'avis de souscrire à la conclusion du juge Lowry que le délai en l'espèce n'est pas nécessairement de nature à entraîner la tenue d'une audience dépourvue des éléments requis pour être équitable. Le droit de l'intimé à une audience équitable n'a pas été compromis. Il n'a pas été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience. Il s'agit là d'une conclusion de fait du juge de pre-

be addressed is therefore whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.

(b) Other Forms of Prejudice

It is trite law that there is a general duty of fairness resting on all public decision-makers (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 628). The human rights processes at issue in this case must have been conducted in a manner that is entirely consistent with the principles of natural justice and procedural fairness. Perhaps the best illustration of the traditional meaning of this duty of fairness in administrative law can be discerned from the following words of Dickson J. in *Martineau*, at p. 631:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

Throughout the authorities in this area, terms such as "natural justice", "procedural fairness", "abuse of process", and "abuse of discretion" are employed. In *Martineau*, at p. 629, Dickson J. (writing for three judges, while all nine concurred in the result), stated that "the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework". With regard to these terms, I would adopt the following words of Sherstobitoff J.A. of the Saskatchewan Court of Appeal in *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, at p. 490:

> There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of circum-

mière instance qui n'a pas été contestée avec succès en appel. La question qui doit être examinée est donc de savoir si le délai écoulé en l'espèce pourrait constituer un déni de justice naturelle ou un abus de procédure même si l'intimé n'a subi aucun préjudice sur le plan de la preuve.

b) Autres formes de préjudice

105 Il est bien établi en droit que les instances décisionnelles publiques ont toutes l'obligation générale d'agir équitablement (*Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, à la p. 628). Les procédures en matière de droits de la personne, dont il est question en l'espèce, doivent s'être déroulées d'une manière tout à fait conforme aux principes de justice naturelle et d'équité procédurale. Les propos suivants du juge Dickson dans l'arrêt *Martineau*, à la p. 631, illustrent peut-être le mieux le sens traditionnel de l'obligation d'agir équitablement en droit administratif:

> En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l'égard de la personne qui se prétend lésée? Il me semble que c'est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l'équité.

106 Dans la jurisprudence qui existe en la matière, on trouve des expressions comme «justice naturelle», «équité procédurale», «abus de procédure» et «abus de pouvoir discrétionnaire». Dans l'arrêt *Martineau*, à la p. 629, le juge Dickson (s'exprimant au nom de trois juges, alors que les neuf juges souscrivaient tous au résultat) a dit que «tracer une distinction entre une obligation d'agir équitablement et celle d'agir selon les règles de justice naturelle conduit à un cadre conceptuel de maniement difficile». En ce qui concerne ces expressions, je suis d'avis de souscrire aux propos suivants du juge Sherstobitoff de la Cour d'appel de la Saskatchewan, dans *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, à la p. 490:

> [TRADUCTION] Il existe deux dénominateurs communs à chacune des expressions. Le premier est l'impossibilité de les définir avec exactitude en raison de leur portée et

stances which may bring them into play. The other is the concept of "fairness" or "fair play". They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.

de la vaste gamme de circonstances susceptibles de les mettre en jeu. Le deuxième est le chevauchement manifeste des notions d'«équité» et de «franc-jeu». Un délai déraisonnable pourrait justifier d'invoquer l'une ou l'autre.

107 The respondent contends that the delay in the human rights proceedings constitutes a breach of procedural fairness amounting to a denial of natural justice and resulting in an abuse of process. The question is whether one can look to the psychological and sociological harm caused by the delay rather than merely to the procedural or legal effect, namely, whether the ability to make full answer and defence has been compromised, to determine whether there has been a denial of natural justice. This issue is a difficult one and there is no clear authority in this area.

L'intimé soutient que le délai dans les procédures en matière de droits de la personne constitue une atteinte à l'équité procédurale qui équivaut à un déni de justice naturelle et qui entraîne un abus de procédure. Il s'agit de savoir si, aux fins de déterminer s'il y a eu déni de justice naturelle, on peut tenir compte du préjudice psychologique et sociologique causé par le délai et non seulement de l'incidence procédurale ou juridique, c'est-à-dire de la question de savoir si la capacité de présenter une défense pleine et entière a été compromise. Cette question est difficile et il n'y a aucune jurisprudence claire en la matière.

108 In cases where the *Charter* was held not to apply, most courts and tribunals did not go further to decide whether the stress and stigma resulting from an unacceptable delay were so significant as to amount to an abuse of process. On the other hand, where courts did go further, they most often adopted a narrow approach to the principles of natural justice. For example, in *Nisbett*, *supra*, the Manitoba Court of Appeal concluded that delay may amount to an abuse of process that the law will remedy only where "on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" (p. 757). In *Canadian Airlines*, *supra*, the Federal Court of Appeal followed *Nisbett*, concluding that the prejudice must be such "as to deprive a party of his right to a full and complete defence" (p. 641). In the case at bar, Lowry J. for the British Columbia Supreme Court, found that unless there was prejudice to hearing fairness, the type of personal hardship and psychological prejudice suffered by Mr. Blencoe could not give rise to a breach of natural justice (at para. 31):

Dans les affaires où ils ont jugé que la *Charte* ne s'appliquait pas, la plupart des tribunaux judiciaires et des tribunaux administratifs ne sont pas allés jusqu'à déterminer si le stress et la stigmatisation découlant d'un délai inacceptable étaient importants au point de constituer un abus de procédure. Par contre, les tribunaux judiciaires qui l'ont fait ont le plus souvent interprété de manière restrictive les principes de justice naturelle. Par exemple, dans l'arrêt *Nisbett*, précité, la Cour d'appel du Manitoba a conclu que le délai peut constituer un abus de procédure auquel la loi ne remédie que si, [TRADUCTION] «d'après le dossier, il a été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience» (p. 757). Dans *Lignes aériennes Canadien*, précité, la Cour d'appel fédérale a suivi l'arrêt *Nisbett* et a conclu que le préjudice doit être tel «qu'il prive une partie de son droit à une défense pleine et entière» (p. 641). S'exprimant en l'espèce au nom de la Cour suprême de la Colombie-Britannique, le juge Lowry a conclu que, à moins qu'une atteinte ne soit portée à l'équité de l'audience, les difficultés personnelles que M. Blencoe a éprouvées et le préjudice psychologique qu'il a subi n'étaient pas de nature à donner naissance à un déni de justice naturelle (au par. 31):

. . . it cannot be said that the personal hardship Mr. Blencoe has suffered, albeit protracted by the time the administrative process has taken, gives rise to any *Charter* considerations. To my mind, it then becomes difficult to see how it can nonetheless be said to be a prejudice giving rise to a denial of natural justice. If it were, there would have been no need for the *Kodellas* court to resort to section 7 of the *Charter*. And, having rejected the applicability of section 7, the *Nisbett* court would have been bound to consider whether the personal hardship in that case constituted a prejudice that supported the prerogative relief sought.

[TRADUCTION] . . . on ne peut pas dire que les difficultés personnelles que M. Blencoe a éprouvées, même si elles se sont prolongées à cause de la longueur du processus administratif, font intervenir des considérations fondées sur la *Charte*. Il est alors difficile, à mon sens, de voir comment on peut néanmoins dire qu'elles constituent un préjudice qui donne naissance à un déni de justice naturelle. Si c'était le cas, la cour, dans l'affaire *Kodellas*, n'aurait pas eu besoin de recourir à l'art. 7 de la *Charte*. Et, après avoir écarté la possibilité d'appliquer l'art. 7, la cour, dans *Nisbett*, aurait été tenue d'examiner si les difficultés personnelles dans cette affaire constituaient un préjudice justifiant la délivrance du bref de prérogative demandé.

However, courts and tribunals have also referred to other types of prejudice than trial fairness, holding that, where a commission or tribunal has abused its process to the detriment of an individual, a court has the discretion to grant a remedy. For example, in *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.), a variety of effects on the petitioner were examined, including a cloud over his professional reputation resulting from a delay of two years and three months between the receipt of the complaint and the inspection, and an additional six- or seven-month delay which followed. However, the delay in that case had also resulted in an inability for the petitioner to have a fair hearing.

109 Cependant, les tribunaux judiciaires et les tribunaux administratifs ont aussi mentionné d'autres types de préjudice que l'atteinte à l'équité du procès et ont statué que, dans le cas où une commission ou un tribunal administratif abuse de sa procédure au détriment d'une personne, un tribunal judiciaire a le pouvoir discrétionnaire d'accorder un redressement. Par exemple, dans *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.), diverses répercussions sur le requérant ont été examinées, y compris l'atteinte à sa réputation professionnelle qui résultait du délai de deux ans et trois mois écoulé entre le dépôt de la plainte et le début de l'inspection, et du délai supplémentaire de six ou sept mois qui a suivi. Toutefois, le délai écoulé dans cette affaire avait également eu pour effet d'empêcher le requérant d'obtenir une audience équitable.

We have also been referred to the case of *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), where the British Columbia Supreme Court referred to the petitioner's right to a fair trial having been jeopardized as well as the petitioner suffering harm to his reputation. In *Brown*, it took three years to serve the petitioner with notice of the inquiry after receiving the complaints. The delays were in no part caused by the petitioner.

110 On nous a aussi mentionné la décision *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), où la Cour suprême de la Colombie-Britannique a décidé qu'il y avait eu atteinte à la réputation du requérant et à son droit à un procès équitable. Dans cette affaire, trois ans s'étaient écoulés entre le dépôt des plaintes et la signification d'un avis d'enquête au requérant. Le délai écoulé n'était aucunement imputable à ce dernier.

In *Misra*, *supra*, a college disciplinary board elected to await the completion of criminal proceedings against Misra, while suspending him from the practice of medicine in the interim five-

111 Dans *Misra*, précité, le comité de discipline d'un ordre avait décidé d'attendre la fin des procédures criminelles engagées contre M. Misra et, dans l'intervalle, de lui retirer son permis d'exercer la

year period. After five years, the criminal proceedings were abandoned and the board council decided to hold a hearing. Sherstobitoff J.A. held for the court that (at p. 490):

> The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters. A court, in exercising its supervisory function over an administrative tribunal is entitled to prohibit abuse of that tribunal's process in cases of unfairness or oppression caused or contributed to by delay resulting in a denial of natural justice.

112 The Court of Appeal found that Misra's ability to defend himself would likely be impaired and that he had already been punished by virtue of the five-year suspension (at pp. 492-93). It is clear, however, that in *Misra* the court felt that it is only in exceptional cases that delay will amount to unfairness. Moreover, in *Misra*, an essential part of the prejudice suffered was the result of the lengthy suspension. Finally, the court also concluded that there was prejudice to Misra's right to a fair hearing due to the passage of a five-year period.

113 In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, Hollinrake J.A. for the British Columbia Court of Appeal agreed with the appellant that, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence" (para. 19). At issue in *Ratzlaff* was a lengthy delay in processing disciplinary charges against a physician that had affected how the physician arranged his finances. In not restricting abuse of process to procedural unfairness, Hollinrake J.A. stated, at paras. 22-23:

> Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the

médecine. Les procédures criminelles ont été abandonnées au bout de cinq ans et le comité a décidé de tenir une audience. Le juge Sherstobitoff a conclu ce qui suit, au nom de la cour (à la p. 490):

> [TRADUCTION] La notion de justice naturelle ou d'équité procédurale dont le juge Dickson fait état dans l'arrêt *Martineau* est assez large pour faire obstacle à ce que l'on a qualifié, dans d'autres contextes, d'abus de pouvoir discrétionnaire ou d'abus de procédure causé par un délai et d'autres éléments connexes. En exerçant son rôle de surveillance d'un tribunal administratif, une cour de justice peut interdire que l'on abuse de la procédure de ce tribunal dans les cas où il y a iniquité ou oppression imputable en totalité ou en partie à un délai qui entraîne un déni de justice naturelle.

La Cour d'appel a conclu que la capacité de M. Misra de se défendre serait vraisemblablement compromise et que sa suspension de cinq ans avait déjà eu pour effet de le punir (aux pp. 492 et 493). Cependant, il est clair que, dans l'affaire *Misra*, la Cour d'appel a jugé qu'un délai ne constitue une iniquité que dans des cas exceptionnels. De plus, dans cette affaire, un élément essentiel du préjudice subi découlait de la durée prolongée de la suspension. Enfin, la cour a aussi conclu que le délai de cinq ans avait porté atteinte au droit de M. Misra à la tenue d'une audience équitable.

Dans l'arrêt *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, le juge Hollinrake de la Cour d'appel de la Colombie-Britannique a convenu avec l'appelant que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d'oppressif, le fait que l'audience elle-même sera équitable importe peu ou pas du tout» (par. 19). Dans cette affaire, un long délai dans le traitement des accusations d'infraction disciplinaire portées contre un médecin avait eu une incidence sur la planification financière de ce dernier. En s'abstenant de limiter l'abus de procédure à l'iniquité procédurale, le juge Hollinrake a affirmé ceci, aux par. 22 et 23:

> [TRADUCTION] La notion d'abus de pouvoir est large et s'apparente à l'oppression. Elle englobe l'iniquité procédurale, la conduite équivalant à la rupture d'un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J'ajouterais que tous les délais ne sont pas injusti-

causes of delay, and to resulting reasonable changes of position.

Where a party in the position of the appellant relies on delay as amounting to an abuse of power it is incumbent on that party to demonstrate a resulting change of position. In my opinion, the very fact that the appellant continued with his practice as he did and throughout the whole period of time in issue is sufficient to establish such a change of position.

Ratzlaff differs from the case at bar in that the physician carried on his practice thinking that his problems were behind him. He had even retired thinking that his billing disputes were over. Moreover, the chambers judge found that the physician had literally requested that action be taken but that it was three years before the Commission even communicated with him (para. 11). In all, it had been seven years before the physician had received a hearing notice.

I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

fiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté.

Lorsqu'une partie qui se trouve dans la situation de l'appelant soutient qu'un délai constitue un abus de pouvoir, il lui incombe de prouver qu'il en a résulté un changement de situation. Selon moi, le fait même que l'appelant a continué d'exercer sa profession pendant toute la période en cause suffit pour établir un tel changement de situation.

114 L'arrêt *Ratzlaff* diffère de la présente affaire du fait que le médecin avait continué d'exercer sa profession en pensant que ses problèmes étaient réglés. Il avait même pris sa retraite en croyant que ses litiges en matière de facturation étaient terminés. En outre, le juge en chambre a conclu que le médecin avait expressément demandé que des mesures soient prises, mais que trois années s'étaient écoulées avant même que la commission communique avec lui (au par. 11). En tout, sept années s'étaient écoulées avant que le médecin reçoive un avis d'audience.

115 Je serais disposé à reconnaître qu'un délai inacceptable peut constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Dans le cas où un délai excessif a causé directement un préjudice psychologique important à une personne ou entaché sa réputation au point de déconsidérer le régime de protection des droits de la personne, le préjudice subi peut être suffisant pour constituer un abus de procédure. L'abus de procédure ne s'entend pas que d'un acte qui donne lieu à une audience inéquitable et il peut englober d'autres cas que celui où le délai cause des difficultés sur le plan de la preuve. Il faut toutefois souligner que rares sont les longs délais qui satisfont à ce critère préliminaire. Ainsi, pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La question difficile dont nous sommes saisis est de savoir quel «délai inacceptable» constitue un abus de procédure.

(c) Abuse of Process — Principles

116 The respondent's case is that there has been an unacceptable delay in the administrative process which has caused him to be prejudiced by the stigma attached to the two Complaints to an extent that justifies the process being terminated now. Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, *supra*, at pp. 9-71 and 9-72:

> The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision. [Emphasis added.]

117 In the context of a breach of s. 11(*b*) of the *Charter*, a stay has been found to constitute the only possible remedy (*R. v. Askov*, [1990] 2 S.C.R. 1199). The respondent asked for the same remedy in his administrative law proceedings before Lowry J. There is, however, no support for the notion that a stay is the only remedy available in administrative law proceedings. A stay accords very little importance to the interest of implementing the *Human Rights Code* and giving effect to the complainants' rights to have their cases heard. Other remedies are available for abuse of process. Where a respondent asks for a stay, he or she will have to bear a heavy burden. The discussion that follows often links abuse of process and the remedy of a stay because the stay, as I have said, is the only applicable remedy in the context of a s. 11(*b*) application. Nevertheless, I wish to underline that my inquiry here is directed only at the determination of the existence of an abuse of process on the facts of this case.

c) Abus de procédure — Principes

L'intimé soutient que, vu qu'il a été tellement lésé par le délai inacceptable dans le processus administratif et par la stigmatisation qui en a découlé par suite des deux plaintes portées contre lui, l'arrêt des procédures est maintenant justifié. L'abus de procédure est une notion de common law qui est invoquée principalement pour mettre fin à des procédures lorsqu'il serait oppressif de permettre leur continuation. Comme l'ont affirmé Brown et Evans, *op. cit.*, aux pp. 9-71 et 9-72:

> [TRADUCTION] La rigueur de l'exigence de démontrer que le délai constitue un manquement à l'obligation d'agir équitablement semblerait attribuable, du moins en partie, à la nature radicale du seul redressement approprié. Contrairement à d'autres cas d'iniquité procédurale où la cour peut renvoyer l'affaire pour qu'elle soit tranchée à nouveau d'une manière équitable sur le plan de la procédure, le redressement prévu en cas de délai injustifié consiste généralement à empêcher le tribunal administratif d'exercer le pouvoir qu'il tient de la loi, soit en lui interdisant de tenir l'audience, soit en annulant la décision rendue à l'issue de celle-ci. [Je souligne.]

Dans le contexte d'une violation de l'al. 11*b*) de la *Charte*, l'arrêt des procédures a été considéré comme étant la seule réparation possible (*R. c. Askov*, [1990] 2 R.C.S. 1199). L'intimé a demandé la même réparation dans le cadre de ses procédures en matière de droit administratif devant le juge Lowry. Cependant, rien ne justifie l'idée que l'arrêt des procédures est la seule réparation possible dans des procédures en matière de droit administratif. Lorsqu'on ordonne un arrêt des procédures, on accorde très peu d'importance à l'intérêt qu'il y a à appliquer le *Human Righs Code* et à faire respecter le droit du plaignant d'être entendu. D'autres réparations peuvent être accordées dans le cas d'un abus de procédure. La personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. L'analyse qui suit lie souvent abus de procédure et arrêt des procédures parce que ce dernier est, comme je l'ai dit, la seule réparation possible dans le contexte de l'application de l'al. 11*b*). Je tiens néanmoins à souligner que mon examen ici ne vise qu'à déterminer s'il y a eu abus de procédure d'après les faits de la présente affaire.

In *R. v. Jewitt*, [1985] 2 S.C.R. 128, this Court unanimously affirmed that the doctrine of abuse of process was available in criminal proceedings. In so doing, and as professed by L'Heureux-Dubé J. in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 613, the Court borrowed the comments of Dubin J.A. in *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.), in describing the abuse of process doctrine, stating that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The Court also adopted the Ontario Court of Appeal's warning in *Young* that this is a power which can be exercised only in the "clearest of cases" (p. 614). This was reiterated on many occasions by this Court (see, for example, *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Scott*, [1990] 3 S.C.R. 979; *Power*, *supra*).

Dans l'arrêt *R. c. Jewitt*, [1985] 2 R.C.S. 128, notre Cour a confirmé à l'unanimité la possibilité d'appliquer la règle de l'abus de procédure en matière criminelle. Ce faisant, et comme l'a dit le juge L'Heureux-Dubé dans *R. c. Power*, [1994] 1 R.C.S. 601, aux pp. 613 et 614, notre Cour a repris les observations du juge Dubin dans *R. c. Young* (1984), 40 C.R. (3d) 289 (C.A. Ont.), pour décrire la règle de l'abus de procédure, en affirmant que l'arrêt des procédures devrait être ordonné lorsque «forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société» ou lorsque la procédure est «oppressive ou vexatoire». La Cour a également fait sienne la mise en garde de la Cour d'appel de l'Ontario dans *Young*, selon laquelle il s'agit d'un pouvoir qui ne peut être exercé que dans les «cas les plus manifestes» (p. 614). Notre Cour a réitéré cela à maintes reprises (voir, par exemple, *R. c. Potvin*, [1993] 2 R.C.S. 880; *R. c. Scott*, [1990] 3 R.C.S. 979; *Power*, précité). 118

In *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, L'Heureux-Dubé J. explained the underlying purpose of the doctrine of abuse of process as follows:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

Dans *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1667, le juge L'Heureux-Dubé a expliqué ainsi la fin qui sous-tend la règle ou doctrine de l'abus de procédure: 119

> Suivant la doctrine de l'abus de procédure, le traitement injuste ou oppressif d'un accusé prive le ministère public du droit de continuer les poursuites relatives à l'accusation. Les poursuites sont suspendues, non à la suite d'une décision sur le fond (voir *Jewitt*, précité, à la p. 148), mais parce qu'elles sont à ce point viciées que leur permettre de suivre leur cours compromettrait l'intégrité du tribunal. Cette doctrine est l'une des garanties destinées à assurer «que la répression du crime par la condamnation du coupable se fait d'une façon qui reflète nos valeurs fondamentales en tant que société» (*Rothman c. La Reine*, [1981] 1 R.C.S. 640, à la p. 689, le juge Lamer). C'est là reconnaître que les tribunaux doivent avoir le respect et le soutien de la collectivité pour que l'administration de la justice criminelle puisse adéquatement remplir sa fonction. Par conséquent, lorsque l'atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies, l'administration de la justice est mieux servie par l'arrêt des procédures. [Je souligne.]

120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

Pour conclure qu'il y a eu abus de procédure, la cour doit être convaincue que [TRADUCTION] «le préjudice qui serait causé à l'intérêt du public dans l'équité du processus administratif, si les procédures suivaient leur cours, excéderait celui qui serait causé à l'intérêt du public dans l'application de la loi, s'il était mis fin à ces procédures» (Brown et Evans, *op. cit.*, à la p. 9-68). Le juge L'Heureux-Dubé affirme dans *Power*, précité, à la p. 616, que, d'après la jurisprudence, il y a «abus de procédure» lorsque la situation est à ce point viciée qu'elle constitue l'un des cas les plus manifestes. À mon sens, cela s'appliquerait autant à l'abus de procédure en matière administrative. Pour reprendre les termes employés par le juge L'Heureux-Dubé, il y a abus de procédure lorsque les procédures sont «injustes au point qu'elles sont contraires à l'intérêt de la justice» (p. 616). «Les cas de cette nature seront toutefois extrêmement rares» (*Power*, précité, à la p. 616). Dans le contexte administratif, il peut y avoir abus de procédure lorsque la conduite est tout aussi oppressive.

(d) Was the Delay Unacceptable?

d) Le délai écoulé était-il inacceptable?

121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".

Pour qu'il y ait manquement à l'obligation d'agir équitablement, le délai doit être déraisonnable ou excessif (Brown et Evans, *op. cit.*, à la p. 9-68). Le délai ne constitue pas en soi un abus de procédure. La personne visée par des procédures doit établir que le délai était inacceptable au point d'être oppressif et de vicier les procédures en cause. Bien que je sois disposé à reconnaître que le stress et la stigmatisation résultant d'un délai excessif peuvent entraîner un abus de procédure, je ne suis pas convaincu que le délai écoulé en l'espèce était «excessif».

122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the

La question de savoir si un délai est devenu excessif dépend de la nature de l'affaire et de sa complexité, des faits et des questions en litige, de l'objet et de la nature des procédures, de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai, et d'autres circonstances de l'affaire. Comme nous l'avons vu, la question de savoir si un délai est excessif et s'il est susceptible de heurter le sens de l'équité de la collectivité dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels,

community's sense of fairness would be offended by the delay.

With respect to the actual length of the delay in this case and whether it had been "unacceptable", Lowry J. noted that, unlike the cases to which he had been referred, there was no extended period without any activity in the processing of the Complaints from receipt to referral, except for an inexplicable five-month period of inaction from April 10, 1996, when the respondent provided his substantive response to the Complaints, to September 6, 1996, when human rights officers were assigned to investigate the Complaints. The Commission's counsel provided no explanation or excuses for this five-month gap at the oral hearing. However, according to a letter to the complainant and the respondent dated March 6, 1996, the Council referred to a period of "adjustment" where investigative resources were being transferred from the Employment Standards Branch to the Council and that from then on the Council was to conduct its own investigations. This letter also stated that some investigations would be commenced prior to April 1, 1996, beginning with those complaints that had experienced the longest delays. The Council stated that it appreciated the parties' patience in waiting to be notified as to when the investigation would begin. Lowry J. found that, other than during this five-month period, communication had been ongoing between the Council, solicitors and complainants, and the respondent had not been ignored. There had been a continuous dialogue between the parties (at para. 39).

With respect to calculating the delay, Lowry J. found that the only time that could be considered for the delay was between the filing of the Complaint to the end of the investigation process, in July. He stated that the Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates, did not question the fixed dates and cancelled the prehearing conference. While the respondent did at one point inquire as to whether one of the Complaints could be set for hearing without investiga-

dont la nature des différents droits en jeu dans les procédures.

En ce qui concerne la longueur du délai en l'espèce et la question de savoir si elle est «inacceptable», le juge Lowry a fait remarquer que, contrairement aux affaires qui lui ont été mentionnées, il n'y avait pas eu de période prolongée d'inactivité dans le traitement des plaintes entre leur dépôt et leur renvoi au Tribunal, à l'exception d'une période inexplicable de cinq mois d'inactivité comprise entre le 10 avril 1996, date à laquelle l'intimé a répondu aux plaintes sur le fond, et le 6 septembre 1996, date à laquelle des agents des droits de la personne ont été chargés d'enquêter sur les plaintes. À l'audience, l'avocat de la Commission n'a fourni aucune explication ni aucune excuse au sujet de cet intervalle de cinq mois. Toutefois, dans une lettre datée du 6 mars 1996 et adressée à la plaignante et à l'intimé, le Conseil a parlé d'une période d'«ajustement» pendant laquelle des enquêteurs de la division des normes d'emploi avaient été mutés chez lui pour qu'il mène dorénavant ses propres enquêtes. La lettre précisait également que certaines enquêtes débuteraient avant le 1er avril 1996 et que la priorité serait accordée aux plaintes dont l'examen avait le plus tardé. Le Conseil remerciait les parties de la patience dont elles feraient preuve en attendant d'être informées de l'ouverture de l'enquête. Le juge Lowry a conclu que, en dehors de cette période de cinq mois, la communication avait été constante entre la Commission, les avocats et les plaignantes, et que l'intimé n'avait pas été tenu à l'écart. Le dialogue s'était poursuivi de façon ininterrompue entre les parties (au par. 39).

Au sujet du calcul du délai, le juge Lowry a conclu que seule la période comprise entre le dépôt de la plainte et la fin de l'enquête, en juillet, pouvait être prise en considération. Il a dit qu'on ne pouvait reprocher au Tribunal de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire, qu'il n'avait pas contesté les dates fixées ni annulé la conférence préparatoire à l'audience. Même si, à un moment donné, l'intimé M. Blencoe s'était enquis de la possibilité de faire inscrire au rôle

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tion, this would have required a concession that there was sufficient evidence to warrant a hearing, a concession which Mr. Blencoe was not prepared to make. Following Lowry J.'s reasoning, the delay would be computed until July 1997, thus reducing the delay from 32 months to 24 months.

l'une des plaintes sans qu'une enquête n'ait lieu, il aurait fallu qu'il reconnaisse que la preuve était suffisante pour justifier la tenue d'une audience, ce qu'il n'était pas disposé à faire. Selon le raisonnement du juge Lowry, le délai serait calculé jusqu'en juillet 1997, de sorte qu'il passerait de 32 mois à 24 mois.

125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):

> It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay.

Au cours de ces 24 mois, la Commission a également été saisie d'une contestation de l'intimé fondée sur le caractère tardif des plaintes, et de son argument que ces plaintes avaient été portées de mauvaise foi. Il refusait de répondre aux allégations jusqu'à ce que l'on ait statué sur ces points. Le processus a donc été retardé d'environ huit mois. L'intimé avait parfaitement le droit d'alléguer la mauvaise foi et le non-respect du délai imparti pour porter plainte. Cependant, la Commission ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Voici ce que le juge Lowry a dit à ce sujet (au par. 42):

> [TRADUCTION] On n'affirme pas que M. Blencoe n'avait pas le droit de contester les plaintes comme il l'a fait au départ, mais j'estime qu'il ne peut pas, après avoir exercé ce droit en vain, prétendre maintenant que les événements qui sont survenus pendant les huit mois qui se sont écoulés ont contribué à l'écoulement d'un délai inacceptable.

Thus, while the respondent was entitled to take the steps he did, the Court of Appeal wrongly considered the delay attributable to the aforementioned challenges in computing the delay caused by the Commission. Clearly much of this delay resulted from the respondent's actions, though there appear to be other delays caused by the Commission. As expressed by Lambert J.A., at para. 29, some of the delay was attributable to the Commission, some to the respondent, but very little of it was attributable to either of the two complainants — Ms. Schell or Ms. Willis.

Donc, même si l'intimé avait le droit de faire les démarches qu'il a faites, la Cour d'appel a eu tort de tenir compte du délai attribuable aux contestations susmentionnées pour calculer le délai imputable à la Commission. Il est clair que ce délai résulte en bonne partie des actes de l'intimé, quoique la Commission semble avoir eu par ailleurs sa part de responsabilité. Comme l'a dit le juge Lambert, au par. 29, le délai était attribuable en partie à la Commission et en partie à l'intimé, mais il l'était très peu à l'une ou l'autre des deux plaignantes, M^me^ Schell ou M^me^ Willis.

126 The arguments advanced by the parties before us rely heavily on criminal judgments where delay was considered in the context of s. 11(*b*) or s. 7 of the *Charter*. It must be kept in mind, as mentioned in paras. 93-95, that the human rights process of receiving complaints, investigating them, determining whether they are substantial enough to

Les arguments que les parties ont avancés devant nous s'appuient en grande partie sur des jugements en matière criminelle où un délai était examiné à la lumière de l'al. 11*b*) ou de l'art. 7 de la *Charte*. Comme je l'ai mentionné aux par. 93 à 95, il faut se rappeler que le processus consistant à recevoir des plaintes fondées sur les droits de la

investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The British Columbia human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. Pursuant to s. 27 of the *Human Rights Code*, the Commission may dismiss a complaint if, *inter alia*, it is brought too late, the acts alleged do not contravene the Code, there is no reasonable basis for referring the complaint to a hearing, if it does not appear to be in the interest of the group bringing the complaint, the complaint was filed for improper motives or if the complaint was made in bad faith. The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.

personne, à enquêter à leur sujet, à déterminer si elles justifient la tenue d'une enquête, à rédiger un rapport et à renvoyer l'affaire au Tribunal pour qu'il l'entende est fort différent du processus en matière criminelle. Le processus en matière de droits de la personne qui a cours en Colombie-Britannique est conçu pour protéger les personnes qui font l'objet d'une plainte en assurant qu'une audience ne sera tenue que si la plainte a un minimum de fondement et que si la question ne peut pas être réglée préalablement. Selon l'art. 27 du *Human Rights Code*, la Commission peut notamment rejeter une plainte si elle est présentée tardivement, si les faits allégués ne contreviennent pas au Code, s'il n'y a aucun motif raisonnable de la renvoyer pour audience, si elle semble contraire aux intérêts du groupe qui porte plainte ou encore si elle a été portée de mauvaise foi ou pour des motifs répréhensibles. La Commission exerce donc une fonction de contrôle ou de tri et empêche ainsi les affaires frivoles ou sans fondement de suivre leur cours. Il y a également l'objectif de règlement par la médiation qui est absent du contexte du droit criminel. Le processus en matière de droits de la personne qui précède le renvoi de la plainte au Tribunal pour qu'il tienne une audience est donc beaucoup plus long.

The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time. Indeed, the Commission was under a statutory obligation to proceed as it did. The process itself was not challenged in this case. True, the Commission took longer than is desirable to process these Complaints. I am not condoning that. Nevertheless, McEachern C.J.B.C. has exaggerated in stating that "a week at the outside would have sufficed" to investigate these Complaints (para. 51). While the case may not have been an extremely complicated one, these stages are necessary for the protection

127 Les principes de justice naturelle exigent en outre que les deux parties puissent examiner les documents aux différentes étapes du processus et prendre connaissance du rapport d'enquête. Les parties ont donc la possibilité de présenter des observations avant que l'affaire soit renvoyée au Tribunal. Ces étapes allongent d'autant le processus. En réalité, la Commission était tenue par la loi de procéder comme elle l'a fait. Le processus comme tel n'a pas été contesté en l'espèce. Il est vrai que la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, ce qui n'est pas excusable selon moi. Toutefois, le juge en chef McEachern a exagéré lorsqu'il a dit [TRADUCTION] «qu'il aurait suffi tout au plus d'une semaine» pour enquêter sur ces plaintes (par. 51). Même s'il se peut que l'affaire n'ait pas été extrêmement compliquée, ces étapes sont nécessaires pour assurer la protection de la personne qui fait l'objet d'une plainte fondée sur les droits de la per-

of the respondents in the context of the human rights complaints system.

128 The Commission seems to have handled the Complaints against Mr. Blencoe in the same manner as it handles all of its human rights complaints. The respondent argues that the Commission should have been sensitive to his particular needs and to have consequently expedited his Complaints on a priority basis. However, as professed by Lowry J., there is, "little if anything in the record to suggest that Mr. Blencoe raised with the Commission any of the hardship he has suffered or that he sought to be afforded any priority on that basis" (para. 45).

129 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada. While this factor has limited weight, I would note that in this regard, on average, it takes the Canadian Human Rights Commission 27 months to resolve a complaint (J. Simpson, "Human Rights Commission Mill Grinds Slowly", *The Globe & Mail* (October 1, 1998), p. A18, as quoted in R. E. Hawkins, "Reputational Review III: Delay, Disrepute and Human Rights Commissions" (2000), 25 *Queen's L.J.* 599, at p. 600). In Ontario, the average length of complaints, according to the *Annual Report 1997-1998 of the Ontario Human Rights Commission* (1998), at p. 24, is 19.9 months. The respondent's counsel at the oral hearing quoted a report of the British Columbia Ministry where the average time to get to a hearing in British Columbia is three years.

130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and

sonne, lorsque vient le temps d'examiner cette plainte.

La Commission semble avoir traité les plaintes portées contre M. Blencoe de la même manière qu'elle le fait pour toutes les autres plaintes fondées sur les droits de la personne dont elle est saisie. L'intimé fait valoir qu'elle aurait dû tenir compte de ses besoins particuliers et, par conséquent, traiter en priorité les plaintes dont il faisait l'objet. Cependant, comme l'a affirmé le juge Lowry, [TRADUCTION] «il n'y a que peu ou pas d'éléments du dossier qui indiquent que M. Blencoe a informé la Commission des difficultés qu'il éprouvait ou qu'il a demandé qu'on lui accorde la priorité pour ce motif» (par. 45).

Dans *Kodellas*, précité, la Cour d'appel de la Saskatchewan a statué que l'exercice consistant à déterminer si un délai est déraisonnable est en partie comparatif, du fait qu'il permet de comparer la durée du délai dans l'affaire en cause au délai qui est normalement nécessaire pour procéder dans le même ressort ou ailleurs au Canada. Bien que ce facteur ait une importance limitée, je tiens à souligner, à cet égard, que la Commission canadienne des droits de la personne met en moyenne 27 mois à régler une plainte (J. Simpson, «Human Rights Commission Mill Grinds Slowly», *The Globe & Mail* (1er octobre 1998), p. A18, cité dans R. E. Hawkins, «Reputational Review III: Delay, Disrepute and Human Rights Commissions» (2000), 25 *Queen's L.J.* 599, à la p. 600). En Ontario, selon le *Rapport annuel 1997-1998 de la Commission ontarienne des droits de la personne* (1998), à la p. 26, la durée moyenne du traitement d'une plainte est de 19,9 mois. À l'audience, l'avocat de l'intimé a cité un rapport du ministère responsable en Colombie-Britannique selon lequel le délai d'obtention d'une audience dans la province est en moyenne de trois ans.

Le délai écoulé en l'espèce devrait être comparé à celui constaté dans des affaires analogues. Dans l'affaire *Nisbett*, environ trois années s'étaient écoulées depuis le dépôt de la plainte de harcèlement sexuel. Dans l'affaire *Lignes aériennes Canadien*, 50 mois s'étaient écoulés entre le dépôt de la plainte et la désignation d'un enquêteur. Dans

three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.

A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more "than the time required to process complaints of this kind given the limitations imposed by the resources available" (para. 47). Lowry J. concluded as follows (at para. 49):

> In my view, it cannot be said that the Commission or the Tribunal have acted unfairly toward Mr. Blencoe. They have caused neither an unacceptable delay in the process nor a prejudice to him whereby fairness of the hearings scheduled to be conducted next month have been compromised. There has been no denial of natural justice and, accordingly, Mr. Blencoe's petition for judicial review cannot succeed.

As expressed by Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), at p. 561, "it should not be too difficult to recognise inordinate delay when it occurs". In my opinion, the five-month inexplicable delay or even the 24-month period from the filing of the Complaints to the referral to the Tribunal was not so inordinate or inexcusable as to amount to an abuse of process. Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community's sense of decency and fairness. While I would not presume to fix a specified period for a reasonable delay, I am satisfied that

l'affaire *Stefani*, deux ans et trois mois s'étaient écoulés entre le dépôt de la plainte et le début de l'inspection, à quoi s'étaient ajoutés six ou sept mois supplémentaires. Dans l'affaire *Brown*, trois années s'étaient écoulées avant qu'un avis d'enquête soit signifié au requérant. Dans l'affaire *Misra*, un délai de cinq ans s'était écoulé, pendant lequel M. Misra s'était vu retirer son permis d'exercer la médecine. Enfin, dans l'affaire *Ratzlaff*, sept ans s'étaient écoulés avant que le médecin reçoive un avis d'audience.

131 L'examen des faits en l'espèce démontre que, contrairement aux affaires susmentionnées où il y a eu des périodes d'inactivité complète extrêmement longues, la communication entre les parties est demeurée constante. Bien qu'il ait reconnu que le dossier était demeuré inactif pendant cinq mois, le juge Lowry a jugé que ce délai n'était pas inacceptable en fin de compte et qu'il ne représentait rien de plus [TRADUCTION] «que le temps nécessaire pour traiter les plaintes de ce genre compte tenu des limites imposées par les ressources disponibles» (par. 47). Le juge Lowry a tiré la conclusion suivante (au par. 49):

> [TRADUCTION] À mon avis, on ne peut dire que la Commission ou le Tribunal ont été inéquitables envers M. Blencoe. Ni l'un ni l'autre n'est à l'origine d'un délai inacceptable ou n'a causé à M. Blencoe un préjudice qui aurait eu pour effet de compromettre l'équité des audiences qui devaient avoir lieu le mois suivant. Il n'y a pas eu de déni de justice naturelle et, en conséquence, la demande de contrôle judiciaire présentée par M. Blencoe ne peut être accueillie.

132 Comme l'a dit le lord juge Salmon dans *Allen c. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), à la p. 561, [TRADUCTION] «il ne devrait pas être trop difficile de reconnaître un délai excessif lorsqu'il se produit». Selon moi, le délai inexplicable de cinq mois ou même le délai de 24 mois qui s'est écoulé entre le dépôt des plaintes et le renvoi au Tribunal n'était ni excessif ni inexcusable au point de constituer un abus de procédure. Vu la communication constante entre les parties, le délai en l'espèce ne me paraît pas être de ceux qui heurteraient le sens de la justice et de la décence de la société. Même si je ne saurais préciser la durée d'un délai raisonnable, je suis

the delay in this case was not so inordinate as to amount to an abuse of process.

133 As noted in the discussion pertaining to the application of s. 7 of the *Charter* (paras. 59 to 72), I am also concerned with the causal connection in this case. There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. While Mr. Blencoe and his family have suffered obvious prejudice since the various sexual harassment allegations against him were made public, as explained above, I am not convinced that such prejudice can be said to result directly from the delay in the human rights proceedings. As in the *Charter* analysis above, I have simply assumed without deciding, for the purpose of my analysis, that the delay caused by the Commission was a contributory cause of the respondent's prejudice.

VII. Conclusion

134 To summarize, it cannot be said that the respondent's s. 7 rights were violated nor that the conduct of the Commission amounted to an abuse of process. However, I emphasize that nothing in these reasons has any bearing on the merits of the case before the Tribunal.

135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(*b*) of the *Charter*, the government "has a constitutional obligation to commit sufficient resources to prevent unreasona-

convaincu que le délai en l'espèce n'était pas excessif au point de constituer un abus de procédure.

Comme je l'ai souligné en procédant à l'analyse concernant l'application de l'art. 7 de la *Charte* (par. 59 à 72), je suis également préoccupé par la question du lien causal en l'espèce. Pour qu'il y ait abus de procédure, le délai écoulé doit, outre sa longue durée, avoir causé un préjudice réel d'une telle ampleur qu'il heurte le sens de la justice et de la décence du public. Bien que M. Blencoe et les membres de sa famille aient manifestement subi un préjudice en raison de la publicité qui a entouré les diverses allégations de harcèlement sexuel, comme je l'ai expliqué précédemment, je ne suis pas convaincu qu'on peut dire que ce préjudice résulte directement du délai écoulé dans les procédures en matière de droits de la personne. Comme je l'ai fait dans l'analyse précédente relative à la *Charte*, j'ai simplement tenu pour acquis, sans pour autant le décider, aux fins de mon analyse, que le délai imputable à la Commission avait contribué à causer un préjudice à l'intimé.

VII. Conclusion

En résumé, on ne saurait dire qu'il y a eu atteinte aux droits garantis à l'intimé par l'art. 7 ou que la conduite de la Commission a constitué un abus de procédure. Cependant, je souligne que les présents motifs ne devraient avoir aucune incidence sur le bien-fondé de l'affaire devant le Tribunal.

Je suis néanmoins très préoccupé par l'inefficacité de la Commission et par l'absence d'engagement de sa part à traiter plus rapidement les plaintes dont elle est saisie. Le manque de ressources ne peut pas expliquer tous les délais en matière de communication des renseignements, de désignation d'enquêteurs, de dépôt de rapports, etc.; il ne peut pas justifier non plus un délai jugé excessif. Le fait que la plupart des commissions des droits de la personne connaissent de sérieux délais ne justifie pas la violation des principes de justice naturelle dans des cas appropriés. Dans l'arrêt *R. c. Morin*, [1992] 1 R.C.S. 771, à la p. 795, la Cour a dit, au sujet de l'application de l'al. 11*b*) de

ble delay". The demands of natural justice are apposite.

I would allow the appeal. The Court of Appeal decision is set aside and the Tribunal should proceed with the hearing of the Complaints on their merits. Considering the lack of diligence displayed by the Commission, I would nevertheless exercise the Court's discretion under s. 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, to award costs against the appellant Commission in favour of Robin Blencoe, Andrea Willis and Irene Schell.

The reasons of Iacobucci, Binnie, Arbour and LeBel JJ. were delivered by

LEBEL J. (dissenting in part) — The reasons of Justice Bastarache fully review the judicial history and the factual background of this case, and I do not intend to summarize them again. I shall refer only to such elements of the evidence and of the history of this case, as may be required, for the purpose of my analysis.

I. The Issues

The parties have fought this case mainly on *Charter* issues. In the end, this approach turned into a constitutional problem, something that it was not. The important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings. Given that human rights commissions are administrative law creations, the first place we should look for solutions to problems in their processes is in the realm of administrative law. If the relevant administrative law remedy had been applied, the trial judge should have found that there had been undue delay in the process of the British Columbia Human Rights Commission (formerly the British Columbia Council of Human Rights), that this delay was abusive, and that some

la *Charte*, que le gouvernement «a l'obligation constitutionnelle d'attribuer des ressources suffisantes pour prévenir tout délai déraisonnable». Les exigences de la justice naturelle sont pertinentes.

136 Je suis d'avis d'accueillir le pourvoi. L'arrêt de la Cour d'appel est annulé et le Tribunal devrait procéder à l'audition des plaintes au fond. Toutefois, vu l'absence de diligence manifestée par la Commission appelante, je suis d'avis de lui ordonner de payer les dépens de Robin Blencoe, Andrea Willis et Irene Schell, en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, confère à notre Cour.

Version française des motifs des juges Iacobucci, Binnie, Arbour et LeBel rendus par

137 LE JUGE LEBEL (dissident en partie) — Dans ses motifs, le juge Bastarache fait un examen complet des procédures et des faits de la présente affaire, de sorte que je ne compte pas les résumer à nouveau. Je vais mentionner seulement les éléments de preuve et les faits qui seront nécessaires pour les fins de mon analyse.

I. Les questions en litige

138 L'argumentation des parties a surtout porté sur des questions relatives à la *Charte canadienne des droits et libertés*. En définitive, le problème qui se posait est, de ce fait, devenu à tort un problème constitutionnel. La question importante et déterminante aurait dû être celle du rôle que le contrôle judiciaire et les principes du droit administratif jouent en matière de prévention des délais injustifiés dans des procédures devant un tribunal administratif. Étant donné que les commissions des droits de la personne sont des créatures du droit administratif, c'est dans le domaine du droit administratif qu'il nous faut d'abord chercher des solutions aux problèmes que posent leurs procédures. Si la réparation appropriée en droit administratif avait été appliquée, le juge de première instance aurait dû conclure qu'il y a eu délai injustifié dans les procédures de la British Columbia Human Rights Commission (auparavant British Columbia Council of Human Rights) («Commission des

form of remedy should have been granted to the respondent Blencoe.

139 Nevertheless, I agree that a stay of proceedings was not warranted in the circumstances of the case and should be lifted, as suggested by Bastarache J. Such a remedy took no consideration of the interest of the complainants Irene Schell and Andrea Willis in the proceedings of the British Columbia Human Rights Commission ("Commission"). Nobody benefits from delay, but the interests of innocent parties must influence our choice of remedy. The Court of Appeal seems to have dealt with this case as if it were a pure conflict between the respondent and the state, without taking into account that the complainants Schell and Willis also had an important interest in an efficient disposition of their allegations against Blencoe and in the correct and timely application of the appropriate administrative law remedies.

II. The Administrative Law Doctrine of Abuse of Process and the Control of Undue Delay

140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

141 The legal doctrines that have developed both under the common law and under the *Charter* to respond to delay are certainly not simple. But the facts of this case point to one inescapable conclusion: the respondent, Robin Blencoe, faced unreasonable delay that violated administrative law principles of fairness in the management of the

droits de la personne de la Colombie-Britannique» ou «Commission»), que ce délai était excessif et qu'une forme quelconque de réparation devait être accordée à l'intimé Blencoe.

Je conviens néanmoins qu'un arrêt des procédures n'était pas justifié dans les circonstances de l'affaire et qu'il devrait être annulé, comme le propose le juge Bastarache. Cette réparation ne tenait aucun compte de l'intérêt que les plaignantes Irene Schell et Andrea Willis avaient dans les procédures de la Commission des droits de la personne de la Colombie-Britannique. Un délai n'est avantageux pour personne, mais les intérêts de parties innocentes doivent influencer notre choix d'une réparation. La Cour d'appel semble avoir considéré qu'il s'agissait en l'espèce d'un simple différend entre l'intimé et l'État, sans tenir compte du fait que les plaignantes Schell et Willis avaient elles aussi considérablement intérêt à ce qu'il soit statué efficacement sur leurs allégations contre Blencoe et à ce que les réparations appropriées en droit administratif soient accordées correctement et en temps opportun.

II. La règle de l'abus de procédure en droit administratif et la prévention des délais injustifiés

Ce n'est pas d'hier que les délais inutiles dans les procédures judiciaires et les procédures administratives sont qualifiés de contraires à une société libre et équitable. Il s'agit jusqu'à un certain point d'un fléau qui touche presque tous les tribunaux judiciaires et les tribunaux administratifs. C'est un problème qu'il faut régler pour assurer le maintien d'un système de justice efficace et digne de la confiance des Canadiens et des Canadiennes. La solution à ce problème réside non seulement dans l'application de la *Charte*, mais également dans celle des principes d'un régime de droit administratif souple et en évolution constante.

Les règles juridiques qui ont été établies en vertu de la common law et de la *Charte* afin de remédier au problème des délais ne sont sûrement pas simples. Cependant, les faits de la présente affaire amènent inévitablement à conclure que l'intimé, Robin Blencoe, a été victime d'un délai déraisonnable contraire aux principes, reconnus en

process of an administrative tribunal or body. Those principles concern not only the fairness of the hearing and of the final decision, but the very conduct of the procedures leading to the disposition in the matter. In these reasons, I shall now examine those principles and the nature of the remedy that appears just and appropriate after giving due consideration to the interests of all parties concerned by this long and frustrating judicial debate.

III. The Application for Judicial Review

This case came before the courts when Blencoe brought a petition for judicial review. Lowry J., in the British Columbia Supreme Court, denied any remedy under administrative law principles because, in his opinion, Blencoe had not established any prejudice that related "directly to the ability to respond to the complaint in an evidentiary sense" ((1998), 49 B.C.L.R. (3d) 201, at para. 37). Judicial review would thus be essentially limited to assessing the impact of the delay on the hearing and the decision.

Some case law did support this approach. In *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, the Manitoba Court of Appeal searched for delay that caused prejudice to an individual's right to a fair and full hearing. In *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, at p. 466, the Ontario Divisional Court explicitly followed the *Nisbett* analysis.

However, these decisions seem to have been exceptions in an otherwise steady progression toward a broader vision of administrative law abuse of process doctrine and the remedies that it provides for unreasonable delay. Administrative law abuse of process doctrine is fundamentally about protecting people from unfair treatment by administrative agencies. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 631, Dickson J. (as he then was)

droit administratif, de l'équité en matière de gestion des procédures d'un tribunal ou d'un organisme administratif. Ces principes concernent non seulement l'équité de l'audience et de la décision finale, mais encore le déroulement même des procédures menant au règlement de l'affaire. Dans les présents motifs, je vais maintenant examiner ces principes et la nature de la réparation qui paraît juste et appropriée, compte tenu, comme il se doit, des intérêts de toutes les parties touchées par ce long et frustrant débat judiciaire.

III. La demande de contrôle judiciaire

142 Les procédures devant les tribunaux ont commencé avec le dépôt par Blencoe d'une demande de contrôle judiciaire. Le juge Lowry de la Cour suprême de la Colombie-Britannique a refusé toute réparation fondée sur les principes du droit administratif parce que, à son avis, Blencoe n'avait pas établi l'existence d'un préjudice lié [TRADUCTION] «directement à sa capacité de répondre à la plainte en produisant des éléments de preuve» ((1998), 49 B.C.L.R. (3d) 201, au par. 37). Ainsi, le contrôle judiciaire consisterait essentiellement à évaluer l'incidence du délai sur l'audience et la décision.

143 Une partie de la jurisprudence appuyait ce point de vue. Dans l'arrêt *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, la Cour d'appel du Manitoba s'est demandé si un délai avait porté atteinte au droit d'une personne à une audience complète et équitable. Dans *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, à la p. 466, la Cour divisionnaire de l'Ontario a explicitement suivi l'analyse effectuée dans l'arrêt *Nisbett*.

144 Toutefois, ces décisions semblent avoir constitué des accidents de parcours dans une évolution par ailleurs constante vers une conception plus large de la règle de l'abus de procédure en droit administratif et des réparations qu'elle offre en cas de délai déraisonnable. Cette règle de l'abus de procédure en droit administratif vise fondamentalement à protéger les gens contre tout traitement inéquitable de la part d'organismes administratifs. Dans l'arrêt *Martineau c. Comité de discipline de l'Insti-*

described the administrative law principle of fairness in these classic terms:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and fairness.

When we ask whether there has been an administrative law abuse of process, we ask the same fundamental question: has an administrative agency treated people inordinately badly?

IV. Historical Context

145 This question, however, does not exist outside of a legal historical context, through which we must trace the role of courts on these kinds of questions up to the present day. Two fundamental aspects of the common law's history are relevant to the rules in this area: (1) the common law system's abhorrence of delay; and (2) the common law's development as to the power of courts to monitor the processes of administrative bodies.

146 The notion that justice delayed is justice denied reaches back to the mists of time. In *Magna Carta* in 1215, King John promised: "To none will we sell, to none will we deny, or delay, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law . . . for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the *Charter*". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized

tution de Matsqui, [1980] 1 R.C.S. 602, à la p. 631, le juge Dickson (plus tard Juge en chef) a décrit le principe de l'équité en droit administratif en ces termes classiques:

> En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l'égard de la personne qui se prétend lésée? Il me semble que c'est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l'équité.

Lorsque nous nous demandons s'il y a eu abus de procédure selon le droit administratif, nous nous posons la même question fondamentale: un organisme administratif a-t-il traité des gens excessivement mal?

IV. Le contexte historique

La question ne se pose cependant pas en dehors d'un contexte juridique historique dans lequel nous devons examiner le rôle que les tribunaux judiciaires ont joué jusqu'à ce jour en la matière. Deux aspects fondamentaux de l'histoire de la common law sont pertinents quant aux règles applicables dans ce domaine: (1) l'aversion de la common law pour les délais, et (2) l'évolution de la common law en ce qui concerne le pouvoir des tribunaux judiciaires de surveiller les procédures d'organismes administratifs.

L'idée que la justice différée est un déni de justice ne date pas d'hier. Dans la *Magna Carta* de 1215, le roi Jean a pris l'engagement suivant: [TRADUCTION] «À aucun nous ne vendrons, à aucun nous ne refuserons ni différerons droit ou justice» (je souligne). Comme l'a dit le juge La Forest, le droit à un procès expéditif «est connu en *common law* depuis plus de 750 ans» (*R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 636). En matière de droit criminel, notre Cour n'a pas hésité à conclure, dans l'arrêt *R. c. Askov*, [1990] 2 R.C.S. 1199, à la p. 1227, que «le droit d'être jugé dans un délai raisonnable est un aspect de la justice fondamentale garantie en vertu de l'art. 7 de la *Charte*». En dehors du contexte du droit criminel, le législateur a établi des délais de prescription, et les cours de justice, des règles d'*equity* comme celle du manque de dili-

that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

Under the common law, courts have gradually developed the power to monitor the processes of administrative bodies and their legality. There is today no doubt that "[t]he superior courts have the inherent power to review the legality of administrative actions" (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 6). Unnecessary delay is not excluded from the scope of judicial review.

This supervisory power over administrative processes developed from the very beginnings of the prerogative writ most apropos in the case before us. Mandamus is a storied writ. At its origins, it empowered the Court of King's Bench to order a court or an administrative body to do its duty: Sir W. Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 229; W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1768), Book III, at p. 110. In the original cases that recognized it, the writ was used largely to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices: see *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; and *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, at p. 1143. But there was always the possibility of something much greater in the writ, and Lord Mansfield would go so far as to announce its prospective use "upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one" (*R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, at pp. 824-25 (emphasis added). Cf. *Bagg's Case*, *supra*, at pp. 1277-78, referring generally to "misgovernment".) The writ always promised the possibility of ensuring that governmental officers would not shirk their duty to keep processes operating efficiently. Perhaps significantly, the very words of the original form of the writ referred to

gence. Depuis des siècles, les gens qui œuvrent dans notre système juridique reconnaissent que les délais inutiles vont à l'encontre des valeurs fondamentales qui le sous-tendent et ils font tout ce qu'ils peuvent pour les éliminer, même s'ils ne parviennent pas toujours à le faire complètement.

147 Sous le régime de la common law, les cours de justice se sont progressivement donné le pouvoir de surveiller les procédures des organismes administratifs et leur légalité. Il ne fait désormais aucun doute que [TRADUCTION] «[l]es cours supérieures ont le pouvoir inhérent d'examiner la légalité de mesures administratives» (D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (3e éd. 1999), à la p. 6). Les délais inutiles n'échappent pas au contrôle judiciaire.

148 Ce pouvoir de surveillance des procédures administratives qui remonte aux origines du bref de prérogative est des plus à-propos en l'espèce. Le mandamus possède une longue histoire. À l'origine, il habilitait la Cour du Banc du Roi à ordonner à un tribunal judiciaire ou à un organisme administratif de faire son devoir: sir W. Holdsworth, *A History of English Law* (7e éd. 1956), vol. I, à la p. 229; W. Blackstone, *Commentaries on the Laws of England* (4e éd. 1768), livre III, à la p. 110. Dans les premières affaires où il a été appliqué, le bref a servi en grande partie à empêcher que des membres de groupes abhorrés soient écartés illégitimement d'une charge municipale: voir *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271, et *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, à la p. 1143. Cependant, il était toujours possible que le bref ait une portée plus grande, et lord Mansfield a même dit qu'il pourrait être utilisé [TRADUCTION] «chaque fois que la common law ne prévoit aucune réparation particulière et que la justice et le bon gouvernement exigent qu'il y ait réparation» (*R. c. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, aux pp. 824 et 825 (je souligne). Comparer avec *Bagg's Case*, précité, aux pp. 1277 et 1278, où il est généralement question de [TRADUCTION] «mauvais gouvernement»). Grâce au bref, il était toujours possible de veiller à ce qu'un fonctionnaire de l'État ne manque pas à son obligation de veiller au déroulement efficace des procédures. Ce qui peut être

"debitam et festinam justiciam" — due and speedy justice (Holdsworth, *supra*, app. XV, at p. 659).

V. Modern Developments

149 Today, there is no doubt that mandamus may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind mandamus, stating that "[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice" (*The King ex rel. Lee v. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, at p. 678). It went on to note that the granting of mandamus was "to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice" (at p. 678, cited with approval in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). Members of our Court have on occasion alluded to the use of mandamus specifically to control delay. (See notably: *R. v. Bradley*, [1941] S.C.R. 270, at p. 277, *per* Duff C.J.; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, at p. 1027, *per* Laskin C.J.; and *Rahey*, *supra*, at pp. 624-25, *per* Wilson J., and p. 631, *per* La Forest J.) And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship: e.g., *Muia v. Canada (Minister of Citizenship and Immigration)* (1996), 113 F.T.R. 234; *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410 (C.A.), at para. 24; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278 (F.C.T.D.); and *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81 (F.C.T.D.), at para. 34. In such a context in *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.), at p. 317, Strayer J. offers this widely quoted statement:

significatif, le libellé même du bref original parlait de «*debitam et festinam justiciam*» — justice régulière et expéditive (Holdsworth, *op. cit.*, app. XV, à la p. 659).

V. Évolution récente

De nos jours, il ne fait aucun doute que le mandamus peut servir à limiter les délais procéduraux. Au milieu du siècle dernier, la Cour d'appel de la Colombie-Britannique a reconnu, dans un arrêt, les principes qui sous-tendent le mandamus en disant que [TRADUCTION] «[l]a raison d'être du bref de prérogative qu'est le mandamus est de remédier aux vices de l'administration de la justice» (*The King ex rel. Lee c. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, à la p. 678). La Cour d'appel a ajouté que la délivrance d'un mandamus devait être [TRADUCTION] «régie par des considérations qui contribuent à une administration de la justice expéditive, peu coûteuse et efficace» (à la p. 678, cité avec approbation dans *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561). Il est arrivé que des juges de notre Cour fassent allusion à l'utilisation du mandamus dans le but précis de limiter un délai. (Voir notamment les arrêts *R. c. Bradley*, [1941] R.C.S. 270, à la p. 277, le juge en chef Duff; *Rourke c. La Reine*, [1978] 1 R.C.S. 1021, à la p. 1027, le juge en chef Laskin; *Rahey*, précité, aux pp. 624 et 625, le juge Wilson, et à la p. 631, le juge La Forest.) En outre, il existe, dans le contexte administratif du droit de l'immigration, un courant jurisprudentiel particulier qui sanctionne une telle évolution, spécialement lorsque le délai cause des difficultés: par exemple, *Muia c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1996), 113 F.T.R. 234; *Dass c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1996] 2 C.F. 410 (C.A.), au par. 24; *Dee c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1998), 46 Imm. L.R. (2d) 278 (C.F. 1re inst.); *Kiani c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1999), 50 Imm. L.R. (2d) 81 (C.F. 1re inst.), au par. 34. C'est dans ce contexte que, dans *Bhatnager c. Ministre de l'Emploi et de l'Immigration*, [1985] 2 C.F. 315 (1re inst.), à la p. 317, le juge Strayer a tenu les propos suivants qui sont souvent cités:

But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis added.]

Mais un bref de *mandamus* peut être délivré pour exiger qu'une décision soit rendue. Normalement, il en est ainsi lorsqu'il y a eu refus exprès de rendre une décision, mais ce peut être également le cas lorsqu'on tarde beaucoup à rendre une décision sans donner d'explication suffisante. [Je souligne.]

The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes. The historical context in which our case law is rooted is a soil of well-established principles. This ground's more modern seedlings must now be examined.

150 La common law a toujours eu les délais en aversion. Dans notre régime de common law, la reconnaissance du rôle de surveillance par voie de mandamus que les cours de justice exercent sur les procédures administratives est perçue comme traduisant la possibilité de contraindre les fonctionnaires de l'État à faire leur devoir et, ce faisant, à éviter les délais dans le déroulement des procédures administratives. Le contexte historique dans lequel s'insère notre jurisprudence est constitué de principes bien établis. Il faut maintenant examiner la jurisprudence plus récente qui en a émané.

VI. Undue Delay and Procedural Fairness

VI. Délai injustifié et équité procédurale

151 English case law began in the last decades to bring these old streams of the common law together. In *R. v. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] Q.B. 606, the English Court of Appeal was prepared to act against unreasonable delay based on the *Magna Carta* itself, as reinforced by the *European Convention on Human Rights*. In *Re Preston*, [1985] A.C. 835, the House of Lords made clear that there could be judicial review of any delay amounting to an abuse of power or breach of natural justice. In *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] 1 Q.B. 424, the English Court of Appeal applied this to a lengthy delay in notifying police officers of disciplinary charges against them. In the judgment of May L.J., at pp. 439-40, this was abusive and a breach of fairness because it disregarded the possibility of prejudice accruing to the officers on account of the delay. Unreasonable delay in administrative processes triggers the ancient rights of individuals who suffer prejudice as a result, and it gives the courts good reason to intervene against injustice. The modern English position, stated by W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 649, is clear: "A statutory duty must be per-

Au cours des dernières décennies, les tribunaux britanniques ont commencé à réaliser la synthèse de ces vieux courants de common law. Dans *R. c. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606, la Cour d'appel d'Angleterre était disposée à réagir aux délais déraisonnables en se fondant sur la *Magna Carta* elle-même, telle qu'elle est renforcée par la *Convention européenne des droits de l'homme*. Dans *Re Preston*, [1985] A.C. 835, la Chambre des lords a précisé qu'il pouvait y avoir contrôle judiciaire de tout délai équivalant à un abus de pouvoir ou à un déni de justice naturelle. Dans *R. c. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424, la Cour d'appel d'Angleterre a appliqué cela au long délai écoulé avant que des policiers soient avisés des accusations d'infraction disciplinaire portées contre eux. Selon le lord juge May, aux pp. 439 et 440, il y avait eu abus et iniquité du fait qu'on n'avait pas tenu compte du préjudice que le délai pourrait causer aux policiers. Le délai déraisonnable dans des procédures administratives met en jeu les droits de longue date que possèdent les personnes qu'il lèse, et il donne aux tribunaux une bonne raison d'intervenir pour remédier à toute injustice qui peut avoir

formed without unreasonable delay, and this may be enforced by mandamus" (emphasis added).

été causée. Le point de vue qui a cours actuellement en Angleterre selon W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), à la p. 649, est clair: [TRADUCTION] «Une obligation légale doit être exécutée sans délai déraisonnable, et pareille exécution peut être obtenue par voie de mandamus» (je souligne).

152 With the few exceptions I noted at the outset of these reasons, modern Canadian courts have begun building on those historical principles and the developments in the English case law discussed above to develop a framework within which they may assess unreasonable delay. First, courts have linked the idea of procedural fairness with a bar on abuse of process through unreasonable delay: e.g., *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.) (leave to appeal to SCC granted, [1989] 1 S.C.R. viii, but appeal later discontinued, [1992] 1 S.C.R. vii). Second, even on a traditional analysis, courts have expressed their preparedness to consider different kinds of adverse effects of delay, such as damage to individuals' reputations or other aspects of their lives, in conjunction with the traditionally recognized effects on the hearing: see, e.g., *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (S.C.); and *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.).

Sauf les quelques exceptions que j'ai mentionnées au début des présents motifs, les tribunaux canadiens modernes ont commencé à s'appuyer sur ces principes historiques et sur l'évolution de la jurisprudence anglaise mentionnée plus haut pour établir un cadre leur permettant de déterminer si un délai est déraisonnable. Premièrement, ils ont lié la notion d'équité procédurale à l'interdiction de tout abus de procédure découlant d'un délai déraisonnable: par exemple, *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (C.A. Sask.) (autorisation de pourvoi accordée par la CSC, [1989] 1 R.C.S. viii, mais désistement ultérieur, [1992] 1 R.C.S. vii). Deuxièmement, même dans le cadre d'une analyse traditionnelle, les tribunaux ont affirmé qu'ils étaient disposés à tenir compte de divers types d'effet préjudiciable du délai, comme l'atteinte à la réputation ou d'autres préjudices personnels, conjointement avec ses effets traditionnellement reconnus sur l'audience: voir, par exemple, *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (C.S.), et *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.).

153 Third, these two evolutions have become fused along with a realization that other adverse effects can create an abusive situation independently of evidentiary prejudice. In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), at para. 22, Hollinrake J.A. set out a theoretical framework within which the courts may consider unreasonable delay, along with some of the relevant factors in assessing it:

Troisièmement, outre ces deux évolutions, on s'est rendu compte que d'autres effets préjudiciables peuvent engendrer une situation abusive indépendamment du préjudice lié à la possibilité de présenter des éléments de preuve. Dans *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), au par. 22, le juge Hollinrake a énoncé un cadre théorique à l'intérieur duquel les tribunaux pourraient déterminer si un délai est déraisonnable, ainsi que certains facteurs à prendre en considération à cette fin:

Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position. [Emphasis added.]

[TRADUCTION] La notion d'abus de pouvoir est large et s'apparente à l'oppression. Elle englobe l'iniquité procédurale, la conduite équivalant à la rupture d'un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J'ajouterais que tous les délais ne sont pas injustifiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté. [Je souligne.]

This analytical method, in which unreasonable delay is assimilated to a type of abuse, helped Hollinrake J.A. to recognize that adverse effects other than on hearing fairness can be considered independently. He writes at para. 19, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence".

Cette méthode analytique, dans laquelle le délai déraisonnable est assimilé à une sorte d'abus, a aidé le juge Hollinrake à reconnaître que des effets préjudiciables autres que celui sur l'équité de l'audience peuvent être pris en considération indépendamment. Il écrit, au par. 19, que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d'oppressif, le fait que l'audience elle-même sera équitable importe peu ou pas du tout».

Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.

154 Le délai administratif abusif est répréhensible, et ce, peu importe qu'il ne ruine que la vie d'une personne sans affecter l'audition à laquelle elle a droit. La jurisprudence associée à cette évolution expose parfois ce point de vue différemment, mais le facteur clé est le suivant: le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif qui existent et qui devraient s'appliquer dans un système juridique équitable et efficace.

Unreasonable delay is not limited to situations that bring the human rights system into disrepute either by prejudicing the fairness of a hearing or by otherwise rising above a threshold of shocking abuse. Otherwise, there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were unlucky enough to have suffered sufficiently to meet an additional, external test of disrepute resulting to the human rights system. Such a limitation may arise from a fear that the main remedy available would be the blunt instrument of the stay of proceedings. However, as we will see below, a remedy other than a stay may be appropriate in other cases where ongoing delay is abusive. It is true that some of the cases that have most developed the doctrine of abusive delay involved lengthier periods of time that, in conjunction with other factors,

155 Un délai n'est pas déraisonnable uniquement dans le cas où le régime de protection des droits de la personne est déconsidéré en raison d'une atteinte à l'équité de l'audience ou du fait que le délai a franchi le seuil d'un abus scandaleux. Si c'était le cas, la personne lésée par un délai injustifié ne disposerait d'aucun recours à moins d'avoir eu la malchance d'être suffisamment lésée pour satisfaire à un autre critère externe, celui de la déconsidération du régime de protection des droits de la personne. Pareille restriction peut découler de la crainte que la principale réparation disponible ne soit l'arrêt pur et simple des procédures. Cependant, comme nous le verrons plus loin, une réparation différente de l'arrêt des procédures peut convenir dans d'autres cas où le délai qui s'écoule est abusif. Il est vrai que, dans certaines des décisions qui ont le plus contribué à l'établissement de la

warranted stays of proceedings. (see, e.g., the cases cited by Bastarache J. at paras. 117-18). They were cases that passed the highest threshold of abusiveness. Because of this, they did not discuss a lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings.

règle du délai abusif, il était question de périodes plus longues qui, en plus d'autres facteurs, justifiaient l'arrêt des procédures (voir, par exemple, la jurisprudence citée par le juge Bastarache, aux par. 117 et 118). Il s'agissait de cas qui satisfaisaient au critère le plus rigoureux du caractère abusif. À cause de cela, on n'y analysait pas le critère moins rigoureux du délai déraisonnable qui pourrait justifier une forme quelconque d'intervention judiciaire et d'autres réparations moins radicales que l'arrêt des procédures administratives.

VII. Assessing Unreasonable Delay

VII. Détermination du délai déraisonnable

156 The authorities and policy considerations that have been reviewed thus far confirm that modern administrative law is deeply averse to unreasonable delay. But nobody suggests the elimination of all delay *per se* — and with good reason. At the limit, a prohibition on delay *per se* would ban any and all delay. This would be an absurd result that would undermine rather than uphold a fair judicial system. Such an approach would, for example, deny parties on both sides the chance to prepare for the hearing (cf. *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1694). Thus, unreasonable delays must be identified within the specific circumstances of every case.

La doctrine, la jurisprudence et les considérations de principe qui ont été examinées jusqu'ici confirment la profonde aversion du droit administratif moderne pour le délai déraisonnable. Cependant, personne ne propose l'élimination de tout délai en soi, et ce, pour une bonne raison. À la limite, l'interdiction du délai en soi aurait pour effet d'interdire tout délai. Ce serait un résultat absurde qui minerait un système judiciaire équitable au lieu de le préserver. Une telle approche priverait notamment les deux parties de la possibilité de se préparer pour l'audience (comparer avec *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1694). Il faut donc déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas.

157 In assessing a particular delay in the process of a specific administrative body, we must keep in mind two principles: (1) not all delay is the same; and (2) not all administrative bodies are the same. First, there are different kinds of delay. There are two kinds of delay in an administrative context: general delay and individual delay. Each of these, in turn, may encompass both necessary and unnecessary delay. General delay may include certain kinds of delay due to substantive and procedural complexities inherent in the kind of matter the tribunal deals with, but it may also include delays from systemic problems. Individual delay may relate to the special complexity of a particular decision, but it may also include delays from inattention to a particular file. (See generally: S. N. McMurtrie, "The Waiting Game — The Parliamentary Commissioner's Response to Delay in

Pour évaluer un délai dans les procédures d'un organisme administratif donné, il faut conserver deux principes à l'esprit: (1) les délais ne sont pas tous les mêmes, et (2) les organismes administratifs diffèrent les uns des autres. Premièrement, il existe différents types de délai. Dans le contexte administratif, il y en a deux: le délai général et le délai particulier. Chacun d'eux peut englober à son tour le délai nécessaire et le délai inutile. Le délai général peut comprendre certains types de délai dus à des difficultés de fond et de procédure inhérentes au genre d'affaire dont le tribunal est saisi, mais il peut aussi comprendre les délais dus à des problèmes systémiques. Le délai particulier peut être lié à la complexité particulière d'une décision donnée, mais il peut aussi comprendre le délai imputable au manque d'attention accordée à un dossier. (Voir, de manière générale, S. N.

Administrative Procedures", [1997] *Public Law* 159; and L. S. Skiffington, "Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context" (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

McMurtrie, «The Waiting Game — The Parliamentary Commissioner's Response to Delay in Administrative Procedures», [1997] *Public Law* 159, et L. S. Skiffington, «Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context» (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. Thus, inevitably, a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors.

158 Deuxièmement, les organismes administratifs diffèrent les uns des autres. En fait, c'est le moins qu'on puisse dire. À première vue, un conseil des relations de travail, une commission de police et un office de contrôle laitier peuvent paraître avoir autant de points en commun qu'une ligne d'assemblage, un policier et une vache! Les organismes administratifs ont évidemment certaines caractéristiques en commun, mais en raison de la diversité de leurs attributions, de leur mandat et de leur organisation, il peut être totalement inapproprié d'appliquer les mêmes normes d'un contexte à l'autre. Par conséquent, l'évaluation judiciaire d'un délai dans une affaire particulière dont est saisi un organisme administratif donné doit inévitablement tenir compte d'un certain nombre de facteurs d'analyse contextuels.

In order to differentiate reasonable and unreasonable delay, a balancing exercise becomes necessary. Courts must, indeed, remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. One must approach matters with some common sense and ask whether a lengthy delay that profoundly harms an individual's life is really justified in the circumstances of a given case.

159 Pour distinguer un délai raisonnable d'un délai déraisonnable, une évaluation s'impose. Les tribunaux doivent en effet être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu'ils déploient de bonne foi en vue d'offrir des protections procédurales aux présumés contrevenants. Il faut faire preuve de bon sens et se demander si le long délai qui ruine profondément l'existence d'une personne est véritablement justifié dans les circonstances d'une affaire donnée.

As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:

160 Comme nous l'avons vu, les principaux facteurs dont l'ensemble de la jurisprudence moderne en droit administratif nous invite à tenir compte sont la longueur, la cause et les effets. Grâce à une meilleure compréhension des différents types de délai et des différents contextes dans lesquels ils se situent, nous considérons que, pour évaluer le caractère raisonnable d'un délai administratif, trois facteurs principaux doivent être appréciés:

(1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

(See generally: *Ratzlaff*, *supra*, at p. 346; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *R. v. Morin*, [1992] 1 S.C.R. 771; McMurtrie, *supra*; and Skiffington, *supra*.) Obviously, considering all of these factors imposes a contextual analysis. Thus, our Court should avoid setting specific time limits in such matters. A judge should consider the specific content of the case he or she is hearing and make an assessment that takes into account the three main factors that have been identified above.

161 A number of parties have raised the objection that the consideration of some of those factors may extend "special treatment" to certain kinds of individuals, whether these be people who commit more stigmatizing wrongs or who are more susceptible to harms like damage to their reputations. Some interveners were afraid that the application of such factors might indeed require preferential

(1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, ce qui comprendrait la complexité juridique (y compris l'existence de questions systémiques particulièrement complexes) et la complexité factuelle (y compris la nécessité de recueillir de grandes quantités de renseignements ou de données techniques), ainsi que les délais raisonnables pour que les parties ou le public bénéficient de garanties procédurales;

(2) les causes de la prolongation du délai inhérent à l'affaire, ce qui comprendrait notamment l'examen de la question de savoir si la personne touchée a contribué ou renoncé à certaines parties du délai, et celle de savoir si l'organisme administratif a utilisé aussi efficacement que possible les ressources dont il disposait;

(3) l'incidence du délai, considérée comme englobant le préjudice sur le plan de la preuve et les autres atteintes à l'existence des personnes touchées par le délai qui s'écoule. Cela peut également comprendre l'examen des efforts que les différentes parties ont déployés pour réduire au minimum les effets négatifs en fournissant des renseignements ou en apportant des solutions provisoires.

(Voir, de manière générale, *Ratzlaff*, précité, à la p. 346; *Saskatchewan (Human Rights Commission) c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.); *R. c. Morin*, [1992] 1 R.C.S. 771; McMurtrie, *loc. cit.*; Skiffington, *loc. cit.*) L'examen de ces facteurs commande, de toute évidence, une analyse contextuelle. Notre Cour devrait donc éviter d'imposer des délais précis en la matière. Un juge devrait examiner les faits particuliers de l'affaire dont il est saisi et faire une évaluation qui tienne compte des trois principaux facteurs décrits plus haut.

Plusieurs parties ont soulevé l'objection selon laquelle l'examen de certains de ces facteurs peut avoir pour effet d'accorder un «traitement particulier» à certaines personnes, qu'il s'agisse de gens qui commettent des fautes plus stigmatisantes ou de gens qui sont plus exposés à des préjudices comme l'atteinte à la réputation. Certains intervenants craignaient que l'application de tels facteurs

treatment for powerful and influential people. These objections and fears are misplaced. It appears sound administrative practice for decision-making bodies to recognize the relevance of the identified factors while deciding how to process a particular case. For example, task forces analysing delay report that it is simply a good case management practice to send to different tracks cases of differing levels of complexity: see, e.g., Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), at p. 3. Similarly, it only makes sense for administrative bodies seeking to minimize their negative impacts on real people to consider the ramifications of their failure to act expeditiously. In any event, every case should be processed with due dispatch.

n'exige, en fait, que des personnes puissantes et influentes jouissent d'un traitement préférentiel. Ces objections et ces craintes ne sont pas fondées. Le fait qu'un organisme décideur reconnaisse la pertinence des facteurs décrits pour décider de la façon de traiter une affaire donnée semble être une saine pratique administrative. Par exemple, des groupes de travail qui analysent les délais signalent qu'une bonne pratique de gestion des dossiers consiste simplement à traiter différemment des affaires comportant des niveaux de complexité différents: voir, par exemple, Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), à la p. 3. De même, il est seulement logique qu'un organisme administratif qui cherche à réduire au minimum son incidence négative sur des personnes tienne compte des conséquences de son omission d'agir rapidement. Quoi qu'il en soit, toute affaire devrait être traitée avec célérité.

VIII. Delays Before the British Columbia Human Rights Commission in This Case

VIII. Délai écoulé en l'espèce dans les procédures devant la Commission des droits de la personne de la Colombie-Britannique

Unreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly. Because of the highly contextual nature of any assessment of delay, I turn now to an analysis of the identified factors in the case at bar. I eventually conclude that inefficiency in the Commission's handling of this matter has led to abuse of process that must be addressed with the appropriate remedies in the circumstances of the case and in consideration of the interests of the complainants.

162 En droit administratif, le délai déraisonnable dans des procédures administratives est illégal. Il constitue un manquement à l'obligation d'assurer un déroulement équitable des procédures. Vu le caractère hautement contextuel de l'évaluation du délai, je vais maintenant analyser les facteurs décrits dans la présente affaire. Je conclus, en définitive, que la façon inefficace dont la Commission a traité la présente affaire a donné lieu à un abus de procédure auquel il faut remédier en accordant la réparation appropriée dans les circonstances de l'affaire et en tenant compte des intérêts des plaignantes.

A. *Length of Delay*

A. *La longueur du délai*

163 The first factor to be considered is the time taken relative to the inherent time requirements of the matter. In the Court of Appeal, McEachern C.J.B.C. characterized the allegations in the case at bar as "relatively simple complaints" ((1998), 49 B.C.L.R. (3d) 216, at para. 37), stated that "[t]hese kinds of disputes are quickly resolved by courts and tribunals all the time, and there are no complex

163 Le premier facteur à prendre en considération est le délai écoulé par rapport au délai inhérent à l'affaire. Le juge en chef McEachern de la Cour d'appel de la Colombie-Britannique a qualifié les allégations en l'espèce de [TRADUCTION] «plaintes relativement simples» ((1998), 49 B.C.L.R. (3d) 216, au par. 37). Il a affirmé que «[l]es tribunaux judiciaires et les tribunaux administratifs règlent

legal or factual issues" (para. 37), and concluded that "a week at the outside would have sufficed" (para. 51) for the investigation. Although McEachern C.J.B.C. perhaps puts matters a bit optimistically in suggesting that the investigation could have been wrapped up within a week, there is a good measure of truth in what he says.

toujours rapidement ce genre de différend, et qu'aucune question juridique ou factuelle complexe ne se pose» (par. 37) et a conclu qu'«il aurait suffi tout au plus d'une semaine» (par. 51) pour effectuer l'enquête. Bien que le juge en chef McEachern soit quelque peu optimiste lorsqu'il laisse entendre que l'enquête aurait pu être complétée en moins d'une semaine, il y a une grande part de vérité dans ce qu'il dit.

164 At this point, a closer scrutiny of the facts is necessary in order to establish the inherent time requirements of the case. Different kinds of "allegations of sexual discrimination" may be more or less complex. A pay equity case might properly involve complex statistical analysis and innovative legal arguments and take time for those reasons. A case about other forms of well-concealed systemic discrimination might involve numerous witnesses and take time for that reason. But other cases that involve "allegations of sexual harassment" between individuals may have few complex legal or factual elements and thus appropriately should take much less time.

À ce stade, un examen plus minutieux des faits s'impose pour déterminer le délai inhérent à l'affaire. Une «allégation de discrimination sexuelle» peut être plus ou moins complexe selon le cas. Une affaire d'équité salariale pourrait requérir, à juste titre, une analyse statistique complexe et une argumentation juridique novatrice, et durer ainsi un certain temps. Une affaire portant sur d'autres formes de discrimination systémique bien dissimulée pourrait faire intervenir de nombreux témoins et se prolonger pour cette raison. Cependant, il se peut que d'autres affaires où il est question d'«allégations de harcèlement sexuel» entre des personnes comportent peu d'éléments juridiques ou factuels complexes et durent éventuellement moins longtemps.

165 Considering the complexity of the allegations should not be seen to reflect in any way on their merits. This being said, the case at bar falls within a relatively less complex category. The allegations with respect to Willis, an aide to Blencoe, were that Blencoe made sexual overtures to her and inappropriately kissed her when she came to work one evening in August 1994 and that he had subsequently put his arm on her arm in a sexual manner in March 1995. The allegations with respect to Schell were that Blencoe in March 1993 had inappropriately kissed and hugged Schell, who worked for a sports organization deriving funding from Blencoe's ministry, and that he had subsequently on several occasions between July 1993 and July 1994 given her unwanted attention by inviting her for a drink. There were no other direct witnesses to any of the incidents, although there was some corroborating evidence from a small number of other

La complexité des allégations ne devrait pas être perçue comme ayant une incidence quelconque sur leur bien-fondé. Cela dit, le présent dossier tombe dans la catégorie des affaires relativement moins complexes. Il était allégué, au sujet de Willis, une adjointe de Blencoe, que ce dernier lui avait fait des avances sexuelles et l'avait embrassée inopportunément lorsqu'elle s'était rendue au bureau pour y travailler un soir du mois d'août 1994, et qu'en mars 1995 il avait appuyé son bras contre le sien dans un dessein apparemment sexuel. Il était allégué, au sujet de Schell, qu'en mars 1993 Blencoe l'avait embrassée et étreinte inopportunément alors qu'elle travaillait pour une association sportive financée par le ministère de Blencoe, et qu'à maintes reprises, entre juillet 1993 et juillet 1994, il lui avait accordé une attention non souhaitée en l'invitant à prendre un verre. Personne d'autre n'a été directement témoin de ces incidents, bien qu'il y ait eu témoignage corroborant de la part d'un petit nombre d'autres personnes. Les allégations

witnesses. Blencoe denied some aspects of the allegations and admitted others.

Recognizing that this case is far less complex than many other sexual discrimination cases does not alleviate the seriousness of the allegations, but it is clear from the record that the allegations were not of a nature that could justify a prolonged investigation. Ultimately, the case was about a "he said/she said" scenario concerning which there should have been an adjudication. In this sense, there was little or nothing to investigate, and there was no reason for the pre-hearing investigation to take a long period of time.

Lowry J. expressed serious misgivings about the delays in this case. He wrote at para. 46:

> It may well be that the structure of the Commission should be such that, given the nature of the complaints made by Ms. Schell and Ms. Willis, two years would not be required to determine that they warrant a hearing. [Emphasis added.]

While Lowry J. went on to attribute the delay to a lack of resources, he questioned the effectiveness of the Commission, and his finding that two years was an inappropriately long time confirms my conclusion on this branch of the analysis. The inherent time requirements in this case were minimal.

By contrast, the time taken was anything but minimal. After five to six months spent on determining that it could hear the complaints, and once Blencoe had a chance to respond, the Commission then mysteriously took the five months from April 1996 to September 1996 to appoint the same investigator who had been working on the file all along despite having told Blencoe that it expected to do so within two months (appellants' record, at p. 229). The investigation took some four months. The trial judge found at para. 44 that this investigation was concluded in January 1997. Given this finding, then after this conclusion of the investigation, it apparently took the investigator another two months to write and forward a 12-page

ont fait l'objet de dénégations de la part de Blencoe à certains égards et d'aveux à d'autres égards.

166 La reconnaissance que la présente affaire est beaucoup moins complexe que bien d'autres affaires de discrimination sexuelle n'atténue pas la gravité des allégations, mais il ressort clairement du dossier que ces allégations n'étaient pas de nature à justifier la tenue d'une enquête prolongée. En fin de compte, il était question de versions opposées des faits, qui auraient dû donner lieu à une décision. Il y avait donc peu ou pas matière à enquête, de sorte que rien ne justifiait que l'enquête préalable à l'audience se prolonge.

167 Le juge Lowry a exprimé de sérieuses réserves au sujet du délai écoulé en l'espèce. Il a écrit, au par. 46:

> [TRADUCTION] Il se peut fort bien que la Commission doive être organisée de telle sorte que, compte tenu de la nature des plaintes de M^mes^ Schell et Willis, deux années ne soient pas nécessaires pour déterminer si elles justifient la tenue d'une audience. [Je souligne.]

Bien qu'il ait ensuite imputé le délai à un manque de ressources, le juge Lowry a mis en doute l'efficacité de la Commission, et sa conclusion qu'un délai de deux ans était trop long confirme la mienne en ce qui a trait à ce volet de l'analyse. Le délai inhérent à la présente affaire était minime.

168 Par contre, le délai écoulé était loin d'être minime. Après avoir mis cinq à six mois à décider qu'elle pourrait entendre les plaintes et après que Blencoe eut obtenu la possibilité de répondre, la Commission a mystérieusement mis cinq mois, soit d'avril à septembre 1996, à désigner le même enquêteur qui s'était occupé jusque-là du dossier, même si elle avait auparavant dit à Blencoe qu'elle s'attendait à le faire dans un délai de deux mois (dossier des appelants, à la p. 229). L'enquête a duré environ quatre mois. Le juge de première instance a conclu, au par. 44, que l'enquête avait pris fin en janvier 1997. Compte tenu de cette conclusion, après la fin de l'enquête, l'enquêteur aurait alors mis deux autres mois à rédiger un rapport de

report in early March 1997, and this only after letters from Blencoe's lawyer asking about the delay (appellants' record, at pp. 322-35). After another four months, in July 1997, the Commission finally told Blencoe that the matter would proceed to a Tribunal hearing. It then took another two months to get a date set for the hearing, which was scheduled to be some six months later in March 1998. In all, the time for the Commission to make the determination that the complaints should go to a hearing was approximately two years. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, every one of these steps involved a significant delay.

12 pages qui a été transmis au début du mois de mars 1997, et ce, uniquement après que l'avocat de Blencoe eut envoyé des lettres dans lesquelles il posait des questions au sujet du délai écoulé (dossier des appelants, aux pp. 322 à 335). Quatre autres mois plus tard, en juillet 1997, la Commission a finalement avisé Blencoe que le Tribunal procéderait à l'audition de l'affaire. Deux autres mois se sont ensuite écoulés avant qu'une date d'audience soit fixée au mois de mars 1998, soit quelque six mois plus tard. En tout, il a fallu environ deux ans à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, chacune de ces étapes a comporté un délai considérable.

169 A particularly egregious example of the Commission's unacceptable lack of diligence may be found in the events during the period from October 16, 1995 to December 21, 1995. During that time, the Commission breached procedural fairness by failing to send to Blencoe Willis's October 16 response to his submissions on the timeliness of her complaint. In response to an inquiry, Blencoe received the Commission's letter dated December 21 on December 27. Although the December 21 letter denied that a decision had been made on this issue, a January 22, 1996 letter revealed that the Commission had actually already made the decision on December 18, before it even sent Blencoe the documents to which he had wished to reply and that the Commission had possessed for three months (see pp. 290-300 of the appellants' record). The Commission essentially failed even to keep those affected by its decisions up to date with what was going on.

Les événements qui se sont déroulés entre le 16 octobre et le 21 décembre 1995 sont un exemple particulièrement frappant du manque inacceptable de diligence de la Commission. Au cours de cette période, la Commission a manqué à son obligation d'équité procédurale en ne transmettant pas à Blencoe la réponse du 16 octobre que Willis avait donnée à ses observations concernant le respect du délai imparti pour déposer la plainte. À la suite d'une demande de renseignements, Blencoe a reçu, le 27 décembre, la lettre de la Commission datée du 21 décembre. Même si, dans la lettre du 21 décembre, on niait qu'une décision avait été prise à ce sujet, une lettre datée du 22 janvier 1996 a révélé que la Commission avait déjà pris une décision le 18 décembre 1995, avant même d'envoyer à Blencoe les documents auxquels il voulait répondre et qu'elle avait en sa possession depuis trois mois (voir les pp. 290 à 300 du dossier des appelants). La Commission a essentiellement omis de tenir au courant de la situation les personnes touchées par ses décisions.

170 Regardless of any arguments that parts of the time were necessary for procedural safeguards, the facts are that the Commission was slow at every step along the way. This eventually added up to a delay measured in years for a decision that was not

Indépendamment de tout argument que le délai était en partie nécessaire pour offrir des garanties procédurales, il reste que la Commission a été lente à toutes les étapes. Il lui a fallu, en définitive, plusieurs années pour prendre une décision non

inherently complex. Although a few letters back and forth might have been appropriate, nothing in the inherent time requirements of the case came close to requiring the delay that occurred.

B. *Cause of the Delay*

The second factor that we must consider is the cause of delay beyond the inherent time requirements of the matter. It is true that Blencoe sought to use those defences available to him, including an argument about whether the complaints had been correctly filed within the limitation period provided by the statute. But in so doing, he did not become responsible for the sheer inefficiency of the Commission in dealing with these and other matters.

A measure of Blencoe's determination to seek an end to the delay is that even after matters had been delayed to this point largely on account of the Commission's failures to comply with basic procedural fairness, he offered to forego the investigative stage of the complaints to bring them to a hearing. In so doing, we may infer that he made clear to the Commission that he was seeking a way past the delay and red tape in which his life had become bound. In his request, he was rebuffed, as the Commission would have required him to make major concessions on the existence of a *prima facie* case against him, if he wanted to proceed to the hearing. (Although Blencoe made the offer only on the Willis complaint, this seems to be explained by the fact that he was simultaneously trying to find out whether a decision on the timeliness issue in the Schell complaint had been made without notification as had occurred with the Willis complaint (see the appellants' record at pp. 220 and 301).) On numerous other occasions as well, Blencoe asked about when there would be a decision on the complaints. Indeed, Blencoe's inquiries of this nature comprise a significant number of the letters in the record. There can be no doubt that there was serious delay on both complaints and that Blencoe tried to find a way to end it. After being thus rebuffed, his counsel was under no obligation to beg and cry for an expedited hear-

complexe en soi. Même si un certain échange de correspondance avait pu être approprié, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé.

B. *La cause du délai*

171 Le deuxième facteur que nous devrons prendre en considération est la cause de la prolongation du délai inhérent à l'affaire. Il est vrai que Blencoe a tenté d'invoquer les moyens de défense dont il disposait, y compris l'argument de la question de savoir si les plaintes avaient été dûment déposées dans le délai prévu par la loi. Toutefois, ce faisant, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces plaintes et d'autres questions.

172 Blencoe a montré à quel point il était déterminé à mettre fin au délai en offrant de renoncer à l'étape de l'enquête sur les plaintes et de passer directement à une audience, même si les choses avaient jusque-là traîné en longueur surtout à cause du manquement de la Commission à son obligation fondamentale d'équité procédurale. On peut déduire que, ce faisant, il a clairement signifié à la Commission qu'il souhaitait en finir avec les délais et les formalités administratives qui lui empoisonnaient la vie. Il a essuyé une rebuffade à ce sujet étant donné que, pour passer directement à l'audience, la Commission l'aurait obligé à faire des concessions importantes au sujet de l'existence d'une preuve *prima facie* contre lui. (Quoique Blencoe n'ait fait cette offre qu'à l'égard de la plainte de Willis, cela semble s'expliquer par le fait qu'il tentait, en même temps, de découvrir si une décision concernant le respect du délai imparti dans le cas de la plainte de Schell avait été rendue à son insu comme cela s'était produit relativement à la plainte de Willis (voir les pp. 220 et 301 du dossier des appelants).) Comme l'atteste un grand nombre de lettres versées au dossier, Blencoe a aussi maintes fois demandé à quel moment une décision serait rendue sur les plaintes. Il ne fait aucun doute que les deux plaintes ont fait l'objet d'un délai important auquel Blencoe a tenté de mettre fin. Après cette rebuffade, il n'était plus

ing to demonstrate to the Human Rights Commission the seriousness of his requests.

173 A further measure of the Commission's behaviour with respect to delay is that even at the Supreme Court of Canada, the Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against Blencoe. On a matter that ideally should not even have taken five months, a five-month period of unexplained delay remains surprising and troubling. Lowry J. characterized this period as a "five-month hiatus when there appears to have been no activity in relation to the complaints" (para. 47). After the gap, the Commission sent Blencoe a letter dated September 6, 1996 to advise him that it was appointing the same person as investigator as had up to that point been dealing with the pre-investigation report. In other words, in five months, nothing happened. This five-month lapse is just the high mark of the Commission's ineptitude.

C. *Impact of Delay on the Respondent*

174 The third factor that we must consider is the harm accruing as a result of the delay. Although Lowry J. found "that no clear case of prejudice in terms of an inability to defend has been made out" (para. 10), there is no doubt that Blencoe and his family suffered serious harm in other ways. Lowry J. went so far as to write at para. 50:

> There is, however, substance to the contention that the hardship Mr. Blencoe, his wife, and his children have suffered, and continue to suffer, is markedly disproportionate to the value there can now be in an adjudicated resolution. [Emphasis added.]

175 There can be no doubt about the impact of the allegations on the respondent and his family. The respondent's career is finished. He and his family have been chased twice across the country in their

nécessaire que l'avocat de Blencoe s'efforce de convaincre la Commission du sérieux des demandes de son client en faisant des pieds et des mains pour obtenir rapidement la tenue d'une audience.

Une autre exemple de la conduite que la Commission adopte en matière de délais est que, même devant la Cour suprême du Canada, elle reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre Blencoe. Dans une affaire qui, idéalement, n'aurait même pas dû se prolonger pendant cinq mois, un délai inexpliqué de cinq mois est à la fois étonnant et troublant. Le juge Lowry a qualifié cette période de [TRADUCTION] «vide de cinq mois pendant lequel rien ne semble s'être passé relativement aux plaintes» (par. 47). Après cette période, la Commission a envoyé à Blencoe une lettre datée du 6 septembre 1996 l'informant qu'elle désignait à titre d'enquêteur la personne qui, jusque-là, s'était occupée du rapport préalable à l'enquête. En d'autres termes, rien ne s'est passé pendant cinq mois. Cet intervalle n'est que le paroxysme de l'ineptie dont la Commission a fait preuve.

C. *L'incidence du délai sur l'intimé*

Le troisième facteur que nous devons prendre en considération est le préjudice résultant du délai. Même si le juge Lowry a conclu [TRADUCTION] «qu'il n'y a aucune preuve manifeste de préjudice en ce qui concerne la capacité de se défendre» (par. 10), il n'y a pas doute que Blencoe et sa famille ont subi un grave préjudice à d'autres égards. Le juge Lowry va jusqu'à écrire, au par. 50:

> [TRADUCTION] Il y a toutefois de quoi prétendre que les difficultés que M. Blencoe, son épouse et ses enfants ont éprouvées et qu'ils continuent d'éprouver sont nettement disproportionnées à l'avantage qu'il peut maintenant y avoir d'obtenir une décision sur l'affaire. [Je souligne.]

Il n'y a aucun doute que les allégations ont une incidence sur l'intimé et sa famille. La carrière de l'intimé est terminée. Sa famille et lui ont été traqués à deux reprises lorsqu'ils ont tenté de

attempts to make a new life. He was under medical care for clinical depression for many months. In the wake of the outstanding complaints before the Commission, even such a normal aspect of life as coaching his youngest son's soccer team has been denied to Blencoe, since he has faced stigmatization in the form of presumed guilt as a sexual harasser. As Lowry J. wrote at para. 13:

> The point need not be further stressed. The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe. [Emphasis added.]

Although I do not deny that Blencoe might have taken additional steps to make the Commission more fully aware of the impact on him of continued delay, he did try to move matters along. The Commission showed next to no regard for the possible impacts of its delays, often taking long periods of time even to respond to requests for information as to the progress of the file. It certainly did nothing to minimize the impact of the delay on the respondent.

It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be termed to have been abusive in respect of the respondent. In this connection, I note that my colleague, Bastarache J., despite coming to the conclusion that the conduct of the Commission did not amount to an abuse of process, nevertheless found it necessary to award costs against the Commission in light of the "lack of diligence [it] displayed"

refaire leur vie ailleurs au pays. Pendant plusieurs mois, il a eu recours à des soins médicaux pour traiter une dépression clinique. À la suite des plaintes déposées devant la Commission, Blencoe a même été empêché d'exercer une activité aussi normale qu'entraîner l'équipe de soccer de son fils cadet en raison de la stigmatisation liée au fait d'être présumé coupable de harcèlement sexuel. Comme l'a écrit le juge Lowry, au par. 13:

> [TRADUCTION] Il n'y a pas lieu d'insister davantage sur ce point. La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté. [Je souligne.]

176 Bien que je ne nie pas que Blencoe aurait pu prendre d'autres mesures pour que la Commission soit plus consciente de l'incidence que le délai avait sur lui, il reste qu'il a tenté de faire avancer les choses. La Commission s'est montrée presque indifférente aux effets possibles de ses délais, en mettant même souvent beaucoup de temps à répondre suite à des demandes de renseignements sur l'évolution du dossier. Elle n'a sûrement rien fait pour réduire au minimum l'incidence du délai sur l'intimé.

177 Il est vrai que le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé. Néanmoins, il a beaucoup contribué à son aggravation. Il faut cependant ajouter que ce délai a également déjoué la volonté des plaignantes de voir leurs plaintes réglées rapidement. Enfin, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission et qui sont liés, en particulier, aux gaffes commises dans la gestion de ces plaintes ont lésé toutes les parties à ce processus déplorable. La procédure a été à ce point viciée qu'on peut à juste titre la qualifier d'abusive à l'égard de l'intimé. À cet égard, je constate que, même s'il conclut que la conduite qu'elle a adoptée n'a pas constitué un abus de procédure, mon collègue le juge Bastarache a néanmoins jugé nécessaire de condamner la Commission à payer des dépens en raison de «l'absence de diligence

(para. 136). In my view, this further demonstrates the tension in this appeal and the fact that the conduct of the Commission in dealing with this matter was less than acceptable.

[qu'elle a] manifestée» (par. 136). À mon avis, cela est un autre indice de la tension qui existait en l'espèce et du caractère moins qu'acceptable de la conduite adoptée par la Commission en traitant cette affaire.

IX. Administrative Remedy

IX. Réparation issue du droit administratif

178 In the end, the specific and unexplained delay entitles Blencoe to some kind of remedy. The choice of the appropriate redress requires, though, a careful analysis of the circumstances of the case, in order to identify the causes and nature of the delay and its impact on the process, because the courts always have some discretion on orders of remedies founded on the old prerogative writs. The selection of an appropriate remedy may also impose a delicate balancing exercise between competing interests. In proceedings like those that gave rise to this appeal, we must factor in the interest of the respondent, that of the complainants themselves and finally, the public interest of the community itself which wants basic rights enforced efficiently but fairly. As we have seen above, the courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process.

En définitive, le délai inexpliqué en cause justifie d'accorder une forme de réparation à Blencoe. Toutefois, le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire afin de déterminer les causes et la nature du délai ainsi que son incidence sur les procédures, étant donné que les tribunaux judiciaires détiennent toujours un certain pouvoir discrétionnaire en matière de réparations fondées sur les anciens brefs de prérogative. Le choix d'une réparation appropriée peut aussi commander une évaluation délicate d'intérêts opposés. Dans des procédures comme celles à l'origine du présent pourvoi, il nous faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et, enfin, de celui de la collectivité, laquelle souhaite une application efficace, mais équitable, des droits fondamentaux. Comme nous l'avons vu, les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives.

179 Several kinds of remedies are available either to prevent or remedy abusive delay within an administrative process. The main forms of redress that we need address here are a stay of proceedings, orders for an expedited hearing and costs.

Plusieurs types de réparation permettent de prévenir le délai abusif dans des procédures administratives, ou d'y remédier. Les principales formes de réparation qu'il nous faut examiner en l'espèce sont l'arrêt des procédures, l'ordonnance enjoignant de tenir une audience accélérée et l'adjudication de dépens.

180 Whoever asks for a stay of proceedings carries a heavy burden. In a human rights proceeding, such an order not only stops the proceedings and negates the public interest in the enforcement of human rights legislation, but it also affects, in a radical way, the interest of the complainants who lose the opportunity to have their complaints heard

Quiconque demande l'arrêt des procédures assume un lourd fardeau. Dans des procédures en matière de droits de la personne, en plus de mettre fin aux procédures et d'être contraire à l'intérêt du public dans l'application de la législation relatives aux droits de la personne, une telle ordonnance va, en outre, radicalement à l'encontre de l'intérêt du

and dealt with. The stay of proceedings should not generally appear as the sole or even the preferred form of redress: see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68. A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. The interest of the complainants would undoubtedly be grievously affected by a stay, but the prime concern in such cases becomes the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself: see *Ratzlaff*, *supra*, at para. 19. Whatever its consequences, a stay may thus become the sole appropriate remedy in those circumstances.

plaignant qui perd la possibilité de voir sa plainte entendue et réglée. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée: voir *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 68. Il serait plus prudent de limiter l'arrêt des procédures aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. L'arrêt des procédures porterait sans doute gravement atteinte à l'intérêt des plaignantes, mais la principale préoccupation, en pareil cas, devient la protection des droits fondamentaux de l'intimé impliqué dans des procédures en matière de droits de la personne et la protection de l'équité essentielle des procédures mêmes: voir *Ratzlaff*, précité, au par. 19. Quelles qu'en soient les conséquences, l'arrêt des procédures peut donc devenir la seule réparation appropriée dans ces circonstances.

I note that my approach on the matter of a stay here is consistent with the approach that our Court has adopted in the slightly different context in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. There, the Court, following *O'Connor*, *supra*, recognized a stay as appropriate in situations where the fairness of the hearing had been compromised as well as in situations falling within a residual category. For a residual case to give rise to a stay, the Court held in *Tobiass*, at paras. 90-91 that a stay could be granted where it was the only reasonable means of stopping an abuse that would be perpetuated and aggravated through the conduct of a trial. For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice (*Tobiass*, at para. 91): i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated.

181 Je souligne que mon point de vue concernant la question d'un arrêt des procédures en l'espèce est conforme à celui que notre Cour a adopté dans le contexte légèrement différent de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391. Dans cet arrêt, la Cour a suivi l'arrêt *O'Connor*, précité, et a reconnu qu'un arrêt des procédures peut être ordonné dans les cas où l'équité de l'audience a été compromise et dans ceux qui relèvent d'une catégorie résiduelle. En ce qui concerne l'arrêt en vertu d'une catégorie résiduelle, la Cour a statué, aux par. 90 et 91 de l'arrêt *Tobiass*, qu'il pourrait être accordé si c'était le seul moyen raisonnable de mettre fin à un abus que le déroulement d'un procès contribuerait à perpétuer ou à aggraver. Pour qu'un arrêt puisse être ordonné afin de remédier à un abus déjà commis, l'abus doit être tel que la seule poursuite de l'affaire choquera le sens de la justice de la société (*Tobiass*, au par. 91): autrement dit, il convient de l'ordonner, selon moi, lorsqu'il y a abus grossier ou scandaleux ou encore lorsque l'intérêt de la société dans la poursuite de l'affaire ne l'emporte pas sur les considérations que j'ai énumérées.

182 The approach of the courts should change when it appears that the hearing will remain fair, in spite of the delay and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. More limited and narrowly focused remedies would then become appropriate. In the context of a judicial review procedure akin to mandamus, the first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing within such time frame and with such conditions as the Court might set would be the most practical and effective means of judicial action. Used at the right moment, such a remedy may safeguard the interest of all parties to the process. A litigant who believes he or she is facing undue delay should probably take that route rather than letting the process decay in the hope of stopping the old process on some future date.

L'approche des tribunaux judiciaires devrait changer lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Des réparations plus limitées et mieux ciblées seraient alors appropriées. Dans le contexte d'un contrôle judiciaire analogue au mandamus, toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une audience accélérée dans un délai et aux conditions prescrites par la cour. Si elle est accordée au bon moment, cette réparation peut protéger les intérêts de toutes les parties en cause. La partie qui se croit victime d'un délai injustifié devrait probablement procéder de cette façon plutôt que de laisser la situation se détériorer dans l'espoir de pouvoir mettre fin aux procédures ultérieurement.

183 An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences. If a party must resort to the courts to secure a timely hearing or to speed up the process in which he or she is engaged, some form of compensation for costs should at least be considered by the courts in their discretion. Whenever parties are compelled to seek judicial interventions to safeguard their rights, costs must be considered to compensate at least in part the time, money and efforts expended in obtaining redress. Even if costs cannot indemnify the party for all the losses and prejudice arising from administrative delay, they afford at least a measure of compensation.

L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences. Si une partie doit recourir aux tribunaux pour obtenir la tenue d'une audience en temps opportun ou pour accélérer les procédures dans lesquelles elle est impliquée, les tribunaux devraient au moins pouvoir envisager la possibilité d'accorder une forme quelconque d'indemnisation des dépens. Chaque fois qu'une partie doit faire appel à une cour de justice pour faire respecter ses droits, les dépens doivent être pris en compte pour compenser, du moins en partie, le temps, l'argent et les efforts consacrés à l'obtention d'une réparation. Même si les dépens ne permettent pas d'indemniser la partie de toutes les pertes et de tout le préjudice résultant d'un délai administratif, ils assurent au moins une certaine indemnisation.

184 In the present appeal, the remedy of a pure stay of proceeding appears both excessive and unfair. First, in spite of the seriousness of the problems faced by Blencoe, the delay does not seem to compromise the fairness of the hearing. As the trial judge found at para. 10, the respondent has not established that the delay has deprived him of evi-

En l'espèce, la réparation consistant à ordonner l'arrêt pur et simple des procédures paraît à la fois excessive et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par Blencoe, le délai ne semble pas compromettre l'équité de l'audience. Comme le juge de première instance l'a conclu, au par. 10, l'intimé n'a pas établi que le

dence or information important to his defence. The delay rather concerns the process leading to the hearing. It arises from a variety of causes that do not evince an intent from the Commission to harm him wilfully, but rather demonstrate grave negligence and important structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing and does not amount to shocking or gross abuse requires the consideration of the interest of the complainants in the choice of the proper remedy (*Tobiass*, *supra*, at para. 92). In the present matter, the judgment of the Court of Appeal completely omitted any consideration of this interest (see para. 39). The lifting of the stay is thus both justified and necessary.

délai l'a privé d'un élément de preuve ou d'un renseignement important pour sa défense. Le délai concerne plutôt les procédures menant à l'audience. Il est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise et où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte l'intérêt du plaignant dans le choix de la réparation appropriée (*Tobiass*, précité, au par. 92). Dans la présente affaire, la Cour d'appel a complètement omis de tenir compte de cet intérêt (voir le par. 39). L'annulation de l'arrêt des procédures est donc à la fois justifiée et nécessaire.

However, rejecting the stay as a proper remedy in the present case does not mean that Blencoe should be deprived of any redress. On the contrary, an order for an expedited hearing should have been considered as the remedy of choice. There will be some irony in granting such a remedy more than five years after the proceedings began. Such an outcome offers the respondent little solace. Nevertheless, in spite of its rather symbolic value, at the present stage of the proceedings, it appears as a critically important remedy that should have been used at an earlier stage to prod the Commission along and to control the inefficiency of its process.

185 Cependant, le rejet de l'arrêt des procédures à titre de réparation appropriée en l'espèce ne signifie pas pour autant que Blencoe devrait être privé de toute réparation. Au contraire, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il est quelque peu ironique d'accorder une telle réparation plus de cinq ans après le début des procédures. Un tel résultat offre une mince consolation à l'intimé. Néanmoins, malgré sa valeur plutôt symbolique à l'étape actuelle des procédures, cette réparation apparaît comme une mesure d'une importance cruciale et aurait dû être accordée plus tôt pour inciter la Commission à agir et pour remédier à l'inefficacité de ses procédures.

In spite of the partial success of this appeal, as I agree that the stay should be lifted, Blencoe is entitled to some compensation in the form of costs in our Court and in the courts below. Section 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, grants our Court broad discretion when awarding costs. In the present case, it would be both fair and appropriate to use this power as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law. He had to fight for his rights, and it would be unfair for him to bear the costs personally.

186 En dépit de la réussite partielle du présent appel et étant donné que je conviens qu'il y a lieu d'annuler l'arrêt des procédures, Blencoe a droit à une indemnisation sous forme de dépens devant notre Cour et les tribunaux d'instance inférieure. L'article 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, investit notre Cour d'un large pouvoir discrétionnaire en matière d'adjudication de dépens. En l'espèce, il serait à la fois juste et opportun d'exercer ce pouvoir étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins

Although ultimately unsuccessful in his application for a stay, Blencoe brought to the attention of the courts the grave deficiency of the administrative processes of the Commission. He should at least not be penalized for this mixture of success and failure (e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 726).

Malgré l'échec de sa demande de sursis, Blencoe a attiré l'attention des tribunaux sur les graves lacunes des procédures administratives de la Commission. Il n'y a pas lieu, à tout le moins, de le pénaliser en raison de ce mélange de réussite et d'échec (par exemple, *Schachter c. Canada*, [1992] 2 R.C.S. 679, à la p. 726).

X. Section 7 of the *Charter*

X. L'article 7 de la *Charte*

187 The application of the general principles of administrative law would have justified the intervention of the trial court without any need to demonstrate a breach of an interest protected by s. 7 of the *Charter*. As I think that this matter should have been resolved on the basis of administrative law principles, I do not think I have to express a definite opinion on the application of s. 7 of the *Charter* in the present case.

L'application des principes généraux du droit administratif aurait justifié l'intervention du tribunal de première instance sans qu'il ne soit nécessaire de démontrer l'existence d'une atteinte à un droit garanti par l'art. 7 de la *Charte*. Comme j'estime que la présente affaire aurait dû être réglée en fonction des principes du droit administratif, il me paraît inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte* en l'espèce.

188 We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. At the same time, the Court should remind litigants that not every case can be reduced to a *Charter* case.

Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application. En même temps, notre Cour devrait rappeler aux parties que les affaires ne peuvent pas toutes être plaidées sur le fondement de la *Charte*.

189 Assuming that the *Charter* must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a *Charter* remedy does not mean that administrative law

Supposer que tout problème juridique doit se régler en fonction de la *Charte* contribuerait à bloquer et à stériliser l'évolution naturelle et nécessaire de la common law et du droit civil dans notre pays. Comme nous l'avons vu, l'absence en l'espèce d'une réparation fondée sur la *Charte* ne

remedies could not have been identified and applied, as we have seen above.

XI. Disposition

For these reasons, I would allow the appeal in part, lift the stay of proceedings and order an expedited hearing of the complainants Schell and Willis. I would also order the appellant British Columbia Human Rights Commission to pay costs on a party-to-party basis to the respondent Blencoe in this Court and in the British Columbia courts.

Appeal allowed with costs against the appellant Commission, IACOBUCCI, BINNIE, ARBOUR *and* LEBEL JJ. *dissenting in part.*

Solicitors for the appellants the British Columbia Human Rights Commission and the Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Solicitors for the appellant the British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Solicitor for the appellant Andrea Willis: Robert B. Farvolden, Victoria.

Solicitors for the respondent: Arvay Finlay, Victoria.

Solicitors for the intervener Irene Schell: Allard & Company, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

signifie pas qu'aucune réparation n'aurait pu être trouvée et accordée en application du droit administratif.

XI. Dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi en partie, d'annuler l'arrêt des procédures et d'ordonner la tenue d'une audition accélérée des plaintes de Schell et Willis. Je suis également d'avis d'ordonner à l'appelante, la Commission des droits de la personnes de la Colombie-Britannique, de payer à l'intimé Blencoe des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique. 190

Pourvoi accueilli avec dépens contre la Commission appelante, les juges IACOBUCCI, BINNIE, ARBOUR *et* LEBEL *sont dissidents en partie.*

Procureurs des appelants la British Columbia Human Rights Commission et le Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Procureurs de l'appelant le British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Procureur de l'appelante Andrea Willis: Robert B. Farvolden, Victoria.

Procureurs de l'intimé: Arvay Finlay, Victoria.

Procureurs de l'intervenante Irene Schell: Allard & Company, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du Procureur général, Victoria.

Procureur de l'intervenante la Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

Solicitors for the intervener the Ontario Human Rights Commission: Cathryn Pike and Jennifer Scott, Toronto.

Solicitor for the intervener the Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Solicitor for the intervener the Manitoba Human Rights Commission: Manitoba Justice, Winnipeg.

Solicitor for the intervener the Canadian Human Rights Commission: Fiona Keith, Ottawa.

Solicitor for the intervener the Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Solicitor for the intervener the British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the Women's Legal Education and Action Fund: Jennifer L. Conkie and Dianne Pothier, Vancouver.

Procureurs de l'intervenante la Commission ontarienne des droits de la personne: Cathryn Pike et Jennifer Scott, Toronto.

Procureur de l'intervenante la Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Procureur de l'intervenante la Commission des droits de la personne du Manitoba: Justice Manitoba, Winnipeg.

Procureur de l'intervenante la Commission canadienne des droits de la personne: Fiona Keith, Ottawa.

Procureur de l'intervenante la Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Procureur de l'intervenante la British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Procureurs de l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes: Jennifer L. Conkie et Dianne Pothier, Vancouver.

TAB 2

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

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

Joanne Richardson
Director – Major Projects and Partnerships
Regulatory Affairs

BY COURIER

February 15, 2018

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

Dear Ms. Walli:

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

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

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

Sincerely,

ORIGINAL SIGNED BY JOANNE RICHARDSON

Joanne Richardson

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

EB-2016-0276

PROCEDURAL ORDER NO. 7

SUBMISSIONS OF HYDRO ONE INC.

FEBRUARY 15, 2018

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

PROJECTED COST SAVINGS

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

Table 1: Projected Cost Savings - $M

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

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

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

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

Distribution Operations

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

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

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

Administration

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

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

Back Office

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

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

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

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

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

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

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

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

COST ALLOCATION RELATING TO ORILLIA POWER'S CUSTOMERS

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

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

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

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

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

CONCLUSION

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

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

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

TAB 3

ONTARIO ENERGY BOARD

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

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

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

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

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

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

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

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

NOTICE OF MOTION

Hydro One Inc. ("Hydro One") will make a motion to the Ontario Energy Board (the "OEB") at its offices at 2300 Yonge Street, Toronto, on a date and time to be fixed by the OEB.

The Motion is for:

1. a review and variance of the OEB's Decision and Order dated April 12, 2018 in EB-2016-0276 (the "Decision") where the OEB finds that the "no harm" test has not been met on the basis of the OEB's objective of protecting consumers with respect to price and denies Hydro One's application to acquire the shares of Orillia Power Distribution Corporation ("Orillia Power");

2. an Order that Hydro One satisfies the "threshold test" referred to in Rule 43.01 of the OEB's *Rules of Practice and Procedure*;

3. an Order for a hearing of the Motion on its merits in such manner as the OEB deems appropriate;

4. an Order:

    (a) setting aside the OEB's decision to deny Hydro One's application on the basis that the "no harm" test has not been satisfied in relation to the OEB's objective of protecting consumers with respect to price;

    (b) finding that the "no harm" test has been satisfied in relation to the OEB's objective of protecting consumers with respect to price and approving Hydro One's application;

    (c) in the alternative finding, on the basis of new facts that have arisen and/or facts that were not previously placed in evidence in the proceeding and that could not have been discovered by reasonable diligence at the time, that the "no harm" test has been satisfied in relation to the OEB's objective of protecting consumers with respect to price and approving Hydro One's application.

The Grounds for the Motion Are:

The OEB Changed its Policy Without Notice

5. Under s. 86 of the *Ontario Energy Board Act, 1998* (the "OEB Act"), the OEB is required to review consolidation transactions, including Hydro One's proposal to purchase all of the issued and outstanding shares of Orillia Power. The OEB has articulated its policy and set out its expectations and approach with respect to consolidation transactions in the electricity distribution sector in the OEB's *Handbook to Electricity Distributor and Transmitter Consolidations*, inclusive of *Schedule 2 - Filing Requirements for Consolidation Applications*, issued January 19, 2016 (the "Handbook").

6. The Handbook recognizes the benefits of consolidation transactions and expresses the OEB's commitment to reducing regulatory barriers to consolidation. It states that,

> consolidation can increase efficiency in the electricity distribution sector through the creation of economies of scale and/or contiguity. Consolidation permits a larger scale of operation with the result that customers can be served at a lower per customer cost. Consolidations that eliminate geographical boundaries between distribution areas result in a more efficient distribution system. Consolidation also enables distributors to address challenges in an evolving electricity industry . . . Distributors will need considerable additional investment to meet these challenges and consolidation generally offers larger utilities better access to capital markets, with lower financing costs . . . The OEB has a statutory obligation to review and approve consolidation transactions where they are in the public interest. In discharging its mandate, the OEB is committed to reducing regulatory barriers to consolidation.[1]

7. In addition to providing guidance to distributors on the process for reviewing consolidation applications and the information the OEB expects to receive in support of such applications, the Handbook advises applicants and potential applicants of the approach that the OEB will take in assessing the merits of a proposed consolidation.[2]

8. As was the case for its previously approved consolidation transactions, when considering entering into the proposed transaction with Orillia Power and when developing and bringing its application to the OEB, Hydro One relied on the Handbook and previous

[1] Handbook, p. 1

[2] Handbook, p. 1

OEB decisions as the most comprehensive and authoritative articulation of the OEB's approach to assessing consolidation transactions.

9. In the Decision, the OEB states that in assessing Hydro One's application it has applied the no harm test "in accordance with its ordinary practice".[3] The OEB describes its ordinary practice as being the application of the no harm test as described in the Handbook.[4] However, the Decision demonstrates that the OEB did not apply the no harm test in this manner when assessing Hydro One's application. Moreover, the OEB did not provide Hydro One with any notice, either prior to or during the course of the proceeding, of its intention to apply the no harm test in a manner other than as it has ordinarily been applied.

10. The OEB's ordinary practice for assessing consolidation transactions, as described in the Handbook, is as follows:

> In reviewing an application by a distributor for approval of a consolidation transaction, the OEB has, and will continue, to apply its "no harm test" . . . The "no harm" test considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives, as set out in section 1 of the OEB Act. The OEB will consider whether the "no harm" test is satisfied based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives. If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application.
>
> The OEB's objectives under section 1 of the OEB Act are:
>
> 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] Decision, p. 1

[4] Decision, p. 5

> 3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
>
> 4. To facilitate the implementation of a smart grid in Ontario.
>
> 5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.[5]

11. The OEB further clarifies in the Handbook that "While the OEB has broad statutory objectives, in applying the "no harm" test, the OEB has primarily focused its review on the impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector."[6]

12. In the Decision, the OEB indicates that it is satisfied that the proposed transaction will cause no harm with respect to reliability and quality of electricity service and that there will be no adverse impacts on financial viability.[7] As such, the sole basis for the OEB's determination that the proposed transaction does not meet the "no harm" test are its findings in respect of the impacts of the transaction on price. On this aspect, the OEB explains in the Handbook that its focus will not be on rates but, rather, on the impacts of a proposed transaction on the underlying cost structures of the consolidating entities at the time of the consolidation and in the future. The Handbook states:

> (T)he 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.

[5] Handbook, pp. 3-4

[6] Handbook, p. 6

[7] Decision, pp. 16-17.

> 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. 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.[8]

13. Furthermore, with respect to rate setting for a consolidated entity, the Handbook clearly states that this will be considered in a separate rate application upon rebasing:

> Rate-setting for the consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB. The OEB's review of a utility's revenue requirement, and the establishment of distribution rates paid by customers, occurs through an open, fair, transparent and robust process ensuring the protection of customers.[9]

14. Despite stating in the Decision that its intention was to apply the no harm test in accordance with its ordinary practice based on the Handbook, the OEB did not do so. Instead, the Decision reflects a fundamental change in the OEB's policy on consolidation transactions relative to the Handbook and prior OEB decisions, and represents a material deviation from the OEB's ordinary practice in assessing consolidation transactions. The OEB made these changes without providing full and proper notice to Hydro One, thereby denying Hydro One a fair opportunity to provide a full response.

15. In the Decision, the OEB articulates several principles that are not contemplated in the Handbook and that have not been applied in prior decisions, but which underlie the manner in which it has applied the "no harm" test in assessing the impacts of Hydro One's proposed transaction on price. Of particular significance is the statement that:

> The OEB is of the view that it would have <u>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</u> Orillia ratepayers after the deferral period . . . 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

[8] Handbook, pp. 6-7

[9] Handbook, p. 11

> 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.[10] (emphasis added)

16. In addition, despite the test established in the Handbook, that "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" (emphasis added), the OEB indicates in the Decision that it now needs certainty of this:

> 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.[11] (emphasis added)

17. Moreover, at the conclusion of the Decision, the OEB makes explicit direction:

> 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.[12](emphasis added)

18. Based on the foregoing, the OEB has established a new set of principles and practices for applying the "no harm" test to the consideration of impacts on price when assessing a proposed consolidation transaction, namely that an applicant must provide a forecast of costs to serve the customers of the utility to be acquired *beyond the ten year deferral period,* including *the general methodology of how costs will be allocated* to those customers *after the deferral period* such that the underlying cost structures will be no higher than they otherwise would have been and *that future rates paid* by the acquired

[10] Decision, p. 13

[11] Decision, p. 13

[12] Decision, p. 20

customers *will be based on the same cost structures* used to project the future cost savings in support of the application.

19. The elements of this new set of principles and practices that are of particular concern include (i) the OEB's focus on the period beyond the deferred rebasing period, (ii) the requirement to provide a general methodology for allocating costs to the acquired customers following the deferred rebasing period, which is an element of the rate-making process, and (iii) that the rates to be paid by the acquired customers following the deferred rebasing period, and the methodology for setting those future rates, will be a fundamental part of the OEB's application of the "no harm" test as it relates to pricing in assessing a proposed transaction in both the present application and any future applications.

20. In accordance with the Handbook, it is the consideration of the "underlying cost structure" that is central to the OEB's application of the "no harm" test as it relates to pricing. As set out above, the Handbook states that ". . . 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 . . . The OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers . . . 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."[13]

21. Despite its prevalence in the Handbook's description of how the "no harm" test will be applied, the term "underlying cost structure" - or even just "cost structure" – is not defined. In Procedure Order No. 7 and the Decision, the term "overall cost structure" was also used but no clarification was provided by the OEB as to any significance of the modifier "overall". These terms have also not been defined by the OEB in its prior MAADs policy documents, namely the *Report of the Board - Rate-making Associated with Distributor Consolidation* issued on July 23, 2007 in EB-2007-0028 (the "2007 Report") or the *Report of the Board – Rate-Making Associated with Distributor*

[13] Handbook, pp. 6-7

Consolidation issued March 26, 2015 in EB-2014-0138 (the "2015 Report"). As a result, the only basis for interpretation of the Handbook and the test to demonstrate no harm in respect of price that is available to the Applicant is the body of the OEB's prior decisions in which it has applied these criteria.

22. In its Decision and Order in the Hydro One/Norfolk Power Distribution Inc. ("NPDI") transaction (EB-2013-0196), in response to concerns from intervenors about the possibility of increased rates for the acquired customers after the deferred rebasing period, the OEB explained that "In accordance with the 2007 Report, the Board's decision will not consider future rates at this time. However, as indicated in the Motion Decision, in applying the no harm test it is appropriate for the Board to assess the cost structures that will be introduced as a result of the acquisition, in comparison to the cost structures that underpin NPDI's current rates."[14]

23. In its Decision and Order in the Hydro One/Haldimand County Hydro Inc. ("HCHI") transaction (EB-2014-0244), the OEB referred to the approach it took in the NPDI proceeding, where it articulated its approach to applying the "no-harm" test as being an analysis of cost structures, and indicated that it adopts that same approach for purposes of considering the transaction with HCHI.[15] In respect of rate making, the OEB stated that "With respect to future rates, in the Hydro One/Norfolk proceeding the OEB provided a clear indication that it expected that future rates would be reflective of the costs to serve the Norfolk service area. The OEB has the same expectation of Hydro One with respect to Haldimand . . . Future Panels of the OEB will be guided in their decisions in setting rates by these expectations and the realities of the rate setting environment at the time of rebasing."[16]

24. More recently, in its Decision and Order in the Alectra consolidation transaction (EB-2016-0025), the OEB explained as follows:

[14] OEB, Decision and Order, EB-2013-0196, July 3, 2014, p. 16.
[15] OEB, Decision and Order, EB-2014-0244, March 12, 2015, p. 2.
[16] Ibid at p. 11

> The OEB considers the long term effect of a proposed transaction on cost structures. This is aligned with the long-term investment cycles of the distribution sector where most distribution assets have life expectancies in the 40 year range. Hydro One Brampton is identified as being the lowest cost entity involved in this transaction. The OEB notes that Hydro One Brampton will have additional scale available to it in the long term and its existing cost structures are embedded in its rates for the next 10 years. The OEB will consider the matter of its rates and the impact of rate harmonization in the context of a rate application. In the OEB's view, there will be no net negative impact on Hydro One Brampton's customers in the long term in comparison to the status quo.[17]

25. The clear distinction between the scope of the OEB's review in a consolidation application and the scope of its review in a future rate application for the consolidated entity is demonstrated by the OEB's Decision and Order in respect of a transaction between Cambridge and North Dumfries Hydro Inc. and Brant County Power Inc. (EB-2014-0217). There, the OEB referenced OEB staff's observation that one of the interrogatory responses from the applicant estimated that the distribution rate impact following harmonization of rates after the deferred rebasing period would be a 54.8% increase for Brant's GS>50 kW customer class, and that staff requested confirmation that the applicant's harmonization plan include measures to mitigate increases for that customer class. The applicant advised that it would include rate mitigation measures for that class in accordance with the OEB's policy and applicable rate-making principles to ensure that rates are just and reasonable for all customers and customer classes.[18] Notwithstanding the estimated rate increase, the OEB concluded that the no harm test had been met and the transaction was approved.[19]

26. The unique manner in which the OEB has applied the "no harm" test to the proposed transaction, by introducing new criteria and fundamentally changing its MAADs policy and practice through the Decision, is further highlighted by the fact that less than one month prior to issuing the Decision the OEB Panel issued a decision in an unrelated electricity distribution consolidation proceeding but did not apply any of these new

[17] OEB, Decision and Order, EB-2016-0025, December 8, 2016, p. 12.

[18] Hydro One notes that if the proposed transaction is approved, then upon rebasing as required by Section 2.8.12 of the OEB's *Filing Requirements for Distribution Rate Applications*, if required, it would expect to propose mitigation measures for any customer class that would otherwise face a total bill increase of greater than 10%. This would be a matter for consideration by the panel hearing the future rebasing application.

[19] OEB, Decision and Order, EB-2014-0217, October 30, 2014, p. 8.

elements. In particular, on March 15, 2018, the OEB issued its decision on an application for approvals to effect the amalgamation of Entegrus Powerlines Inc. and St. Thomas Energy Inc. (EB-2017-0212) (the "Entegrus Decision"). The OEB applied the "no harm" test generally in accordance with its ordinary practice and found that the transaction met that test. Whereas in the Decision the OEB sets out its expectation that Hydro One ought to have filed a forecast of costs to service Orillia customers beyond the ten year deferral period and an explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period, and indicated that it could not conclude there would be no harm without this information, in the Entegrus Decision the OEB does not refer to any such evidence as having been filed in the proceeding nor does it express any expectation that such evidence was necessary for it to determine whether or not that transaction will cause harm. The timing of the Entegrus Decision relative to the Decision further demonstrates that Hydro One had no notice and no basis for anticipating the additional elements of the "no harm" test that were introduced in the Decision.

27. The OEB's ordinary practice when considering the no harm test in relation to price is to assess whether there is a reasonable expectation based on "underlying cost structures" that the costs to serve acquired customers will be no higher than they otherwise would have been. Based on the foregoing, in carrying out this assessment, the OEB has consistently found and demonstrated that its consideration of cost structures does not involve a consideration of the allocation of costs or the resulting rates or rate-making.

28. The Handbook expressly states that "rate-setting for the consolidated entity will be addressed in a separate rate application."[20] Moreover, the 2007 Report, which sets out the OEB's policies on rate-making matters associated with consolidations in the electricity sector, states that

> ". . . the issue of rate harmonization in the context of a consolidation transaction is better examined at the time of rebasing, because this is when the consolidated entity will apply for its combined revenue requirement . . . Where the distributor does intend to harmonize rates, the

[20] Handbook, p. 11

> distributor will be required to file its proposed plan at the time of rebasing."[21]

29. Under the OEB's new set of principles and practices for applying the "no harm" test to the consideration of impacts on price as established in the Decision, the OEB indicated that Hydro One ought to have provided a forecast beyond the deferred rebasing period, a general methodology of how costs would be allocated to its acquired customers after the deferral period and the costs that will be reflected in future rates. This is despite that both the Handbook and the body of decisions previously made by the OEB on distribution consolidation applications do not impose any such obligations.

30. Unlike the Decision, the Handbook and prior decisions are wholly consistent with the understanding that the question of how costs are to be allocated upon consolidation following the deferred rebasing period, (i) is squarely within the OEB's rate making function, and (ii) that the determination of how costs are to be allocated upon consolidation is a matter that will remain fully within the OEB's discretion to consider at such future time when the rate making function following the deferred rebasing period is to be carried out. It is for this reason that the OEB has consistently and unambiguously reserved rate making aspects for a separate proceeding, during which it will consider the consolidated utility's proposal for cost allocation and rate harmonization. This is because the determination of those future rates is a matter that is in the discretion of the future OEB panel that presides over that future rate application. As a result, the Decision has unexpectedly and materially altered the established criteria for assessing the impact on price as part of the no harm test.

Procedural Order No.7 Provided No Guidance

31. In Procedural Order No. 6, the OEB determined that the hearing of the application would be adjourned until the OEB renders its decision on Hydro One's rate application in EB-2017-0049. Hydro One and Orillia Power filed motions to review and vary Procedural Order No. 6. On January 4, 2018, the motion panel granted the motions and referred the matter back to the panel on the MAAD application for reconsideration. The panel on the

[21] OEB, 2007 Report, July 23, 2007, pp. 7-8.

motion determined that it would not determine the merits of the MAAD application and that the panel in the MAAD proceeding was in the best position to continue hearing it and to reopen the record if it became necessary to seek additional information or clarification "in areas that are within the scope of the MAAD proceeding." The motion panel identified three possible areas in which additional information or clarification within the scope of the MAAD proceeding might be helpful. The OEB panel in EB-2017-0320 provided no guidance as to the appropriate no harm criteria. It gave no indication that it was contemplating any material changes to the OEB's policy or ordinary practice for applying the "no harm" test.

32. Upon reconsidering the matter in Procedural Order No. 7, the Panel in EB-2016-0276 determined that it would reopen the record in the MAAD application to enable it to receive further material from Hydro One. In particular, the panel referred to one of the three areas identified by the motion panel and ordered as follows:

> 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 …"[22]

33. No further guidance was provided by the Panel in the main proceeding. There is no reference to the need for any information setting out the general methodology for how costs will be allocated by Hydro One after the deferred rebasing period (which is a rate related matter). Nor is there any indication of the possibility that the requested information on the cost structures giving rise to the savings would become the basis of the rates that are to be established for Year 11, following the deferred rebasing period. Rather, the only guidance provided by the OEB on these aspects was in the Decision issued on April 12, 2018, which was long after the opportunity had passed for Hydro One to respond to these fundamental deviations from the OEB's ordinary practice in applying the "no harm" test.

34. The Decision states that "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

[22] OEB, Procedural Order No. 7, EB-2016-0276, February 5, 2018, p. 3.

evidence."[23] (emphasis added). In fact, Hydro One did file further material that was directly responsive to the OEB's request in Procedural Order No. 7 and that was consistent with the OEB's established criteria relating to the "no harm" test. Procedural Order No. 7 invited Hydro One to file "evidence or submissions". Moreover, based on the guidance in the decision of the motion panel in EB-2017-0320, Hydro One understood the purpose of the request in Procedural Order No. 7 to be "to seek additional information or clarification" on its expectations of the overall cost structures following the deferred rebasing period. Given that Hydro One had already filed comprehensive materials in the proceeding based on the requirements set out in the Handbook, and no other guidance was provided by the Panel in the main application, it responded to Procedural Order No. 7 by filing materials in the form of submissions that provided clarification on its expectations of the overall cost structures following the deferred rebasing period.

35. Moreover, as the OEB goes on to say in the Decision immediately after stating that Hydro One did not file further evidence, the submissions Hydro One filed in response to Procedural Order No. 7 clarified and reiterated Hydro One's "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."[24] This is directly responsive to Procedural Order No. 7 and closely tracks the expectations articulated by the OEB in the Handbook.

Board Erred in Departing from its Own Guidance and Not Providing Notice of the Change

36. At no time prior to the Decision were the OEB's material changes to its policy and criteria for applying the "no harm" test in respect of price impacts communicated to Hydro One. Consequently, Hydro One was not provided with an opportunity to provide a full response. It is unreasonable and unfair for the OEB to have made a determination on the basis of its new policy and criteria in the absence of such a response from Hydro One. The policy changes have not been articulated through any announced amendments

[23] Decision, p. 13

[24] Decision, p. 13

or consultation processes on potential amendments to the Handbook, nor were they communicated to Hydro One in any of the procedural orders issued in the proceedings.

37. Although the OEB has significant control over its own procedures, it is required to ensure that those procedures are fair. As recently reaffirmed by the Ontario Superior Court, the OEB must ensure that its procedures provide "the highest degree of procedural fairness."[25] As part of that duty, parties are entitled to "take into account the promises or regular practices of administrative decision-makers," such that "it will generally be unfair for [decision-makers] to act in contravention of representations as to procedure."[26] Both published guidelines and previous practice can give rise to legitimate expectations about the "procedural norms" to be applied by decision-makers.[27] Departure from these norms is inconsistent with the OEB's duty of fairness.

38. In this proceeding, the OEB erred in imposing a new version of the "no harm" test that was inconsistent with its own guidance and previous practice, thereby breaching its duty of procedural fairness.

39. In addition to the duty to act consistently with its own previous guidance and practices, the OEB is required to provide notice to parties of its intention to depart from its existing guidance.[28]

40. In the current case, the OEB erred in imposing a novel version of the "no harm" test without any notice to the parties. Neither its request for further information in Procedural Order No. 7, nor any other communication from the OEB in the proceeding, provided Hydro One with notice of any such intention. Hydro One properly interpreted that direction in light of existing OEB guidance about the scope of the "no harm" test, which does not include considerations of future rate-setting.

[25] *Rogers Communication Partnership v. Ontario (Energy Board)*, 2016 ONSC 7810 at para. 16.
[26] *Baker v. Canada (Minister of Citizenship & Immigration*, [1999] 2 S.C.R. 817 at para. 26.
[27] *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 at para. 97.
[28] *Baker v. Canada (Minister of Citizenship & Immigration*, [1999] 2 S.C.R. 817 at para. 26.

41. As a result, Hydro One did not discover that the OEB had decided to apply a new test until the day that the final Decision was issued, at which point it had no opportunity to respond or adduce evidence to meet its new burden.

Board Erred in Ruling that Hydro One Failed to File Further Evidence

42. Without new guidance from the OEB, which was not provided, the only basis for Hydro One to understand the OEB's request was the established policy and practice best articulated in the Handbook and through the various prior decisions by the OEB on similar applications. In this regard, and in conjunction with the direction set out in Procedural Order No. 7, Hydro One filed submissions on February 15, 2018, to clarify its expectations with respect to the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers.

43. In its submissions, Hydro One set out the projected cost savings for the initial 10-year period (a 60% reduction from status quo costs) and submitted that these savings were "expected to persist beyond the extended deferred rebasing period."[29] The submissions identified a number of areas in which expected savings were expected to continue into the future, including capital expenditure requirements and sustained operational efficiencies. As a result, Hydro One submitted, it was able to "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."[30]

44. The Board erred in concluding and subsequently relying on its conclusion, at p. 13 of the Decision, that Hydro One did not file further evidence on what it expects the overall cost structure to be following the deferral period or to explain the impact on Orillia's customers. As noted above, Hydro One was directed in Procedural Order No. 7 to file evidence *or submissions*. Hydro One did file further submissions to the best of its ability, having regard to the OEB's established policy and the evidence already on the record in the proceeding. Its submissions expanded upon the record in the proceeding by clarifying its expectation that the cost savings projected over the initial 10-year period would persist

[29] Hydro One, Submissions in Response to Procedural Order No. 7, EB-2016-0276, February 15, 2018, pp. 1, 3.
[30] Hydro One, Submissions in Response to Procedural Order No. 7, EB-2016-0276, February 15, 2018, p. 2.

beyond that period. In the absence of notice from the Board as to the need for information setting out the general methodology of how costs will be allocated by Hydro One after the deferred rebasing period or as to the OEB's expectation that the requested information on the cost structures giving rise to the savings would become the basis for rates that are to be established for Year 11, Hydro One's further submissions sufficiently and reasonably responded to Procedural Order No. 7. Moreover, together with its application and materials already on the record in the proceeding, the further submissions ensured that Hydro One effectively and completely discharged its onus under the OEB's established MAADs policy and criteria for the "no harm" test. As such, the Board should grant Hydro One leave to acquire Orillia Power on the basis of the record filed.

Board's New Criteria Fetters and Preempts the Discretion of a Future Panel

45. Upon harmonizing rates, Hydro One will need to propose a cost allocation methodology where it allocates the common costs of utility functions between the acquired customers in the Orillia service area and its existing 'legacy' customers in a manner that is fair, recognizing the nature of the customers and the avoidance of cross-subsidization.

46. In the Decision, the OEB indicates the need for Hydro One to file evidence in the present application of the cost allocation methodology that would be used in setting rates for the acquired customers at the end of the deferral period in ten years' time. Moreover, the OEB has indicated that the future rates to be paid by the acquired customers following rebasing will be based on the same cost structures used to project the future cost savings in support of the present application.

47. It is critical to recognize that Hydro One itself has no authority to impose costs on the acquired customers at the end of the deferral period. That authority rests with the OEB alone. The allocation of costs with respect to Hydro One's revenue requirement at that time, or a portion thereof, is an element of rate making. As such, the ultimate determination in Year 11 as to the methodology for allocating costs, and the extent to which those costs are allocated to the acquired customers consistent with the savings giving rise to the cost structure, is a matter that is fully in the discretion of the OEB panel that will be responsible for the rebasing application. Hydro One can merely propose an

approach. It will be the OEB that decides at that time. Therefore, to include the general approach to cost allocation as a basis for considering the no harm criteria and to expect such methodology to be the basis for setting rates after the deferred rebasing period – and to rely on that expectation as a basis for a consolidation decision - is not only contrary to established OEB practice, but it also fetters the discretion of the future OEB panels responsible for setting rates for the consolidated entity.

48. In the particular circumstances of Hydro One's proposed transaction, by denying the application and preventing it from being completed the OEB has gone beyond fettering the discretion of a future panel. On this point, it is helpful to contrast the Decision with the Entegrus Decision, where the OEB stated its findings on the price element of the no harm test as follows:

> The OEB has determined that it is reasonable to expect that the underlying cost structures to serve acquired customers following the proposed merger will be no higher than they otherwise would have been. The applicants have satisfied the "no harm" test with respect to price.
>
> 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.[31]

49. In the Entegrus Decision, although in the last sentence of its findings on the price element of the no harm test the OEB states its expectation that future rates paid by the acquired customers will be based on the same cost structures, the OEB provides no further elaboration. This is because, in the Entegrus Decision, the OEB applied the no harm test in accordance with its ordinary practice, which recognizes the fact that rates remain under the discretion of a future panel. As such, the last sentence of the OEB's findings on the price element in the Entegrus Decision can only be taken as the OEB's expectation of the nature of a future panel's consideration.

50. While the OEB restates the aforementioned sentence from the Entegrus Decision in the concluding section of the Decision, it is significant that the OEB then goes on to state immediately thereafter:

[31] OEB, Decision and Order re Amalgamation of Entegrus Powerlines Inc. and St. Thomas Energy Inc., EB-2017-0212, March 15, 2018, p. 9.

> 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.[32]

51. Given that the OEB Panel concluded that Hydro One had filed no new evidence and the Panel also took notice of Hydro One's distribution rate proceeding, the Panel in the MAAD application is, in essence, saying that the proposed consolidation should be denied because the Panel is not confident that the future rates, to be paid by customers in the Orillia Power service area following the 10-year deferred rebasing period, will be based upon the underlying cost structures for serving those customers at that time. Given the OEB's findings in the Decision, the only basis for the Panel's lack of confidence regarding the future rates appears to be the inference it has erroneously drawn from having taken notice of Hydro One's proposals in its distribution rate proceeding (as discussed below). In doing so, the Panel in Hydro One's application has effectively pre-judged, and rejected, the future rebasing application, which is to be properly heard by a future panel, on no basis other than by taking notice of untested proposals filed by Hydro One in relation to unrelated service areas in an unrelated rate proceeding. This is not a proper basis for denying the application.

Board Erred in Relying on Irrelevant Evidence

52. As noted above, the OEB erred in the Decision by relying upon irrelevant evidence from a separate proceeding. Specifically, the OEB relied upon information filed in Hydro One's distribution rates proceeding (EB-2017-0049) with respect to the rates proposed in respect of customers in the service areas of three previously acquired utilities that are unrelated to Orillia Power. The OEB states that "this panel takes notice of the proposed rate increases (for the three previously acquired utilities in the distribution rates proceeding) 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."[33]

[32] Decision, p. 20

[33] Decision, p. 13

53. The panel in the motion proceeding (EB-2017-0320) granted the motions varying Procedural Order No. 6, in part, on the finding that the moving parties did not have an opportunity to thoroughly explore the relevance of the distribution rate application to the MAAD application before the procedural order was issued. The motion panel suggested that the panel in the main application could seek additional information or clarification from the parties as to "whether the outcome of the rate application would provide relevant information about the effect of the acquisition on customers of Orillia Power.[34] While this indicates that the motion panel agreed that the relevance of that information was at issue, it did not determine this issue. Moreover, in issuing Procedural Order No. 7, the panel in the main application opted not to seek submissions on this issue. Despite relevance still being at issue, the OEB panel in deciding the main application took notice of the rate increases proposed by Hydro One in the distribution application.

54. It is important to note that although the distribution rate application pertains to the 2018-2022 period, Orillia ratepayers would not be consolidated into Hydro One's distribution rate classes until the 11th year following the transaction and that the distribution rate application provides no information that would assist the OEB in determining whether these customers will be harmed.[35]

55. Moreover, the OEB, in the Decision, does not take into account that Hydro One's distribution rates proceeding is subject to the OEB's discretion to rule on the appropriate cost allocation methodology to be applied. The panel in the distribution rates proceeding may accept the cost allocation and rates as proposed by Hydro One or establish different rates based on an alternative allocation of Hydro One's costs between acquired customers and existing customers. Given this discretion, it was not appropriate for the OEB in the Decision to rely on Hydro One's rate proposals to inform the Decision and to treat that proposal as a fact as it does not yet form the basis of a Board determination and is subject to change.

[34] OEB, Decision and Order, EB-2017-0320, January 4, 2018.

[35] Hydro One, Submissions, EB-2017-0320, August 14, 2017.

56. Even if the materials from the rate application were relevant and probative – which Hydro One disputes – the OEB still erred in relying on those materials in the current proceeding without providing notice to Hydro One. Although section 21(6.1) of the OEB Act permits the OEB to consider evidence from other proceedings without consent, it does not permit the OEB to consider such evidence without notice to the parties. To the contrary, the OEB has recognized that it cannot blindside parties by making decisions based on evidence that the parties would not expect the OEB to consider within a specific proceeding. As the OEB stated in its 2006 "*Report with Respect to Decision-Making Processes at the OEB*," parties to OEB proceedings have the "right to know and answer the case they have to meet. This involves a requirement that a decision maker not base his or her decision on facts which are not on the record and parties have the opportunity to respond to legal and policy arguments that are considered by the decision-maker."[36] In the current case, by relying on extraneous evidence without notice, the OEB denied Hydro One the "right to know and answer the case [it had] to meet." As such, the OEB breached its duty of fairness.

Proposed Approach to Rate Harmonization Based on the Decision

57. In the alternative, if the panel on this motion decides to grant the motion but is unable to grant the requested relief of approving the proposed transaction on the basis of the existing record in the proceeding, in response to the Decision and the new criteria relating to no harm articulated therein, Hydro One proposes the following approach relating to the underlying cost structure and basis of rates following the deferred rebasing period.

58. The information provided in support of this proposed approach is based on Hydro One's understanding of the OEB's new expectations regarding the criteria for applying the "no harm" test in considering the impact on price, particularly in Year 11, as articulated in the Decision and to which Hydro One did not have an opportunity to respond.

59. As described in the Affidavit of Joanne Richardson, attached hereto as Schedule 'A', in the harmonization and rebasing application following the deferred rebasing period for the Orillia Power service territory, Hydro One would commit to seeking approval to allocate

[36] OEB, *Report with Respect to Decision-Making Processes at the OEB*, September 2006, p. 26.

Hydro One's Shared Costs to the acquired customers in the Orillia Power service territory in an amount that would be less than $5.8M which, together with the Residual Cost to Serve of $6.8M, would be lower than the Orillia Power Status Quo cost to serve of $12.6M.[37]

60. For years subsequent to Year 11, Hydro One would propose setting the new revenue requirement for the former Orillia Power service territory by adopting the same percentage change in revenue requirement that the Board approves for all Hydro One Distribution customers. This would ensure that the acquired Orillia Power customers would pay the residual cost to serve them (with 'no harm' to Hydro One's legacy customers), while also ensuring that the acquired Orillia Power customers are paying no more than they would have paid in the absence of the transaction (with 'no harm' to the former Orillia Power customers).

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

Threshold Test is Satisfied

62. Rule 43.01 of the OEB's *Rules of Practice and Procedure* provides that, in respect of a motion brought under Rule 40.01, the OEB may determine, with or without a hearing, a

[37] Capitalized terms not otherwise defined in this section have the meanings given in the Affidavit of Joanne Richardson, attached as Schedule 'A'.

threshold question of whether the matter should be reviewed before conducting any review on the merits. The OEB applies the following tests (the "Threshold Tests"):[38]

- *the grounds must raise a question as to the correctness of the order or decision;*
- *the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the OEB deciding that the decision should be varied, cancelled or suspended;*
- *the motion must show that there is an identifiable error in the decision, as a review is not an opportunity for a party to reargue the case;*
- *in demonstrating that there is an error, the party bringing the motion 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; and*
- *the error must be 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.*

63. The grounds for this motion raise a number of material questions as to the correctness of the OEB's decision to reject Hydro One's application to acquire the shares of Orillia Power, and should therefore be corrected by granting the relief sought above. The OEB's conclusion is, as set out above, contrary to both its own existing guidance and to the evidence that was before the panel. Its findings also demonstrate that it failed to consider material evidence. Once corrected, the OEB would have determined that the proposed consolidation transaction satisfied the "no harm" test, and would have approved the transaction. As such, Hydro One has satisfied the Threshold Tests and the OEB should proceed to hear this motion on its merits.

Documentary Evidence:

64. The following documentary evidence will be used at the Motion:

(a) materials from the record in EB-2016-0276 and EB-2017-0320;

(b) the Decision;

[38] *Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision* in EB-2006-0322/-0338/-0340 at p. 18.

(c) the Affidavit of Joanne Richardson, sworn May 2, 2018;

(d) Hydro One's submissions on this Motion to be delivered in accordance with the OEB's procedural order or orders; and

(e) such further evidence as counsel may advise and the OEB may permit.

May 2, 2018

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Charles Keizer (LSUC#: 34735D)
Tel: 416.865.7152

Jonathan Myers (LSUC#: 49869V)
Tel: 416.865.7532

Counsel for the Applicant,
Hydro One Inc.

TO: **ONTARIO ENERGY BOARD**
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario M4P 1E4

AND TO: **BORDEN LADNER GERVAIS LLP**
Bay Adelaide Centre, East Tower
22 Adelaide St. W.
Toronto, Ontario M5H4E3

J. Mark Rodger
Tel: (416) 367-6190
Fax: (416) 367-6749

Counsel for the Applicant,
Orillia Power Distribution Corporation

AND TO: All Intervenors in EB-2016-0276

TAB 4

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July 2017

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Library and Archives Canada Cataloguing in Publication

Blake, Sara, 1956
Administrative law in Canada/Sara Blake. — 6th ed.

Includes index.
ISBN 978-0-433-48662-6

1. Administrative law — Canada. I. Title.

KE5015.B53 2006 342.71'06 C2006-900980-5

Published by LexisNexis Canada, a member of the LexisNexis Group
LexisNexis Canada Inc.
111 Gordon Baker Road, Suite 900
Toronto, Ontario
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Email: customerservice@lexisnexis.ca
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Printed and bound in Canada.

¶4.37 Benefits may be reinstated on appeal effective the date they were revoked.[104] Eligibility for benefits may not be backdated due to delay in processing an application[105] but, if an emergency makes it impossible to meet a requirement for prior approval, necessity may permit retroactive approval.[106]

¶4.38 Rates may be fixed as at the date of the interim rate order or application[107] but may not compensate for a windfall or loss resulting from a prior final rate order.[108] Authority to review a decision fixing rates may be exercised to adjust the rates effective the date of the earlier order.[109] An order, directing the use of funds that were ordered put aside in case of a difference between forecast and actual revenues and costs, is not regarded as retroactive.[110]

6. Contempt Powers

¶4.39 Every tribunal has an inherent power to control its own processes but may not punish a person for contempt unless it is granted, by statute, the powers of a superior court to enforce its own orders.[111]

D. PREVIOUS DECISIONS ARE NOT BINDING

¶4.40 When a tribunal is faced with a new case raising legal or policy issues similar to those decided in a previous case between the same parties, the tribunal is not bound by the concept of *res judicata*. This flexibility enables a tribunal to apply the public interest in a way that reflects the evolution of policy and effectively regulates dynamic and ongoing relationships between parties. A tribunal may permit re-litigation and may

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[104] *Kelley v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2009] N.B.J. No. 165 (N.B.C.A.).

[105] *Lee v. British Columbia (Employment and Assistance Appeal Tribunal)*, [2013] B.C.J. No. 575 (B.C.S.C.).

[106] *C.-W. (C.) (Litigation guardian of) v. Ontario (Health Insurance Plan, General Manager)*, [2009] O.J. No. 140 (Ont. Div. Ct.).

[107] *Nova Corp. v. Amoco Canada Petroleum Co.*, [1981] S.C.J. No. 92; *Eurocan Pulp and Paper Co. v. British Columbia (Energy Commission)*, [1978] B.C.J. No. 1228 (B.C.C.A.).

[108] *Northland Utilities (Yellowknife) Ltd. v. Northwest Territories (Public Utilities Board)*, [2010] N.W.T.J. No. 91 (N.W.T.S.C.).

[109] *Scott v. Nova Scotia (Rent Review Commission)*, [1977] N.S.J. No. 571 (N.S.C.A.).

[110] *Bell Canada v. Bell Aliant Regional Communications*, [2009] S.C.J. No. 40.

[111] *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64; *Sternberg v. Ontario (Racing Commission)*, [2008] O.J. No. 3864 (Ont. Div. Ct.).

come to a different conclusion without risk of court interference.[112] However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.[113]

¶4.41 A tribunal may refuse to permit parties to re-litigate factual questions. It may rely on findings of fact made in previous proceedings between the same parties, if these findings are relevant to the present proceeding and there is no new evidence that would support a different finding.[114]

¶4.42 Immigration and mental health statutes require periodic reviews of the detention of individuals. Though, the issue on review is whether, in the current circumstances, continued detention is warranted, the tribunal should have regard to and should not depart from its previous detention decisions without compelling reasons.[115]

¶4.43 The principle of *stare decisis* does not apply to tribunals.[116] A tribunal is not bound to follow its own previous decisions on similar issues.[117] Its decisions may reflect changing circumstances and evolving policy in the field it governs. A departure from a previous ruling should be explained.[118] The analytical framework of previous decisions should be reviewed to reduce the risk of arbitrariness[119] and the tribunal should

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[112] *Sackville (Town) v. Canadian Union of Public Employees, Local 1188*, [2007] N.B.J. No. 97 (N.B.C.A.); *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1931 (F.C.A.), leave to appeal refused [2004] S.C.C.A. No. 62; *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, [2004] N.B.J. No. 219 (N.B.C.A.); *Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union, Local 832*, [1981] S.C.J. No. 75, adopting dissenting reasons of Monnin J.A. *Manitoba Food and Commercial Workers Union, Local 832 v. Canada Safeway Ltd.*, [1981] M.J. No. 89 (Man. C.A.).

[113] *Canadian Red Cross Society v. United Steelworkers of America*, [1991] N.B.J. No. 314 (N.B.C.A.).

[114] *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, [2004] N.B.J. No. 219 (N.B.C.A.); *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America*, [1980] O.J. No. 3727 (Ont. Div. Ct.), leave to appeal refused (1980), 30 O.R. (2d) 29*n* (Ont. C.A.).

[115] *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] F.C.J. No. 15 (F.C.A.).

[116] *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75; *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269 (Halifax Longshoremen Assn.)*, [2004] N.S.J. No. 316 at para. 82 (N.S.C.A.), leave to appeal refused [2004] S.C.C.A. No. 464.

[117] *Maitland Capital Ltd. v. Alberta (Securities Commission)*, [2009] A.J. No. 523 (Alta. C.A.).

[118] *J.D. Irving, Ltd. v. International Longshoremen's Assn., Local 273 (General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, New Brunswick)*, [2003] F.C.J. No. 951 (F.C.A.), leave to appeal refused [2003] S.C.C.A. No. 393.

[119] *Canadian Union of Public Employees, Local 2745 v. New Brunswick (Board of Management)*, [2004] N.B.J. No. 110 (N.B.C.A.), leave to appeal refused [2004] S.C.C.A. No. 215.

anticipation of appeal.[152] New hearings may be held to cure the prejudice caused to a party by procedural deficiencies.[153] If the decision is a nullity because required procedure was not followed, or if a court has quashed the decision, the tribunal may start again.[154] If the decision was made in the absence of a person affected by the order, who should have been notified but was not, the tribunal may reopen the matter.[155] If a party was unable, through no personal fault, to exercise the right to be heard, the hearing may be reopened.[156] The investigation of a closed complaint may be reopened even if the subject of the investigation has been told that no further action will be taken.[157] It is not accurate to characterize any of these circumstances as a "re-hearing" or a new proceeding. They are a continuation of the original proceeding that was not properly completed.[158]

¶4.54 Applying the finality principle, a matter should not be re-heard if, a reasonable time after the decision, a party made binding commitments,[159] unless there is compelling new evidence.[160] A decision that implemented a settlement agreement should not be reopened if the parties have performed their obligations under the agreement.[161]

¶4.55 Where a court decision changed the interpretation of a statutory provision, previous decisions that were based on the erroneous interpretation may be reopened at the discretion of the tribunal, subject to restrictions on making retroactive orders.[162]

¶4.56 A person whose application was denied may file a new application but a repeat applicant who does not provide more information, which would warrant fresh consideration, may be precluded from filing

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[152] *Sea-Scape Landscaping v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2004] N.B.J. No. 348 (N.B.C.A.); *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*, [2009] O.J. No. 4501 (Ont. C.A.).

[153] *Gill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 53 (F.C.A.).

[154] *Chandler v. Alberta Assn. of Architects*, [1989] S.C.J. No. 102.

[155] *Di Leo v. Hétu*, [1982] C.S. 442 (Que. S.C.).

[156] *Kaur v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 1100 (F.C.A.); *Zutter v. British Columbia (Council of Human Rights)*, [1995] B.C.J. No. 626 (B.C.C.A.), leave to appeal refused [1995] S.C.C.A. No. 243.

[157] *Holder v. College of Physicians and Surgeons*, [2002] M.J. No. 405 (Man. C.A.), leave to appeal refused [2002] S.C.C.A. No. 519.

[158] *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1980] O.J. No. 3845 (Ont. C.A.), leave to appeal refused [1981] 1 S.C.C.A. No. 254; *Webb v. Ontario (Securities Commission)*, [1987] O.J. No. 161 (Ont. Div. Ct.).

[159] *Laidlaw Transport Ltd. v. Bulk Carriers Ltd.*, [1979] O.J. No. 4135 (Ont. Div. Ct.).

[160] *Saskatchewan Wheat Pool v. Canadian Grain Commission*, [2004] F.C.J. No. 1568 (F.C.).

[161] *Manitoba v. Happy Penny Donut Palace*, [1985] M.J. No. 114 (Man. C.A.).

[162] *Campbell v. Prince Edward Island (Workers' Compensation Board)*, [1997] P.E.I.J. No. 56 (P.E.I.C.A.); *Kelly Western Services Ltd. v. Manitoba (Municipal Board)*, [2000] M.J. No. 323 (Man. Q.B.).

repetitive applications that attempt to re-litigate an application that has been decided.[163] On a repeat application by an applicant who did not accept conditions attached to a previous grant of the same application, a tribunal is not bound by its first decision and may decide all issues afresh.[164] A power to reconsider an application may not be used to compel an applicant to revise its application. The tribunal may review only the application originally filed and further particulars it requires.[165]

¶4.57 On whose initiative may a tribunal exercise its power to re-hear? If the statute empowers the tribunal to re-hear a matter, but is silent as to who may cause the re-hearing, the matter may be re-heard at the request of any person affected by the order or on the tribunal's own initiative.[166] If the statute grants a power to re-hear only at the request of a party, the tribunal may not re-hear on its own initiative.[167]

¶4.58 A party has no right and a tribunal is not obliged to re-hear a matter.[168] A tribunal has discretion.[169] A tribunal that has a published policy indicating the circumstances when a matter may be re-heard should not refuse to re-hear in other circumstances and should be willing to reconsider whenever appropriate.[170] A tribunal may refuse a request to re-hear a matter if a considerable period of time has passed since the original decision,[171] or if the request is a tactic to delay implementation of the order or to extend a limitation period.[172]

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[163] *Kaloti v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 365 (F.C.A.); *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 866 (F.C.), vard [2010] F.C.J. No. 1159 (F.C.A.); *Regional Assessment Commissioner, Region No. 9 v. 674951 Ontario Ltd.*, [1999] O.J. No. 3774 (Ont. Div. Ct.); *Sawatsky v. Norris*, [1992] O.J. No. 1253 (Ont. Gen. Div.); *Baron v. Nova Scotia (Community Services)*, [2009] N.S.J. No. 239 (N.S.S.C.).

[164] *Davidson v. Calgary (City)*, [2007] A.J. No. 1317 (Alta. C.A.).

[165] *Canadian Pacific Ltd. v. Canada (Transport Commission)*, [1980] F.C.J. No. 99 (F.C.A.).

[166] *Canadian Pacific Ltd. v. Canada (Transport Commission)*, [1980] F.C.J. No. 99 (F.C.A.).

[167] *Canada (Employment and Immigration Commission) v. Macdonald Tobacco Inc.*, [1981] S.C.J. No. 35.

[168] *Re Union Canadienne de l'Industrie des Pêches v. des Travailleurs, Local 140*, [1981] N.B.J. No. 83 (N.B.C.A.); *Sparrow v. Canada (Minister of Manpower and Immigration)*, [1977] F.C.J. No. 211 (F.C.T.D.); *Jordan v. York University Faculty Assn.*, [1977] O.J. No. 2526 (Ont. Div. Ct.); *Garba v. Lajeunesse*, [1978] F.C.J. No. 179 (F.C.A.).

[169] *Hospital Employees Union, Local 180 v. Peace Arch District Hospital*, [1989] B.C.J. No. 286 (B.C.C.A.).

[170] *Hall v. Ontario (Ministry of Community and Social Services)*, [1997] O.J. No. 5212 (Ont. Div. Ct.).

[171] *Roeder v. British Columbia (Securities Commission)*, [2005] B.C.J. No. 693 (B.C.C.A.); *Webber v. Neil*, [1996] N.J. No. 268 (Nfld. T.D.); *Commercial Union Assurance Co. of Canada v. Ontario (Human Rights Commission)*, [1987] O.J. No. 438 (Ont. Div. Ct.), affd [1988] O.J. No. 405 (Ont. C.A.).

[172] *Lodger's International Ltd. v. O'Brien*, [1983] N.B.J. No. 128 (N.B.C.A.).

TAB 5

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

2007 ABCA 364 (CanLII)

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
Q.B. No. 0601-09572

Between:

James W. Davidson and Patricia M. Davidson

Respondents
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- and -

The City of Calgary

Appellant
(Respondent)

- and -

1167648 Alberta Ltd. And Vango Custom Homes Inc.

Respondents
(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

2007 ABCA 364 (CanLII)

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)

2007 ABCA 364 (CanLII)

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

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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).

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[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

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> 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

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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*.

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[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.

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[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.

2007 ABCA 364 (CanLII)

Appearances:

T. Bardsley
for 1167648 Alberta Ltd. and Vango Custom Homes Ltd.

S. Petruik & E. Grier
for James W. Davidson and Patricia M. Davidson

L.J. Gosselin
for The City of Calgary

TAB 6

Case Name:

Enbridge Gas Distribution Inc. (Re)

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O.1998, c. 15, (Schedule B); AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas commencing January 1, 2014.

2014 LNONOEB 14

No. EB-2012-0459

Ontario Energy Board

Panel: Paula Conboy, Presiding Member; Cynthia Chaplin, Member; Emad Elsayed, Member

Decision: July 17, 2014.

(317 paras.)

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DECISION WITH REASONS

Introduction

1 Enbridge Gas Distribution Inc. is a natural gas distributor serving about two million customers primarily in the Toronto, Ottawa, and Niagara areas of Ontario. Enbridge has applied to the Ontario Energy Board for approval of new distribution rates. The application relates to the costs for distribution infrastructure, pipelines, compressor stations, metering, customer service, and all the other activities of a distributor - everything except the commodity costs of the natural gas.[1]

2 Enbridge can only charge rates which are approved by the Board, but the company is responsible for proposing specific rates and supporting those proposals with evidence. After conducting a public hearing, which includes the participation of customer representatives and other interested stakeholders, the Board may approve the proposals, may reject the proposals and direct the company to re-apply, or may modify the proposals and implement different rates. The Board's authority in this area is set out in section 36 of the *Ontario Energy Board Act*.

3 In the past, Enbridge has applied for rates for one year, or for as long as 5 years using a

formulaic adjustment mechanism. Enbridge's current application is quite different. The company has provided five years of forecast data and is seeking approval now for rates for each of those five years, although some adjustments would be made each year for certain pre-determined factors. If Enbridge's application were approved in full, residential ratepayers would see their rates decrease somewhat in 2014 and then increase each year between 2015 and 2018. The specific rate changes proposed by Enbridge are set out in the table below.

Residential Rate Impacts (Proposed)

	2014	2015	2016	2017	2018
Rate Increase (Proposed)	-1.7%	2.1%	4.6%	2.4%	2.5%

4 Often Enbridge has been able to reach a negotiated settlement with the participants in its rates proceedings, most of whom represent different groups of ratepayers. The negotiations were not successful this time, so all of the issues are being decided by the Board through this decision. All of the information and evidence related to this hearing is available on the Board's website under the file number EB-2012-0459.

5 The Board has decided to approve Enbridge's proposed approach, but with a number of important modifications. The modifications will reduce the rate impacts, incent Enbridge to become more efficient, and reduce the risk to ratepayers if Enbridge's major capital projects go over budget. Details about each of the issues in this application are contained in this decision. Once the company has received the decision, it will make the necessary calculations to determine the final rates. Once those are available, the specific impacts on ratepayers will be known with greater certainty. However, the Board expects the results of its decision to be little or no change to the rate reduction in 2014 and somewhat lower rate increases in 2015 through 2018 than Enbridge proposed.

6 As part of this application, Enbridge also sought approval to change how it accounts for the costs to remove assets from service, known as "site restoration costs". In changing the method used, Enbridge and its advisors have concluded that more money has been collected from ratepayers than is now considered necessary. As a result, there will be a refund to ratepayers over the next five years, which is separate from the rate changes described above. The Board has decided to accept Enbridge's proposal but with modifications which will result in a somewhat larger refund to ratepayers.

7 A significant number of issues are addressed in this decision. The overarching issue is which rate setting mechanism should be used, and the Board addresses that issue first in the next section. Subsequent sections address the specific components of the rate plan, the budgets which support the plan, and the associated accounting, rate design and implementation issues.

Rate Setting Mechanism

8 Enbridge proposed a five-year Custom Incentive Rate-setting ("Custom IR") plan to begin January 1, 2014. If approved, the plan would fix Enbridge's allowed distribution revenue ("Allowed Revenue") for each year in the five-year term based on a forecast of capital and operating costs, inclusive of productivity savings. The proposed revenue requirement for 2014 is $1,009 million, rising to an estimated $1,292 million in 2018.

9 The concept of any incentive rate-setting approach is that it decouples costs from the rates that a distributor charges for its services. This is deliberate and is designed to incent more efficient performance. The approach provides the opportunity for a distributor to earn, and potentially exceed, the allowed rate of return on equity. The Board monitors the company's results over the term of the plan to ensure that the company is actually finding productivity improvements and not simply cutting costs in a way which compromises safety, reliability or other important customer metrics. The Board also monitors the company's financial results over the plan term to make sure that the company did not over-forecast its costs at the outset of the plan.

10 The Board has been regulating natural gas and electricity utilities under IR plans for years and the approach has been widely used in other jurisdictions such as the Great Britain and Australia. In 2005, the Board set out the criteria for natural gas utility IR plans in its Natural Gas Forum ("NGF") Report. Electricity distributors have been under some form of IR regulation since 2000. Most recently, the Board issued its Renewed Regulatory Framework for Electricity Distributors ("RRFE")[2] report in which the Board outlines a new five-year Custom IR option for electricity distributors, along with a traditional IR option and an Annual IR option.

11 Enbridge explained that in developing its proposal, it was guided by the NGF Report and the RRFE Report as well as a "building blocks" ratemaking model that has been used in Great Britain and Australia. Enbridge's proposed Custom IR plan and its last IR plan both relied on forecasts of costs and revenues. However, in the last IR ("traditional IR"), rates for the first year were set on a single forward test-year cost of service (or "base" year) basis. Rates for subsequent years of the plan were set using an index based on an externally derived inflation factor and productivity adjustment. These annual rate adjustments recognize that costs rise with inflation but also that a company should be striving for continuous improvement in productivity. In the current application, Enbridge proposed to set its rates for 2014 through 2018 based on a five-year forecast of its revenue requirement and sales volumes. Some annual adjustments are proposed for certain pre-determined factors; these are discussed further elsewhere in this decision.

12 Most parties opposed Enbridge's proposal and many argued that the Board should impose a

traditional IR plan on the company.

Board Findings

13 Enbridge's application for a "Custom IR plan" is the first of its kind since the Board issued its RRFE Report. The RRFE Report was targeted explicitly to electricity distributors. However, the objectives and principles in the RRFE Report are consistent with those of the earlier NGF Report which focused exclusively on natural gas. In many important respects the Board's policy articulated in the RRFE Report is the natural evolution of the Board's thinking in the areas of both natural gas and electricity rate-setting. It is therefore appropriate that Enbridge looked to the RRFE Report for guidance on developing its plan.

14 Each Custom IR application will be considered on an individual basis. Indeed, one of the purposes of the Custom IR option is to provide a utility with the opportunity to tailor its rate profile to meet its specific needs. However, an applicant for Custom IR is also responsible for providing a robust plan which is properly documented and supported. This initial Custom IR application by Enbridge has been a significant learning experience for all parties and for the Board as it works to implement its new policy framework. It is the Board's expectation that this decision will provide further guidance on the interpretation and implementation of the Board's rate-setting policies.

15 Enbridge submitted that a Custom IR is appropriate given its extraordinary capital requirements, especially its GTA and Ottawa projects and its Work and Asset Management project. Together, these projects raise the capital expenditures over the 2014 to 2018 period by approximately 28% above what Enbridge termed its "core capital" requirements.[3] The company also noted that its increasing depreciation costs, productivity challenges and uncertainty about its other capital spending requirements contributed to the need for the Custom IR framework. Enbridge claimed that it would not be able to provide safe and reliable service to its customers if the company were subject to the formulaic adjustments approved under a traditional IR.

16 Enbridge also maintained that the Custom IR plan will benefit customers by supporting necessary investment to ensure safe and reliable service. In Enbridge's view, customers and the company will benefit from the establishment of rates for a five-year period because it will produce fair and predictable rates while reducing regulatory burden. Under Enbridge's proposal customer distribution bills are projected to increase by an average of 2% annually, with an initial reduction followed by increases above expected inflation. The Board has indicated that distributors whose capital needs are expected to be comparatively stable over time should be able to operate under the traditional IR plan. Intervenors argued that there are provisions under the traditional IR that could accommodate the three major projects and that the company could operate safely and reliably under traditional IR because the company's core capital is relatively stable.

17 The Board finds that Enbridge's capital requirements are sufficient to support the request for a Custom IR. Other approaches could have been used, for example the Incremental Capital Module that is available to electricity distributors under traditional IR or the Y factor approach negotiated by

Union Gas, but it is open to a utility to request a Custom IR if the expenditures are significant and if the application is adequately supported. As the Board stated in the RRFE Report:

> *The Custom IR method will be most appropriate for distributors with significantly large multi-year or highly variable investment commitments that exceed historical levels*.[4]

18 Many parties also argued that the traditional IR model contained in Union Gas' Settlement Agreement and subsequently approved by the Board (EB-2013-0202, 2013 LNONOEB 11) should be applied to Enbridge. The Board does not accept this argument. The Board has long indicated its reluctance to impose a negotiated settlement from one utility to another without a thorough analysis of the circumstances for each utility. In accepting settlement agreements, the Board has made it clear that there is no precedential value in the individual components of a settlement agreement as all settlements contain trade-offs. The Board will not impose the Union Gas Settlement Agreement on Enbridge.

19 In its RRFE Report, the Board indicated that a distributor applying for Custom IR would need to file robust evidence and external benchmarking to support the reasonableness of its forecasts, especially given the recognized incentive to over-forecast, the uncertainties with long-term forecasting, and the level of rate increases projected (higher than under traditional IR). The Board also identified its expectation that a distributor would file a comprehensive asset management plan that is linked to the capital budget and operationalized to support the prioritization of decisions and the optimization of utility assets. A distributor would need to demonstrate its ability to manage within the rates set, given that actual costs and revenues will ultimately vary from forecast.

20 Parties argued that Enbridge has not provided sufficiently robust evidence on its costs and revenues that would allow the Board to set rates that are just and reasonable for the next five years. Specifically parties criticized the benchmarking work which compared Enbridge to a number of peer US companies. Enbridge retained Concentric Energy Advisors Inc. ("Concentric") to undertake benchmarking analysis and Mr. Coyne from Concentric provided expert evidence at the oral hearing. The Concentric studies concluded that Enbridge is among the most efficient of its US peers in most categories measured. Enbridge argued that Concentric's benchmarking analysis confirms that the company is among the most efficient. Board staff retained Pacific Economics Group Research LLC ("PEG") to undertake analysis of the Enbridge proposal, and Dr. Kaufmann from PEG provided expert evidence at the oral hearing. Dr. Kaufmann was of the opinion that the benchmarking analyses were inadequate. Most parties supported Dr. Kaufmann's analysis and argued that the benchmarking analysis provided by Concentric was flawed and could not be relied upon to reach conclusions as to the efficiency level of Enbridge or the reasonableness of its budgets.

21 The Board finds that there are significant limitations to the benchmarking analysis. First, it is not a total cost benchmarking. Other than net plant per customer the Concentric analysis did not include capital costs in its benchmarking and yet capital represents approximately 65% of the total

costs in this case. The RRFE Report is clear that the Board will use total cost benchmarking. Mr. Coyne and Dr. Kaufmann did prepare ad hoc measures of total unit cost during the proceeding. In the case of Dr. Kaufmann, the results suggest that Enbridge is not as efficient as Enbridge claims to be. Second, there are significant concerns with the comparator group developed by Concentric, which was driven significantly by weather considerations. Dr. Kaufmann disagreed that weather would be a significant factor. The evidence was not conclusive one way or the other regarding the importance of weather, however, because of its reliance on the weather factor, the Concentric comparator group included companies which in other important respects are not comparable to Enbridge and excluded companies which in other important respects are comparable to Enbridge. In particular, the comparator group contains a number of older northeast utilities which still have large amounts of cast iron and bare steel pipe, which Enbridge has mostly replaced, and the group excludes almost all the rapidly growing utilities, of which Enbridge is one. The Concentric analysis did not adequately examine the impact of using other criteria for its selection process.

22 The Board finds that because of these limitations the benchmarking evidence does not support a conclusion that Enbridge is particularly efficient. Without this external analysis, the Board must rely on the internal analysis of the budget and the company's own plans for productivity improvements. This is discussed further in later sections of this decision.

23 Enbridge, however, has committed to developing a benchmarking study that attempts to address both capital and operating costs and to holding a consultation with stakeholders that will allow for review of and feedback on the benchmarking study. Based on the results of the consultation, Enbridge proposed to develop a benchmarking study to be filed on rebasing which, Enbridge intends, will use a methodology that has been accepted by all parties, including Board staff and its expert. The Board views this as an important and valuable commitment and therefore will not reject the Custom IR proposal on the grounds of insufficient benchmarking. The Board will accept Enbridge's proposal but expects that Enbridge's benchmarking work will be supported by independent expert opinion. In addition, the Board will require Enbridge to report on its progress in this area as part of its annual reporting. For purposes of current rate setting, the Board will address the shortcomings in the current benchmarking through suitable modifications to the Custom IR plan.

24 The Board also finds that there is limited external analysis of Enbridge's capital and operating and maintenance budgets. Enbridge maintained that there is no requirement in the Board's RRFE Report that benchmarking evidence must be filed by an applicant.

25 Enbridge interpreted the RRFE Report's wording to mean that an applicant, Board staff, or any other party may provide benchmarking evidence. However, the RRFE Report is quite clear that the Board expects such analysis to be presented in the application:

> *In addition, the Board sees merit in receiving the evidence of third party experts as part of a distributor's application, or retaining its own third party experts, in*

> *relation to the review and assessment of distributor asset management and network investment plans (along with other evidence filed by the distributor).*[5]

26 Enbridge submitted, however, that it did engage experts who rendered opinions on specific programs which have been filed in evidence (e.g. WAMS, AMP Fitting Replacement program). Those studies were useful, but the Board's evaluation of the reasonableness of Enbridge's proposed capital forecasts would have greatly benefited from more extensive external independent analysis. The Board does not accept Enbridge's view that such independent assessment cannot be conducted. It is the Board's expectation in a Custom IR application with a significant capital component that the applicant will provide the necessary support, including independent total-cost benchmarking and independent assessment. Enbridge also argued that the hearing process itself provides a form of third-party expert assessment. While the analysis and arguments presented through the public hearing process are an important part of the Board's decision making process, independent expert opinion is a different sort of analysis and equally valuable to the Board.

27 As a result of the lack of an independent expert assessment as well as shortcomings related to the benchmarking analyses, the Board has concluded that there is insufficient evidence to support the proposed allocation of risk between the company and ratepayers in the area of capital expenditures and insufficient productivity in the area of operating and maintenance expenditures. Each of these is addressed in detail later in this decision.

28 However, the Board recognizes that this is the first Custom IR application which the Board has received. Being the first, Enbridge has had to deal with a high level of uncertainty as to how the parties and the Board would apply the policy principles in the NGF Report and RRFE Report to a specific case.

29 The Board concludes that it better serves the public interest to approve Enbridge's Custom IR plan, with appropriate modifications, than to reject the application or impose an alternative model. The Board reaches this conclusion for two reasons: Enbridge's willingness to modify its proposals and the Board's ability to remedy the shortcomings of the plan through suitable modifications.

30 Enbridge has continued to show a willingness to address the concerns raised throughout the proceeding and to propose alternatives. In particular, the original application included a proposal that the company's 2017 and 2018 capital budgets would be determined midway through the Custom IR term. In response to stakeholder concerns, the company agreed to assume greater capital risk by updating its application to use the 2016 capital budget (excluding the Work and Asset Management System project) as the forecast for 2017 and 2018. Enbridge also agreed to additional stakeholder consultation and annual reporting. The Board concludes that each of these modifications represents a significant improvement in the Custom IR plan.

31 The Board will make further modifications to the plan to enhance customer benefits during the Custom IR plan and reduce the risks to customers. The modifications include the following:

* The Earnings Sharing Mechanism has been modified to provide greater benefits to ratepayers.

* The Sustainable Efficiency Incentive Mechanism proposal has not been approved as proposed.

* A variance account for the GTA Project will not be established, thereby reducing the risk to ratepayers.

* A threshold will be applied to the Mains Relocations and Mains Replacement Variance Accounts, to reduce the risk to ratepayers.

* Operating and Maintenance costs have been reduced to allocate more efficiency benefits to ratepayers.

* The Cost of Capital will be re-set each year using the Board's established approach.

32 Each of these modifications is discussed in detail later in this decision. The Board will also implement a number of reporting requirements in order to monitor Enbridge's performance against the plan. Other modifications have been made as well, which are not directly related to the specific rate-setting mechanism. Detail on those subjects also appear later in this decision.

33 It is the Board's intention that this decision will provide guidance to future applicants, although the Board recognizes that each Custom IR application will have unique characteristics.

34 The remaining sections of this decision address the following major topics:

* The Custom IR components

* The volume and revenue forecast underpinning Enbridge's plan

* Capital expenditures

* Operating and maintenance expenditures

* Cost of capital

* Site Restoration Costs

* Deferral and variance accounts

* Cost allocation and rate design

* Reporting

* Implementation

Plan Components

35 Enbridge's proposed Custom IR includes a number of factors which are also used in traditional IR. These include an Earnings Sharing Mechanism, a Z Factor, and an off-ramp. Enbridge proposed an additional factor, a Sustainable Efficiency Incentive Mechanism. Each of these will be addressed in this section. Parties also made proposals regarding adjustments for 2013 results for purposes of setting rates going into the Custom IR. The Board will address that issue first.

Adjustments for 2013 Results

36 Enbridge's 2013 financial results show that the company earned 148 basis points above the return on equity that underpins Enbridge's 2013 Board approved rates (or $31.2 million gross basis inclusive of tax). Intervenors argued that the Board should reduce the 2014 base by the $31.2 million 2013 revenue sufficiency. They submitted that this would result in a more realistic base year starting point for the Custom IR which limits the recovery in rates to the Board approved return. Without the adjustment, intervenors argued, Enbridge would build up significant overearnings over the 5 year plan. The Association of Power Producers of Ontario ("APPrO") claimed that Enbridge's 2013 over earnings imply that the 2013 Board approved revenues and cost projections were conservative in Enbridge's favour. The Building Owners and Managers Association (Toronto) ("BOMA") pointed to the recent Union Gas 2014-2018 IRM Settlement Agreement (EB-2013-0202), in which Union Gas agreed to reduce its 2014 revenue requirement by $4.5 million to compensate for 2013 over earnings.

37 Enbridge provided explanations for the factors that contributed to the 2013 revenue sufficiency and stated that the sufficiency does not change the forecast risk in the 2014 through 2018 forecasts. In Enbridge's view, these factors were either one-time events or beyond the

company's ability to control. In all instances, according to Enbridge, the factors are not indications of expected future revenue sufficiency.

38 Enbridge also argued that by advocating for a $31.2 million adjustment, the intervenors were essentially inappropriately introducing an earnings sharing mechanism into a cost of service year (which typically does not have an earnings sharing mechanism) and attributing ratepayers with 100% of the benefits.

Board Findings

39 The Board does not accept that Enbridge is necessarily starting its custom IR period with a built in revenue sufficiency from 2013. A Custom IR is not set based on a single cost of service year the way Enbridge's prior traditional IR plan was. A Custom IR is based on five-year forecasts of costs. Once set, the company is then required to operate within that envelope for the next 5 years. This proceeding provides a complete look at all the costs for the next 5 years and therefore adjustments for whether the company over- or under-earned in the previous year would not be appropriate. However, the fact that Enbridge has been able to consistently over-earn in every year under its last IR plan will inform the Board's thinking on what is required to operate the business going forward.

40 Parties noted that Union Gas agreed to a reduction in 2014 to compensate for over-earnings in 2013. However, Union Gas adopted a traditional IR plan, not a Custom IR plan. At the time of Enbridge's 2013 settlement, the parties may have expected that 2013 would be followed by a traditional IR plan. However, the 2013 settlement agreement made no provision for an alternative outcome and did not include an earnings sharing mechanism. The Board subsequently issued its RRFE Report that provided for a Custom IR option. Enbridge used the report as guidance and submitted a Custom IR plan. It would be inappropriate to impose an Earnings Sharing Mechanism for 2013 after the fact.

Earnings Sharing Mechanism ("ESM")

41 An Earnings Sharing Mechanism ("ESM") is a tool which provides for benefit sharing between ratepayers and shareholders if the company earns more than its allowed return during the IR term. The form of ESM that Enbridge has proposed going forward is similar to that approved in its prior IR plan and includes three components:

* Under-earnings: if the weather normalized return is less than the allowed ROE, the under-earnings will be borne entirely by the shareholders.

* A "dead band": if the weather normalized return is less than 100 basis points above the allowed ROE, then ratepayers receive no benefit and all of the extra earnings flow to the shareholders.

* A sharing ratio above the "dead band": if the weather normalized return is more than 100 basis points above the allowed ROE, the extra earnings will be shared 50:50 between ratepayers and shareholders.

42 None of the parties disputed that an ESM plan was appropriate. However, views differed as to the operation of the dead band and the sharing ratio.

Board Findings

43 The Board will establish an ESM for Enbridge's Custom IR. The ESM will provide a performance incentive to Enbridge while at the same time ensuring that ratepayers share in the benefits for that performance.

44 All parties, including Enbridge, agreed that the "allowed" ROE for purposes of calculating the ESM should be the ROE used to determine the allowed revenue requirement. The Board will adopt this approach because it ensures that the earnings sharing is based on weather normalized actual results compared to what is embedded in rates.

45 Many parties argued that ratepayers are bearing greater risks under Enbridge's proposed Custom IR plan relative to its prior plan, and that the ESM should be adjusted so that the ratepayers' share of the benefits is larger. The parties argued that the lack of independent third-party cost benchmarking leads to an incentive for Enbridge to over-forecast costs and under-forecast earnings. Intervenors recommended a variety of approaches:

* Energy Probe Research Foundation ("Energy Probe"), with the support of School Energy Coalition ("SEC") and Canadian Manufacturers and Exporters ("CME") proposed that there be no dead band and that the first 100 basis points of over-earnings should accrue entirely to ratepayers while the next 100 basis points of over-earnings should accrue entirely to Enbridge. Any earnings over 200 basis points should be shared 90:10 in favor of ratepayers.

* Consumers Council of Canada ("CCC") proposed the elimination of the dead band and a 50:50 sharing of all of the over-earnings.

* APPrO also recommended a 50:50 sharing of all of the over-earnings for the first 100 basis points, beyond which, the benefits should be shared 90:10 in favour of the ratepayer.

46 Enbridge argued that changing the parameters of an already asymmetrical ESM further in favour of ratepayers should be balanced against the fact that an IR plan is meant to incent a utility to find and implement sustainable efficiencies. In reply, Enbridge proposed an approach that would still allow the company to retain the first 100 basis points of over-earnings, but then it would share any over-earnings beyond that level on a 90:10 basis in favour of ratepayers.

47 The Board finds that the dead band should be eliminated and that all over-earnings will be shared 50:50 between ratepayers and shareholders. The Board agrees that the central issue is that the sharing with ratepayers needs to be balanced with an incentive to find and retain efficiencies. The Board also agrees with CCC that a key consideration is the overall IR framework and the other parameters. The Board is approving a Custom IR for Enbridge, but must address the shortcomings of the plan. The lack of total cost benchmarking and the lack of independent budget assessments result in a greater risk that costs have been over-forecast. Therefore, the Board concludes that additional ratepayer protection is warranted. A 100 basis point dead band provides insufficient protection for ratepayers, and therefore the Board finds that the dead band should be eliminated for this Custom IR plan. However, the Board is also concerned that there be suitable performance incentives for Enbridge and finds that a sharing ratio of 90:10 in favour of ratepayers largely eliminates the performance incentive for Enbridge. The Board finds that a sharing ratio of 50:50 provides a suitable incentive level for the company while still ensuring significant benefits for ratepayers. The Board also addresses risk sharing and efficiency levels further in the capital expenditure and O&M expenditure sections of this decision.

Sustainable Efficiency Incentive Mechanism ("SEIM")

48 Enbridge proposed a Sustainable Efficiency Incentive Mechanism ("SEIM") which it claims will promote long-term sustainable efficiencies within the custom IR framework, including near the end of the IR term. Enbridge explained that IR plans tend to incent short-term cost cutting and discourage the adoption of new productivity measures near the end of the plan term. The SEIM is an attempt to address these issues by providing a financial reward to the company for undertaking sustainable efficiency improvements.

49 The proposed SEIM has three steps, which would be undertaken within Enbridge's rebasing application for 2019:

* Calculating the potential reward: The potential reward would equal one half of the difference between the average ROE achieved during the IR term and the average ROE allowed during the IR term. The potential reward would form a premium on the ROE that applies to rates for the rebasing year and the following year (2019 and 2020). The potential reward for each year would be capped at 50 basis points above the allowed ROE. The ROE premium would be expressed as a dollar amount, based on the forecast 2019 rate base.

* Determining whether the potential reward is justified: To qualify for the SEIM reward, Enbridge must show that the net present value of the long-term benefits generated by productivity initiatives undertaken during the IR term is greater than the reward. The company must also show that its Service Quality Reporting performance has been maintained at or above the 2013 level for at least three of the five years of the IR term.

* Implementing the reward: If Enbridge is successful in establishing its entitlement to a SEIM reward, then the reward would be administered within the 2019 rebasing case and the 2020 rates case. The reward amount would be added to the revenue requirement in the rebasing year for collection in that year. The same amount would be applied to the 2020 rates.

50 Board staff and intervenors opposed the proposal. While a number of parties supported the objectives of the SEIM and commended Enbridge on its efforts, they concluded that the flaws were too significant to go forward as proposed. APPrO, Energy Probe and SEC each proposed alternatives.

Board Findings

51 The Board will not accept the current SEIM proposal. The Board finds that there are significant flaws in the proposal which make it likely that the objectives will not be achieved. The Board does see merit in a mechanism which serves to incent long-term sustainable productivity improvements. The Board is also encouraged by Enbridge's ongoing commitment to improving the proposal and addressing the concerns raised. The Board concludes that Enbridge should undertake a consultation process over the next year, in order to address the concerns identified below (and in parties' submissions) and to develop a revised proposal to bring forward as part of its 2015 or 2016 rates application.

52 CME argued that there is no need for a SEIM because it is redundant in an IR plan which already includes incentives. CME submitted that a more appropriate way of ensuring the achievement of sustainable efficiencies during an IR plan is to penalize a distributor for creating efficiencies which are not sustainable. Enbridge responded that it is a reasonable inference from the importance attached to the discussion of "incentives for sustainable efficiency improvements" within the NGF Report that the Board recognized the need for a specific incentive for sustainable efficiencies. The Board finds merit in two approaches to encouraging greater efficiency: robust forecasts which incorporate expected efficiency improvements during the IR term and the potential for carry-over incentives for sustainable efficiency improvements near the end of the IR term. Dr. Kaufmann and Ms. Frayer[6] each acknowledged that one of the shortcomings of IR is a focus on

short-term cost-cutting rather than sustainable efficiency improvements, particularly at the end of the plan term. The Board finds that it is appropriate in a Custom IR plan to attempt to address this shortcoming.

53 A number of parties argued that the SEIM issue should be considered and determined in a generic proceeding because it has application to all distributors. The Board is examining this issue through its electricity rate-setting policy consultations. However, the Board finds that it is appropriate to address Enbridge's proposal within the context of the current application and to allow Enbridge to undertake a focussed consultation to develop a revised proposal within the overall framework of its Custom IR.

54 The Board finds that the following aspects of the current SEIM proposal are of particular concern:

* The reward will be cash to the utility while the benefits to ratepayers are in the form of forecast future savings, which are not verified. This is an imbalance which should be addressed.

* The proposal does not appear to distinguish between early term productivity measures and late-term productivity measures, and therefore may not adequately address the concern about diminishing incentives to invest in productivity toward the end of an IR term.

* The SEIM has the potential to reward inflated forecasts for capital or operating expenditures.

* It is not clear whether grossing up the reward for taxes is a balanced approach given the method by which the ratepayer benefits are determined.

55 Both APPrO and Energy Probe made a number of specific proposals. The Board encourages parties to consider these, as well as other alternatives, as part of the consultation process. SEC proposed that the Board indicate that when Enbridge files its rebasing application, it may be eligible for an additional incentive if it can demonstrate that its costs going forward have been reduced by initiatives implemented during IR. The method for calculating the incentive would be decided in the rebasing application, taking into consideration the amount, nature and certainty of the future savings, the savings already achieved during the IR plan, and the level of increase or decrease in revenue requirement being proposed by the company on rebasing. Enbridge was not opposed to this suggestion. The Board concludes that if the consultation does not reach a proposal which is supported by the parties, then the company may proceed as suggested by SEC.

Z-Factor

56 Enbridge proposed that the Z-factor should continue to apply to protect the company and ratepayers from unexpected costs, and proposed that it should apply where the revenue requirement impact is more than $1.5 million per year and the costs are outside of management control. Enbridge proposed to modify the description and criteria from what was approved in the prior IR plan. In Enbridge's view, the criteria in the company's prior IR plan were difficult to interpret and apply, and the proposed changes would make the evaluation of Z-factor requests more clear and consistent.

57 Currently, Z-factors must be linked to a specific "event"; Enbridge proposed to change that to specific "cause". The company maintained that this was appropriate because it changes the focus from a singular event to all the costs at issue when there may be a combination of related events all linked to one cause. Under the proposed wording, it would be necessary for the company to demonstrate that the causes that led to cost increases or decreases were unexpected, non-routine and outside of management control.

58 Enbridge's witnesses expressed concern that with the original wording there did not appear to be anything that would qualify as a Z-factor. Enbridge cited the Board's denial of its application for two Z-factors (EB-2011-0277, 2012 LNONOEB 222) under the prior IR plan as evidence that the wording of the Z-factor criteria was inappropriate.

59 Dr. Kaufman expressed concern that the linkage to a "cause" would often be subtle, complex and difficult to identify, whereas an "event" would be discrete, concrete and readily identifiable. He concluded that the result of Enbridge's proposal would be to expand the scope of Z-factor and to potentially lead to expensive regulatory investigations. For example, under the proposed wording, Enbridge could file a Z-factor application whenever a cause arose that the company had not anticipated when preparing its plan.

60 Dr. Kaufman also suggested that the criteria related to "management control" should be amended using clearer language such as "the cost must be beyond what the company management could reasonably control or prevent through the exercise of due diligence".

61 Intervenors did not support Enbridge's proposal.

Board Findings

62 The two primary areas of dispute are the change from "event" to "cause" in the criteria, and the maintenance of the threshold at $1.5 million.

63 With respect to the criteria, the Board has been clear in its approach to Z-factors. Z-factors are intended to provide for unforeseen events outside of management's control, regardless of the multi-year rate-setting mechanism at the time of the event. The cost to a distributor must be material

and its causation clear. The Board does not agree with Enbridge's suggestion that previous Z-factor applications were denied because the wording was unclear or the language was so stringent that nothing would qualify. The Board has approved Z-factor applications for electricity distributors under similar wording to what was used in Enbridge's prior IR plan. The Board concludes that it is appropriate to have similar criteria across all regulated entities to facilitate consistent outcomes in specific applications. For that reason, the Board will not adopt Enbridge's proposal to use "cause" as the reference. The Board will retain the reference to "event". In reply, Enbridge submitted that if the Board does not adopt its proposal, then the approach proposed by Board staff is the most appropriate of the alternative positions. The Board will adopt Board's staff's proposed wording as it is sufficiently similar to the criteria for Union Gas and for electricity distributors and transmitters. The criteria will be as follows:

(i) Causation: The cost increase or decrease, or a significant portion of it, must be demonstrably linked to an unexpected, non-routine event.

(ii) Materiality: The cost at issue must be an increase or decrease from amounts included within the Allowed Revenue amounts upon which rates were derived. The cost increase or decrease must meet a materiality threshold, in that its effect on the gas utility's revenue requirement in a fiscal year must be equal to or greater than $1.5 million.

(iii) Management Control: The cause of the cost increase or decrease must be: (a) not reasonably within the control of utility management; and (b) a cause that utility management could not reasonably control or prevent through the exercise of due diligence.

(iv) Prudence: The cost subject to an increase or decrease must have been prudently incurred.

64 With respect to the materiality threshold, intervenors argued that the threshold should be increased from $1.5 million to $4 million, which is comparable to that approved in the Union Gas Settlement Agreement. Parties argued that the companies are similar in terms of revenue requirement and risk and that Z-factor relief should only be granted in very exceptional circumstances. Staff noted that even the $4 million Z-factor threshold is well under 1% of Enbridge's annual revenue requirement. In reply, Enbridge objected to assigning any precedential value to provisions that were the subject of an overall negotiated package from another company. Enbridge argued that there has been no evidence in this case as to how the Union Gas Z-factor wording would apply to and impact Enbridge. Enbridge also noted that its proposed threshold is 50% higher than the maximum Z-factor threshold for electricity distributors including Toronto

Hydro and Hydro One.

65 The Board has expressed reluctance to impose a negotiated model on to a different company. As with other provisions of the Union Gas Settlement, the Z-factor provision was the subject of an overall package and the Board agrees with Enbridge that it should not be considered to have precedential value for other distributors. The Board has articulated its policy on Z-factors for electricity distributors in the *Filing Requirements for Electricity Distribution Rate Applications* July 17, 2013. The policy sets a materiality threshold of $1 million for a distributor with a distribution revenue requirement of more than $200 million. To the extent that this provides a Board policy for a company this size and until the Board changes its policy on a principled basis, the Board finds no reason to change Enbridge's current threshold. The materiality threshold for Z-factor applications will remain at $1.5 million.

66 Energy Probe, with the support of SEC, proposed that Z-factor treatment should not be available when Enbridge has over-earned its allowed ROE. In Energy Probe's view, it would not be reasonable to expect ratepayers to pay for a Z-factor event at the same time the utility has over-earned due to other factors that could include bad forecasting on the part of the utility. For the same reasons the Board is not changing the threshold, it will not at this time prohibit Z-factor applications when there are over-earnings available to pay the additional cost. Intervenors will be free to advance those arguments in specific Z-factor applications.

Off-Ramp

67 An off-ramp serves as a trigger for the Board to review whether a company should remain on its IR plan. The off-ramp is set in order to trigger that review process if the company significantly over-earns or under-earns the allowed ROE. Enbridge proposed a symmetrical off-ramp, with the trigger being when weather normalized earnings are more than 300 basis points different from the ROE determined annually through the application of the Board's ROE Formula.

Board Findings

68 Energy Probe and CME questioned whether an off-ramp is required. However, the Board accepts Enbridge's proposal and agrees with CCC that in a five-year Custom IR plan an off-ramp is an important component. The Board will monitor Enbridge's results and carry out a review if Enbridge over-earns or under-earns more than 300 basis points. Parties agreed that the reference ROE should be the level of ROE which underpins rates. The Board agrees with this approach.

69 Energy Probe submitted that the off-ramp should only be applicable the second year that the utility under-earns more than 300 basis points. Enbridge responded that the off-ramp does not amount to an automatic termination of the Custom IR plan but rather an application to review the plan. Enbridge noted that parties such as Energy Probe would be free to argue that the company should live with the Custom IR plan for additional time. The off-ramp triggers further review but not necessarily a change in rates. The Board agrees with Enbridge that at the time of such a review,

it will be open to the parties to argue what action, if any, should be taken.

Volumes and Revenues

70 Enbridge develops its budgets for capital expenditures and operating and maintenance expenditures based partially on its forecast of customer numbers and volumes. In addition, the Board determines how much the current rates will need to change by applying the current rates to the forecast of customers and volumes and calculating whether the resulting revenues are sufficient to recover the costs. Enbridge presented a forecast of customer additions and volumes. The company also proposed to update the volume forecast each year as part of the annual rate setting process.

71 The following table sets out Enbridge's forecast of total volumes.

Gas Volumes

	2013 Board Approved	2014	2015	2016	2017	2018
Total Gas Volume(10^6m^3)	11,504.4	11,156.0	11,249.5	11,348.4	11,348.4	11,348.4

72 Several aspects of the volume forecasts were disputed by the parties:

* The annual forecast update process

* The forecast of customer additions

* The forecast of average use by Rate 1 and Rate 6 customers

* The forecast for contract market customer volumes

* The change to the heating degree day forecast

* The forecast of other revenue

73 Each of these will be addressed in turn.

Annual Forecast Update Process

74 Enbridge developed its 2014 volume forecast using its proposed updated Heating Degree Day methodology and the existing methodologies for forecasting average use and large volume customer use. Although Enbridge also provided a forecast for 2015 to2018, the company proposed that the forecast be updated each year.

75 Enbridge proposed that in advance of each year (2015 to 2018) it would provide updated volume forecasts as part of its application. These updated forecasts would include an updated meter unlocks forecast, current economic data, and the application of the methodologies and processes for Heating Degree Days, average use, and large volume forecasts. The updated forecast would be used to derive final rates for each year from 2015 to 2018. Enbridge submitted that it would appropriately balance the risk between the company and ratepayers to update the volumetric projections annually to reflect actual data reflecting the current economic environment and the impact of the GTA Project.

Board Findings

76 The Board will accept the annual forecast update process proposed by Enbridge, but will make some modifications, which are detailed in the following sections. The Board's Custom IR framework did not contemplate annual updates, but the Board finds that such an approach is a reasonable approach for one of the first Custom IR plans. It is also the Board's expectation that this annual process need not be particularly contentious, and might well be appropriate for a settlement process.

Forecast of Customer Additions

77 The table below presents Enbridge's gross customer additions forecast for 2014 and beyond.

Gross Customer Additions

	2013 Board Approved	2013	2014	2015	2016	2017	2018
Residential	36,025		34,188	35,931	37,030	**Not in evidence**	**Not in Evidence**
Commercial	2,544		2,455	2,555	2,612		
Industrial	10		4	3	3		
TOTAL	**38,579**	**36,644**	**36,647**	**38,489**	**39,645**		

78 Enbridge proposed that the customer additions forecast should be approved in this proceeding and should not be updated annually. In Enbridge's view, this would streamline the process and would be consistent with its cost forecasts, which are based in part on the customer additions forecasts.

79 Energy Probe submitted that the 2014 customer additions forecast for Rate 1 should be increased by 1,386 and Rate 6 should be increased to 1,500. Energy Probe argued that these increases are justified given the level of under-forecasting in 2013. Energy Probe further argued that the customer additions forecast should be part of the annual updating process.

80 Enbridge disagreed with the proposed adjustments. The company noted that it is using the same methodology which has been accepted either through settlement or decision in previous cases. Enbridge submitted that Energy Probe was referencing the average customer meters forecast, which is not comparable to the gross customer additions, and that actual customer additions were below the 2013 Board approved level. Enbridge also noted that there have been declines in housing starts since the original forecast and that current forecasts show worsening outlook for 2014. Enbridge concluded that there was no basis to change the methodology or increase the customer additions for Rate 1 and Rate 6.

Board Findings

81 The Board will not adjust the gross customer addition forecast for 2014. The Board finds that the forecast for 2014 is reasonable in light of the evidence regarding current economic indicators and Enbridge's reliance on a consistent methodology. However, the Board will require the customer addition forecast to be updated on an annual basis as part of the volume forecast update process. Enbridge resisted this approach due to concerns about complicating the process and creating a misalignment with cost forecasts which would not be updated. The Board finds that as part of the

volume forecast update process, it is reasonable to examine the major components, including customer additions. The methodology for forecasting customer additions is well established so the Board does not expect that adding this component will unduly complicate the process. Enbridge has indicated that if the customer addition forecast changes, there would be implications for the capital expenditure forecast. However, the Board finds that Enbridge will be able to accommodate the expected modest level of variability in the associated capital costs without any adjustment.

Average Use Forecast for Rate 1 and Rate 6

82 The following factors influence average use for Rate 1 (residential) and Rate 6 (commercial and light industrial): new customers (both new construction and replacement customers); the timing of customer additions; rate migration; gas prices; economic conditions; and the company's Demand Side Management ("DSM") programs. Enbridge uses econometric models to forecast average use for Rates 1 and 6. Enbridge explained that the models have been subjected to many diagnostic tests which have demonstrated that the results are statistically valid.

83 Enbridge maintained that average use changes for Rate 1 are fairly reflective of regression model results because of the homogenous nature of customers within this class, but that modeled Rate 6 average uses may require adjustment to account for rate migration or specific changes in usage patterns for customers within this class. Approximately 2,000 contract market customers migrated to Rate 6 over the period 2006 through 2010, which resulted in increases in the average use per customer during that period. Enbridge observed that in the past few years migration has stabilized.

84 Energy Probe noted that the forecast decrease of 2.21% in 2014 for Rate 1 average use is higher than historical or forecast decreases. Energy Probe submitted that the average use forecast for Rate 1 should use a decrease of 1.3% instead. Energy Probe further argued that it was not reasonable to forecast a decline for Rate 6 of 2.81% because average use for this class has increased over the historical period and is forecast to be flat for 2015-2016. Energy Probe concluded the 2014 average use for Rate 6 in 2014 should be kept at the 2013 Board approved level of 29,204m^3. BOMA supported Energy Probe.

85 Enbridge responded that its econometric methodology has been used since 2001, and the forecasts have been accepted through settlement or Board decisions. Enbridge maintained that the decline in Rate 1 for 2014 is 1.8% compared to 2013 actual and is reasonable in light of expected gas prices and economic conditions. Enbridge argued that Energy Probe's proposals were without an evidentiary or methodological foundation.

Board Findings

86 The Board will not adjust the average use forecast for 2014. The Board finds that the forecast for 2014 is reasonable in light of current economic indicators and the consistent application of the long-standing methodology and reflects the impact due to Rate 6 migration. The Board will require

the average use forecast to be updated on an annual basis as part of the volume forecast update process. As part of the volume forecast update process, it is reasonable to examine the major components, including average use.

Contract Market Volume Forecast

87 Enbridge generates the contract market volume budget using a "grass roots" approach. Volumes are forecast on an individual customer basis by Enbridge account executives in consultation with customers during the budget process. Current economic and industry conditions and degree days are also factored into the volume determination. Unless a customer has signed a contract, no volumes are included in the forecast. This forecast would be updated each year as part of the annual rate application.

88 APPrO argued that the contract customer additions were historically under-forecast and that therefore the 2014 contract customer additions forecast should be increased by 5%. Enbridge responded that APPrO appeared not to have accounted for the migration of customers between Rate 6 and the Large Volume classes in doing its analysis.

89 Energy Probe submitted that the 2014 forecast should be revised to include the two contract customers added since the forecast was made. Enbridge opposed this addition arguing that continual updating was "endless and time consuming" and could go in either direction.

90 Energy Probe also submitted that the forecast should be increased to include the potential for further contract customers using a probability-weighted approach. Energy Probe argued that not including any volume forecast for potential customers is a flaw and noted that a probability weighted approach would be consistent with Union Gas' approach. Enbridge opposed this approach, stating:

> *Where the customer is known and there are arrangements for a new customer to come online, that customer's volumes would be included in the forecast. However, it is not possible to incorporate incremental volumes mid-year arising from new customers that were not foreseen or expected to come online.*[7]

91 Enbridge also argued that it would be inappropriate to include every possible customer given the uncertainty as to timing and volumes.

Board Findings

92 The Board finds that the contract customer volume forecast for 2014 should be adjusted to include the two customers who have been added. Enbridge is directed to adjust the volume forecast accordingly. This is a reasonable reflection of current circumstances and does not represent a complex adjustment.

93 Enbridge intends to update the contract market volume forecast on an annual basis as part of the volume forecast update process. The Board accepts this approach. The Board sees merit in a probability-weighted forecast approach proposed by Energy Probe. The Board finds that Enbridge's method of only including volumes for signed customers is unduly conservative. The Board concludes that the company can make an assessment of the probability of potential customers coming online for the forward year and use this to create a volume forecast which is reasonable. Enbridge will adopt this approach for purposes of the 2015 rate application and for the balance of the IR term.

Heating Degree Days Forecast

94 Enbridge proposed to change the method used to forecast heating degree days for its Central weather zone to a "50:50 Hybrid" method. The 50:50 Hybrid is the average of two existing models: the 10-year Moving Average model and the 20-year Trend Based model. Enbridge's evidence showed that the 50:50 Hybrid ranks first among its models in predictive accuracy using actual data for the Central weather region. Enbridge proposed no change to the methods used to forecast heating degree days for the Eastern weather zone, where the "deBever with Trend" method is used, and the Niagara weather zone, where the "10-year Moving Average" method is used.

95 Energy Probe supported the company's proposal, while SEC submitted that the heating degree day forecast should only change at rebasing. Enbridge responded that there was no reason to wait for until the next rebasing and noted that an updated approach was contemplated in 2013 settlement proposal.

Board Findings

96 The Board accepts the proposed change to the heating degree days forecast method for the Central weather zone. The Board does not agree with SEC that such a change should only be considered in a rebasing application. The evidence is clear that the change, which is an application of existing methods, results in a more reliable forecast.

Other Revenue

97 Enbridge earns "other" revenue from a variety of sources, including service charges, late payment penalties, open bill revenue and transactional services.[8] The following table shows actual and forecast Other Revenue.

Other Revenue
($ millions)

	2013 Board Approved	2013 Actual	2014	2015	2016	2017	2018
Other Revenue	45.0	42.8	40.6	41.0	41.3	41.3	41.3

98 Energy Probe argued that the 2014 Other Revenue forecast should be $42.8 million, which is the actual for 2013, because that level reflects the impact of reduced late payment penalty revenue and customer service rule changes. Enbridge responded that the 2013 actual level was lower than the 2013 Board approved due to the decline in late payment penalty revenue, new account and red lock charges.

99 Energy Probe submitted that the flat forecast for Other Revenue during 2015-2018 suggests an under-forecast. In Energy Probe's view, either the forecast should be updated annually like volume forecast or the Board should increase forecasts for 2015, 16, 17 and 18 by $2.2 million/year. Energy Probe maintained that updating the forecast would not add much complexity. Energy Probe noted that the 2013 actual was $2.2 million higher than forecast and used that as the basis for its proposed adjustment. BOMA supported Energy Probe.

100 Enbridge responded that if Other Revenue is to be updated annually, then bad debt expense should be updated as well. Enbridge also argued that this additional level of updating would reduce forecast risk on the company, which was already a criticism raised by some parties.

Board Findings

101 The Board finds that the forecast of Other Revenue for 2014 through 2018 is unduly conservative. The forecast is essentially flat, even though the company is forecasting customer and volume increases over the period, and the level for 2014 is below the 2013 actual. The Board acknowledges that reductions have taken place in late payment penalty revenue, however the 2013 actual incorporates that change. The Board concludes that it is reasonable to set the 2014 forecast at the 2013 actual level ($42.8 million). Having increased the 2014 level, the Board will use that level for the balance of the Custom IR term. The Board concludes that this represents a reasonable balance in forecast risk. The Board will not require the Other Revenue forecast to be updated on an annual basis.

Capital Expenditures

102 Enbridge's proposed capital program for 2014 to 2018 is a critical part of its application and is the primary reason, according to Enbridge, that it chose a Custom IR as opposed to the traditional IR structure.

103 The proposed capital program consists of a core capital component, the Work & Asset Management Solution (WAMS) project, as well as the GTA and Ottawa projects. The core capital is intended to meet customer growth, the operational and business needs of the company, and the integrity management programs that the company has been mandated to undertake. The amounts for each component are summarized in the following table.

Capital Expenditures
2012 - 2018
($ millions)

	2012 Actual	2013 Board Approved	2013 Actual	2014 Forecast	2015 Forecast	2016 Forecast	2017 Forecast	2018 Forecast
Core Capital	418.7	386.1	441.6	443.8	446.6	441.9	441.9	441.9
WAMS		0.5		36.3	25.7	8.1		
GTA / Ottawa	19.1	63.3	76.2	202.2	359.7			
TOTAL	**437.8**	**449.9**	**517.8**	**682.3**	**832.0**	**450.0**	**441.9**	**441.9**

104 Enbridge explained that the significant increase in the proposed total capital expenditures in 2014 and 2015 relative to other years is due to the GTA, Ottawa, and WAMS projects. If these projects are excluded, the forecast is basically flat and consistent with the 2012 and 2013 actual expenditures ($418.7 million and $441.6 million, respectively). Enbridge proposed to hold its core capital budget for 2017 and 2018 at the same level as 2016 even though its asset plan forecasts higher spending in those years.

105 Enbridge maintained that the 2013 Board-approved capital budget of $386.1 million (excluding WAMS, GTA and Ottawa projects) was not reflective of the company's capital spending requirements for the past couple of years, or the anticipated requirements during the Custom IR term.

106 In the following sections, the Board will address the four aspects of Enbridge's proposed capital expenditures plan:

* magnitude of the proposed capital budget,

* asset planning process,

* productivity, and

* proposed capital-related variance accounts.

Magnitude of the Proposed Capital Budget

107 As stated in the RRFE Report:

> *The Custom IR method will be most appropriate for distributors with significantly large multi-year or highly variable investment commitments that exceed historical levels*.[9]

108 In this case, and as stated earlier, the main reason for the significant increase in proposed capital expenditure in 2014 and 2015 relative to other years is the inclusion of the GTA, Ottawa and WAMS projects. If these projects are excluded, the proposed capital budgets for the plan duration are fairly consistent with historical levels.

109 The Ottawa project has been completed and is in-service. The GTA project received leave to construct approval from the Board in a separate proceeding (EB-2012-0451), with construction starting in 2014 and a forecast in-service date of October 2015.

110 The evidence is that the WAMS project is going through a public tendering process; the first stage is completed (software vendor selected) and the second stage (system integrator selection) is expected by mid-year. WAMS is expected to go live at the end of 2015. Enbridge retained Sync Energy to undertake an independent third-party review of the WAMS budget and the direction that Enbridge proposed to take. Sync Energy's report concludes that the budget developed by Enbridge is in the expected range, and the approach being proposed by the company is appropriate.

111 The main concerns raised about Enbridge's capital forecasts are:

* Lack of independent support for the cost forecasts, including the proposed significant increase in the integrity management spending within the core capital program.

* Lack of rationale for using the Custom IR approach given that the core capital expenditures are forecast to remain at the 2012 and 2013 levels throughout the IR period.

112 Enbridge submitted that it has developed capital budgets which it believes represent the reasonable minimum cost to continue to operate its system safely, reliably and in compliance with all applicable regulatory requirements. According to Enbridge, its budgets are intended to provide the Board and ratepayers with confidence that there has been no over-forecasting and that it will be the company that will be at risk if there is over-spending.

Board Findings

113 Earlier in this decision, the Board determined that Enbridge's capital requirements are sufficient to support the request for a Custom IR if adequately supported. Although a traditional IR approach could have been used, the Board acknowledges that it is open to a utility to request a Custom IR if the expenditures are significant and if the application is adequately supported. Although the Board is prepared to accept a Custom IR approach, the Board agrees with the various parties that the magnitude of the core capital budget is not sufficiently supported either by an independent third-party review, benchmarking or by a strong direct linkage to Enbridge's asset management plan. These aspects have been addressed earlier in this decision (in the Rate Mechanism section) and are addressed further below.

114 The Board also emphasizes the expectation that, under a Custom IR plan, the company is expected to bear a greater proportion of the forecast risk in exchange for the advance approval of higher capital expenditures for inclusion in rates.

115 More specifically for the large components of the capital program, the Board findings are summarized below:

* GTA project: Given the advanced status of the project, the Board finds that Enbridge should bear the risk of cost and schedule variances until rebasing (see variance account section). The Board will require Enbridge to report on cost and schedule status of this project as part of the annual reporting process.

* WAMS project: Given the independent third-party review of Enbridge's approach and budget for this project, as well as Enbridge's use of a competitive public tendering process for vendor selection, the Board is satisfied with the approach taken and will require Enbridge to report on the project's progress as part of the annual reporting process.

* System Integrity Program: The Board shares SEC's and the Industrial Gas Users Association's ("IGUA") concerns about the uncertainty and lack of external evidence regarding the program drivers and cost estimates. The Board expects these concerns to be addressed through future refinements in Enbridge's asset planning and benchmarking processes, including risk assessment, prioritization, and examination of industry trends (see corresponding sections below). The Board will require Enbridge to report on the progress of this program as part of its annual reporting process.

116 The Board will, therefore, accept the proposed capital expenditure plan as submitted subject to the conditions outlined in the variance accounts and reporting sections of this decision.

117 The Board notes Enbridge's acknowledgement and understanding of the RRFE Report's approach to annual reporting of capital spending versus plan under the Custom IR method. The RRFE Report states that if actual spending is significantly different from plan, the Board will investigate and may, if necessary, terminate the distributor's rate setting method.

Asset Planning Process

118 Several parties argued that Enbridge's Custom IR plan lacks a robust asset management plan which includes all its assets and is directly linked to its capital budget.

119 In response, Enbridge described the rigour which the company exercised in the development of its capital budgets and objected to the assertion that its asset plan is not clearly linked to the filed capital budgets. Enbridge explained that the final capital budgets differ from the asset plan due to the fact that after having considered the relevant inputs from the asset plan, Enbridge went through further prioritization and rationalization exercises to finalize the capital spending requirements set out in the evidence.

120 Enbridge acknowledged that its asset plan does not include its non-distribution assets (storage, facilities, fleet, IT), but suggested that this does not mean that there is no long-term planning or good asset management for these items. Enbridge also acknowledged that its asset management practices will continue to evolve.

121 Enbridge concluded that it has demonstrated the fundamental principles of good asset management and coordinated longer term optimized planning as expected by the Board. Enbridge submitted that its asset plan was a fundamental input into its capital budget process, and was a key determinant of the capital spending forecasts.

Board Findings

122 The Board acknowledges the work done by Enbridge to develop its asset management plan, but finds that there are some shortcomings. The Board believes that a robust asset management plan

should include all the company's assets and be based on a comprehensive process of condition assessment, risk evaluation, and prioritization. A comprehensive asset management plan is a critical part of a Custom IR application. The evidence is clear that Enbridge's asset management plan does not include all of the company's assets. An asset management plan should also be directly linked to the proposed budget, in order to provide the Board with robust evidence that the proposed capital expenditures have been through the necessary optimization and prioritization process. One of the stated objectives of Enbridge's asset plan is to:

> *Serve as a mechanism to communicate EGD's asset management priorities and planned investments with internal and external parties including EGD's regulators.*[10]

123 This implies that the "planned investments" contained in the asset plan should be consistent with those communicated through the proposed capital budget. However, the evidence does not describe the linkage between the estimated capital costs included in the asset plan and those proposed in the Custom IR plan. The explanation provided by Enbridge is that it did consider the inputs from the asset plan, and then went through separate prioritization and rationalization exercises to finalize the capital spending requirements. The Board would have expected that the asset plan would actually be the vehicle that Enbridge would use to perform the necessary prioritization and rationalization such that the outcome would be one final capital spending plan. With such a strong and direct linkage, the Board would be provided with a basis to judge the rigour with which the resulting capital investment plan has been optimized and rationalized.

124 The Board finds that Enbridge should continue to work on advancing its asset management plan, specifically in the following two areas:

* Inclusion of all the company's assets; and

* Direct linkage to the budget

125 Given the significance of the asset management planning process in the context of the Custom IR plan, the Board will require Enbridge to report on these efforts on an annual basis, including some form of an independent third-party assessment of the asset management planning process and resulting plan. The Board concludes that this approach will mitigate the shortcomings and will be the most effective means to ensure that Enbridge develops the necessary asset management plan going forward.

Productivity

126 Enbridge explained that its capital spending requirements for 2014 to 2018 were identified through a lengthy, rigorous process including several iterations to identify the lowest possible prudent capital budget. Enbridge submitted that its proposed capital budgets are substantially lower

than the costs that it actually expects to face and that it will have to find ways to accommodate its actual costs through productivity improvements and initiatives.

127 Enbridge identified two approaches to productivity with the budgets:

1. "Embedded productivity savings" where the forecast costs are lower than what Enbridge believes will be the actual costs. The gap will be addressed through productivity savings. These "embedded productivity savings" are estimated at $162 million within the 2014 to 2018 capital budget ($127 million related to Enbridge's decision to limit the budgeted cost of customer additions, $16 million challenge associated with maintaining a flat labour cost, and $19 million of inflation-related challenge for 2017 and 2018).

2. In addition to the estimated $162 million of "embedded productivity savings", Enbridge excluded $264 million of "variable costs" from its 2014 to 2018 budget. These "variable costs" are defined as costs that are dependent on outcomes from planned studies and other future activities, where the amount of such costs cannot be forecast with certainty. Enbridge provided a list of identified "variable cost" items for 2014 to 2016 totalling $164 million and then assumed additional uncertainties for each of 2017 and 2018 of $50 million per year, roughly the average of 2014 to 2016, bringing the total to $264 million.

128 The main issues that the various parties had with Enbridge's approach to productivity improvement were the lack of specific initiatives that the company will employ to achieve the stated budget challenges, the lack of assurance that the initial capital budget was not overstated, and the lack of objective third-party verification of the reasonableness of the proposed capital expenditures.

129 Enbridge submitted that seeking approval of capital budgets based upon forecasts which have removed significant "variable cost" components and which do not include the costs of expected capital requirements acts as an incentive to generate efficiencies, failing which the company will find itself in a situation of over-spending which will not be addressed until the next rebasing.

Board Findings

130 The Board finds that, while Enbridge quantified the levels of "embedded productivity savings" included in its budget ($162 million) as well as the "variable costs" excluded from the budget ($264 million), it did not specifically identify the initiatives and programs that it intends to employ in order to achieve these productivity savings. For context purposes, the total of the identified "embedded productivity savings" and "variable costs" ($162 million plus $264 million) represent approximately 9% of the total submitted capital budget for 2014 to 2018.

131 On the one extreme, these productivity savings can be achieved by completing the proposed program at a lower cost through more efficient execution. On the other extreme, they can be achieved by cutting other work components from the program. Without a clearer identification of productivity initiatives upfront, it is difficult to make a determination as to where the final results fall between these extremes. Obviously, the third possibility is that the work program is completed at a lower cost because the initial estimates were inflated.

132 Given this lack of clarity, the Board will require Enbridge to report on the status of the work items making up the $162 million embedded productivity savings[11] as well as those items making up the $164 million variable costs for 2014-2016[12] as part of its annual reporting process. The reporting will identify whether and how these work items were accommodated within the approved capital envelope. This approach and the associated level of transparency will assist the Board in monitoring the operation of Enbridge's Custom IR and will provide Enbridge with an incentive to meet its budgets through productivity improvements.

Proposed Capital-Related Variance Accounts

133 As indicated earlier, one of the main components of the Custom IR is the demonstration that the applicant is willing and able to assume the considerable risk associated with five-year capital forecasts. Enbridge proposed three variance accounts to track variances between actual and forecast spending:

* The GTA Project Variance Account

* Relocation Mains Variance Account

* Replacement Mains Variance Account

134 Many parties submitted that these accounts resulted in inappropriate shift in risk from shareholders to ratepayers. Each proposed account is discussed below.

Greater Toronto Area Project Variance Account ("GTAPVA")

135 The Board has already approved leave to construct the GTA project (EB-2012-0451). Construction is expected to begin in 2014 and the in-service date is forecast for October 2015. Enbridge proposed that an account be created to record any variance between the forecast Allowed Revenue and the eventual actual Allowed Revenue which will be known upon completion of the project. Enbridge maintained that the account was justified given the scale of the project, which is the largest in the company's history with a forecast capital cost of $686.5 million.

136 Enbridge proposed that the variance for the years 2015 through 2018 be recorded in the

account with an offsetting annual entry through revenue, with the cumulative impact at the end of each of 2015 to 2018 to be cleared through a rate rider with other deferral or variance accounts for the subject year.

137 Some parties supported the account, or a similar mechanism, while others opposed it.

138 CCC supported the account, but pointed out that if the Union Gas IRM model is used, the account could be more generic. Both BOMA and Energy Probe supported the account, or Y-factor treatment, but under traditional IR plan. Board staff did not oppose the account, but submitted that there should be a cap in order to create a cost control incentive.

139 Enbridge responded that the account should not be capped and noted that any cost over-runs would still be subject to a prudence review.

140 BOMA submitted that if a Custom IR is set, then the account should be asymmetric, functioning only to return under-spend to ratepayers. Energy Probe opposed the account, arguing that Enbridge should be prepared to take on forecast risk under a Custom IR. Energy Probe noted that the project is at an advanced stage and concluded that the project did not present a greater risk. Enbridge responded that the GTA project is the most costly single project in the company's history and therefore the risks are greater.

Board Findings

141 Enbridge notes that Union Gas has a similar account for its major expansion projects. However, Union Gas is under a different rate framework. The Board's expectation under Custom IR is that the company will be prepared and able to bear the risks associated with its capital expenditure forecasts. The risk in this instance is the variance in revenue requirement (due to cost variances or timing differences) between the forecast in-service date and the next rebasing proceeding (expected to be 2019).

142 The Board finds that Enbridge should bear the risk of cost variances and timing differences until rebasing, and therefore the account will not be established.

143 The ability to manage risk is an important component of the Custom IR. Enbridge notes that this is the largest single project in the company's history. However, the project has already received leave to construct approval and the in-service date is October 2015; so the project is fairly far advanced. If any cost overrun is found to be prudent at rebasing, the revenue requirement may be adjusted going forward.

144 Enbridge indicated that the account is also needed to address timing differences. However, the company's testimony in the leave to construct hearing was that the project would proceed because of distribution requirements, whether or not Union Gas and TCPL's related projects proceed. This evidence leads to the conclusion that a delay is unlikely. If the project is delayed, the

Board can monitor the situation through the capital reporting, and take action if appropriate.

Relocation Mains Variance Account ("RLMVA") and Replacement Mains Variance Account ("RPMVA")

145 Enbridge proposed to fix its core capital budget for 2017 and 2018 at the 2016 forecast level. However, Enbridge maintained that the capital costs for relocation mains and replacement mains are unpredictable beyond 2016 and proposed that a variance account be established for each activity.

146 Board staff opposed these two accounts on the basis that they remove too much risk from the company. Staff quoted from Dr. Kaufmann:

> *So just to step back a second, we know that incentive regulation is supposed to be a substitute for cost of service regulation, and all of these variance accounts are very much focussed on cost recovery. Each one is kind of a miniature cost of service review or plan in itself.*
>
> *When you layer in more and more of these things [variance accounts] on top of an incentive plan, it tends to - at some point, the plan becomes something other than an incentive regulation plan. And I haven't really made an issue of this before, you know, before this point, but I have become aware of that I think that is a problem.*
>
> *So I don't know if that necessarily answers your question about something they can do to protect against the forecast issue per se. But one thing they could do to make this plan more of a - to move it in the direction of an incentive plan is to scale back on some to the Y factoring in variance accounts, particularly for replacement.*[13]

147 CCC also opposed the accounts, arguing that mains relocations and replacements are normal distribution activities which should be managed within the capital envelope. CCC concluded that the shifting of risk to ratepayers was not justified. Energy Probe also opposed the accounts, arguing that these accounts are like an Incremental Capital Module, which is not permissible under Custom IR. Energy Probe also noted that the accounts are asymmetrical because no under-spend would be returned to customers.

Board Findings

148 Enbridge originally proposed to delay fixing the capital budget for the final two years of the Custom IR plan. This was broadly opposed by the parties. Enbridge subsequently modified its proposal to hold the budget flat for the final two years and establish variance accounts for two

specific activities. The Board sees this as an improvement in the proposal; one which brings the overall plan closer to the expectations under Custom IR.

149 The Board agrees with Enbridge that holding capital expenditures flat in 2017 and 2018 will be challenging. However, the Board agrees with parties which have expressed concern about an inappropriate allocation of risk to ratepayers arising from the RLMVA and RPMVA variance account proposal. Enbridge notes that Dr. Kaufmann agrees that the concern about an inappropriate allocation of risk to ratepayers arising from relocation and replacement mains expenditures could qualify as Y-factors under a traditional IR plan. However, as discussed above, one of the key differences between traditional IR plan and a Custom IR plan is the expectation that the company will bear a greater proportion of the forecast risk under the Custom IR plan in exchange for the advance approval of higher capital expenditures for inclusion in rates. The RRFE Report contemplates a robust five-year capital plan along with a demonstration that the distributor is able to manage the forecast risk over the plan term.

150 Enbridge has further modified its proposal to address the concern that the proposed accounts unduly mitigate the company's risk. In its reply argument, Enbridge proposed that the threshold revenue requirement for the accounts be raised from $1.5 million to $5 million. Enbridge explained that its spending on mains relocations or main replacement would need to be $50 million higher than budgeted to qualify for inclusion in the accounts and any disposition would also be subject to a prudence review. The Board finds that this is a further improvement in allocating capital expenditure risk between the company and ratepayers.

151 The Board finds that the accounts, as modified through Enbridge's reply argument, are reasonable because the forecast remains flat in total for the final three years of the plan and the risk to be borne by the company remains significant given the limitation of the accounts to two activities and the threshold revenue requirement of $5 million.

Operating and Maintenance Costs

152 Operating and Maintenance (O&M) costs are the day-to-day costs of running the business. Like capital expenditures, Enbridge's Custom IR plan is built on a 5-year forecast of O&M expenditures. The following table provides the 2013 Board approved and actual, and 2014 to2018 forecast for the main O&M cost categories.

Operating & Maintenance Costs by Category
($ millions)

	2013 Board Approved	2013 Actual	2014	2015	2016	2017	2018
Customer Care/CIS	89.4	83.1	92.6	96.5	100.4	104.4	108.5
DSM	31.6	31.6	32.2	32.8	33.5	34.2	34.9
Pension & OPEB	42.8	44.0	37.2	33.8	30.9	28.5	26.2
RCAM	32.1	32.1	35.3	34.0	33.8	34.8	35.9
Sub-total	**195.9**	**190.8**	**197.3**	**197.1**	**198.6**	**201.9**	**205.5**
Other O&M	**219.2**	**224.7**	**228.0**	**231.5**	**241.0**	**248.5**	**256.3**
TOTAL	**415.1**	**415.5**	**425.3**	**428.5**	**439.5**	**450.5**	**461.8**

153 The first three rows of the table relate to expenses for Customer Care and Customer Information System (CIS) service charges, Demand Side Management (DSM) expenses and Pension and Other Post-Employment Benefits ("OPEB") expenses. Each of these have been, or will be, set outside of the current case:

* Customer Care/CIS service charges are subject to an approved settlement agreement (EB-2011-0226, 2011 LNONOEB 271) which provides a mechanism to determine the costs for each year 2013 to 2018.

* DSM costs are subject to a separate regulatory process. The 2014 DSM budget included in this proceeding was recently approved by the Board in EB-2012-0394, 2013 LNONOEB 9. The Board has recently launched a policy consultation related to future DSM expenditures (EB-2014-0134).

* The amounts for Pension and OPEB costs are subject to an agreement stemming from Enbridge's 2013 rate case (EB-2011-0354). Enbridge and the parties to the proceeding agreed that the company should recover only its actual Pension and OPEB costs over the coming IR term. The approved

settlement agreement in that proceeding included the creation of a new variance account, the Post-Retirement True-up Variance Account (PTUVA).

154 Enbridge proposed that as part of the annual rate adjustment process for 2015 to 2018, it would update the values related to each of these areas. No party disputed that these items are beyond the scope of the current proceeding. Together, these expenditures (including Regulatory Cost Allocation Methodology, which is discussed below) represent about 44% of the annual total O&M expenditures.

155 In the current proceeding, attention focussed on "Other O&M" costs, and to a lesser extent, the Regulatory Cost Allocation Methodology costs and municipal taxes.[14] The Board will address Regulatory Cost Allocation Methodology and municipal taxes first, then Other O&M.

Regulatory Cost Allocation Methodology ("RCAM")

156 The Regulatory Cost Allocation Methodology ("RCAM") is the corporate cost allocation method used to determine Enbridge's share of corporate costs from Enbridge Inc. The purpose of RCAM is to ensure compliance with the Board's Affiliate Relationships Code and to ensure that the established test to determine appropriate corporation cost allocations is being satisfied. The development of the RCAM has been the subject of review and analysis by several experts and consideration by the Board in the past. The RCAM was in place during the previous IR plan (2008 to 2012) and was most recently addressed in the 2013 rates case (EB-2011-0354). In that proceeding, parties agreed to an amount of $32.1 million as part of the settlement agreement. The overall RCAM methodology involves stakeholder consultations.

157 Enbridge used the RCAM methodology to forecast a trend for RCAM amounts for the

158 2014 to 2016 period and that trend indicates a decline due to Enbridge being a decreasing share of Enbridge Inc. The company proposed that the forecast for 2017 and 2018 be set using the same adjustment formula proposed for Other O&M.

159 Energy Probe submitted that the RCAM costs should be included in setting O&M for the Custom IR plan, with no variance account or true up. Board staff noted that the consultative has not met since 2012 and that the preliminary forecast amounts have increased since the last settlement agreement in EB-2011-0354. Board staff submitted that the 2013 amount should not be seen as being explicitly Board approved because it was part of a larger settlement agreement. Board staff proposed three options for the Board to consider:

* the costs should be subject to consultative review before being embedded in the IR plan;

* the costs should be frozen at the 2013 level ($32.1 million); or

* the costs should be set at the 2008-2012 average ($24.6 million).

160 Enbridge responded that it intends to reconvene the consultative in late 2014 or early 2015, and at that time the company will share the 2013 and 2014 data. The company noted that the declining forecast for 2014-2016 reflects that Enbridge is a smaller part of Enbridge Inc., while the levels for 2017 and 2018 have been set using the same rate of increase applied to Other O&M, adjusted by other RCAM-specific factors. Enbridge submitted that there is no evidence to suggest that the methodology should be changed, and also noted that any difference between forecast and actual will be captured in the ESM process.

Board Findings

161 The Board will accept Enbridge's proposal, including the company's commitment to reconvene the consultative in 2014 or 2015 to review the 2013 and 2014 data. The Board finds that this adequately addresses Board staff's concern. Energy Probe argued that RCAM should be considered together with Other O&M. The Board does not agree. RCAM was developed separately and has its own distinct approach. The Board is content to allow the issue to be managed as Enbridge proposes - through the consultative and the ESM process.

Municipal Taxes

162 Energy Probe argued that the municipal tax forecast for 2017 and 2018 is too high. In Energy Probe's view, there is no evidence to support accelerated growth in this item and proposed that the increase should be limited to 4.8%. This would result in reductions of $200,000 and $400,000 in 2017 and 2018, respectively. Enbridge responded that the increase for 2017 and 2018 was similar to the prior years and included impacts due to the integrity program. Enbridge maintained that tax rate increases are likely to be higher than inflation and noted that net plant is also increasing.

Board Findings

163 The Board will not adopt Energy Probe's proposal for a specific reduction to municipal taxes. The Board finds that Enbridge's explanation for the municipal tax forecast is reasonable.

Other O&M

164 Other O&M represents about 55% of the total O&M budget for the 2014 to 2018 period. Enbridge explained that it set the budget using a bottom-up approach to understand the business needs and a top-down approach to embed productivity. The bottom-up approach was a grass roots budget process which was influenced by the expectations of greater needs in areas such as integrity inspections and repair and replacement. From the top-down perspective, a number of constraints

were placed on the budget, including holding Full Time Equivalents ("FTEs") constant over the IR period, and limiting the annual total increase to 2.24% (with some exceptions). The 2.24% was based on Concentric's analysis of two external measures of inflation: GDP-IPI-FDD for material and Ontario average hourly wages. To this "target" rate of increase, a number of what Enbridge described as "extraordinary items" were added:

* 2014: $3.3 million added for the full-year effect of hires in 2013, higher hearing costs and higher interest on security deposits.

* 2015: a reduction for lower hearing costs

* 2016: 2.1% increase plus $4.1 million for WAMS

* 2017 and 2018: increase at the average rate of increase for 2014-2016

165 Enbridge identified three main cost pressures:

* integrity management expenditures;

* customer growth, which is about 1.7% to 1.8% per year; and

* salary and benefits which will likely rise at 3% and 6.1% annually, respectively.

166 Enbridge submitted that "the totality of the evidence supports the conclusion that the company will be hard pressed to operate within the budgets as requested"[15] and that it will be required to generate additional productivity over the Custom IR term. The company identified a number of specific productivity measures, including the use of GPS and improvements in locates. The company has also budgeted holding FTEs flat, holding bad debt flat, and absorbing other upward cost pressures between $24 million and $43 million per year. Enbridge estimated that its budget for Other O&M includes a total cost savings of $172.4 million over the Custom IR term.

167 The parties were critical of the O&M forecast, arguing that it was unrealistic, did not contain specific productivity improvements, did not show sufficient efficiency improvements, and was not substantiated by external analysis or rigorous benchmarking.

Board Findings

168 The Board will make an adjustment to the 5-year Other O&M budget so that it recognizes

inflation, incremental cost pressures, and customer growth, but also an adequate level of productivity improvement. This adjustment is necessary to incent Enbridge to greater efficiency and to protect the interests of ratepayers over the term of the Custom IR plan.

169 Three main issues arose in the submissions from parties:

* The overall approach to budgeting
* Whether sufficient productivity improvements were included in the forecasts
* How the forecast should be adjusted

Overall Approach to Budgeting

170 SEC argued that the forecasts are not realistic because the company's evidence excludes known costs and known savings. SEC pointed to the known higher costs for items such as outside contractors, bad debt, and benefits and salary increases and the expected cost savings related to, for example, switching from Envision to WAMS, and the rollout of GPS. SEC submitted that the approach is flawed because these factors are not directly reflected in the forecasts. SEC submitted that Enbridge had developed a hybrid of a 3-year forecast and two years using a formula, which in SEC's view was an indirect and inappropriate approach to traditional IR plan.

171 The Board does not agree with this overall criticism. A bottom up approach with known or expected specific costs, combined with a top down approach which applies specific cost constraints, can be an appropriate way to develop a reasonable forecast. This is discussed further below. The Board also considers it reasonable to include productivity expectations even if specific programs are not fully identified. This is also discussed further below.

172 Board staff submitted that Other O&M may include over-forecasting given the inherent incentive in the building blocks approach and that this could be addressed through staff's stretch factor proposal. Board staff submitted that there was no way to verify whether a lower achievable budget could have been presented. CCC submitted that there was no external analysis as to whether the expenditures are reasonable.

173 The Board agrees that there is an inherent incentive to over-forecast when setting rates for multiple years. The Board's RRFE report contemplates that an applicant will provide independent expert analysis to support its forecasts and/or provide robust benchmarking evidence as to the level of efficiency of the applicant. Enbridge has provided no external analysis of its O&M budgets, and the benchmarking analysis has significant limitations. The Board has taken this into account in its adjustments.

Productivity

174 Earlier in this decision, the Board has found that the benchmarking evidence does not support a conclusion that Enbridge is particularly efficient. Without this external analysis, the Board must rely on the internal analysis of the budget and the company's own plans for productivity improvements.

175 A number of parties criticized Enbridge for not identifying specific productivity improvement programs. Board staff argued that there are no specific productivity programs associated with the embedded savings of $172.5 million, and therefore these cost savings may not be sustainable and may not be productivity improvements. In staff's view, the Board should be looking for something more tangible than a "baked in" amount. Board staff also noted that the savings are not large in percentage terms compared to total revenue requirement. CCC, BOMA and SEC also argued that productivity improvements had not been identified sufficiently. Enbridge responded that productivity improvements have been embedded in the forecast and are the difference between the forecast and the expected actuals. Enbridge also pointed to evidence regarding a number of specific productivity programs, including GPS and locates.

176 The objective is for Enbridge to develop a forecast which is reasonable and defensible. The Board finds that it can be an appropriate approach to develop a forecast which includes self-imposed cost reduction assumptions as a means of ensuring productivity improvements, even if those productivity improvements cannot be precisely identified. The Board would expect a combination of planned programs and unplanned targets given the duration of the Custom IR plan. However, it would also be necessary to ensure that the budget constraints are sufficient to drive an appropriate level of efficiency and that the result is genuine productivity improvements and not merely short-term cost cutting.

177 One of the specific measures which Enbridge incorporated into its budgets was the requirement that the FTE level be held flat over the IR term. Enbridge maintained that its use of flat FTEs represents "an embedding of productivity" and a stretch factor. However, APPrO argued that holding FTEs flat does not imply the level of productivity which Enbridge is asserting because FTEs increased by about 15% between 2011 (2,070 actual) to 2013 board approved (2,388). The increase between 2011 and the 2014 budget (2,377) was slightly below 15%. APPrO also argued that the vacancy rate would provide flexibility as to the actual level of FTEs and that therefore the budget should be reduced to remove the costs associated with the vacancy rate. Enbridge responded that the 2013 rates include a credit for a 2.5% vacancy rate, and that this credit continues through the forecast period because it is in the base.

178 The Board agrees that holding FTEs flat is a form of cost containment; however, the Board finds that it is not as significant a constraint as Enbridge claims. First, the increase in FTEs between 2011 and 2014 is close to 15%, which is a significant level of increase over a short period. Second, the rates include a credit equivalent to a 2.5% vacancy rate, but the evidence is that the actual

vacancy rate is running at 5%, thereby affording Enbridge with additional flexibility.

179 Productivity was also analyzed in the context of O&M cost per customer measures. Enbridge noted that total utility O&M per customer is declining in 2016 constant dollars and flat in nominal dollars, and that it is lower than Concentric derived from its approach to a traditional IR plan. The Vulnerable Energy Consumers Coalition ("VECC") argued that the declining cost per customer does not demonstrate efficiency because it is almost exclusively due to customer growth and monopoly economics. The increases in cost per customer for 2014-2018 are lower than in 2013, but in SEC's view that is because of the significant increases in 2012 and 2013.

180 The Board finds that the cost per customer data is not strong evidence of productivity improvement. The evidence is clear that Enbridge is growing and as a result the Board would expect to see the cost per customer show a declining trend as a result of scale economies. Enbridge witnesses testified that there are limits to scale economies and pointed to customer care as an area that would not decline on a per customer basis as customers are added. However, the customer care costs are subject to a separate budget setting mechanism.

181 The Board concludes that while Enbridge's approach is reasonable, the evidence is not sufficient to reach a conclusion that an appropriate level of productivity has been incorporated into the forecast. A number of parties made specific recommendations as to how the Other O&M forecast should be adjusted to incorporate a sufficient level of productivity. These are discussed in the next section.

Adjustments to the Forecast

182 Board staff proposed that a productivity factor be imposed on Enbridge in the form of a reduction to the total revenue requirement of $20 million per year. Staff pointed to a number of factors in support of its proposal:

* the recent levels of over-earning
* statements in the Strategic Plan
* the "stretch objective" included in Enbridge's memo to its Board of Directors regarding this application.

183 This productivity factor, totalling $100 million over the five years, would be a direct consumer benefit. Staff also submitted there should be a further stretch factor beginning in 2015, modelled on the approach for electricity distributors, which would amount to about $6.3 million to $7.8 million per year (or about $28.6 million over the IR term).

184 APPrO submitted that Other O&M should be adjusted for ongoing vacancies.

185 Energy Probe submitted that a number of adjustments should be made to the combined Other O&M and RCAM budget:

1. At a minimum, the Board should apply the Enbridge inflator of 2.24% to 2013 Board approved levels to set O&M for 2014 and, therefore, the base for subsequent years. This would result in a $35.8 million reduction over the IR term.

2. The Board should replace the escalation factor of 2.22% for 2015 with the Board determined inflation level of 1.7%. This change would increase the total O&M reduction described in #1 to $42.6 million.

3. The Board should reduce the subsequent years' inflation to 2%, which in Energy Probe's view is reasonable in light of 2008-2013 trend and most forecasts. This change would further increase the total reduction to $49.1 million.

186 CME argued that rates should be set using a traditional IR approach and that inflation should be set using GDP-IPI at 1.7% and that a combined productivity and stretch factor should be 60% of inflation, as it is for Union Gas.

187 Enbridge opposed the proposed reductions and argued that with the exception of the impact of WAMS, the increase in Other O&M is less than a combination of inflation (about 2%) and customer growth (about 1.7-1.8%). Enbridge noted that WAMS causes an incremental $4.1 million increase beginning in 2016, but over time replaces the costs of Envision. Enbridge also noted that its budgeting was done before the 2013 actuals were known. Enbridge argued that the Board should use 2013 actuals, which were higher than the level in the 2013 settlement agreement, as the starting point for any analysis as this is "the only and best evidence of the actual costs to undertake the operations".[16]

188 The Board finds that Other O&M should be set on the basis of yearly increases of 1% beginning with the 2014 proposal level. Some parties argued that the 2014 level should be reduced, but the Board will not do so. The 2014 level is 3.9% higher than the 2013 approved level, and 1.5% higher than the 2013 actual. The Board finds that this level of increase is reasonable in light of the cost pressures facing the company. More importantly, the Board concludes that accepting the 2014 level as proposed, combined with robust expectations for productivity improvements over the term of the IR plan represents an appropriate balance between the company and ratepayers.

189 The Board understands that there will be incremental expenses over the period related to

WAMS and the integrity management program. However, over any given period there will be incremental cost pressures. It is the Board's expectation that the company will manage all expenditures and prioritize its work accordingly.

190 Proposed increases in Other O&M greater than inflation might be reasonable if there was robust benchmarking analysis to demonstrate that the company had achieved a significant level of efficiency and if there was external expert analysis of the budgets themselves. Neither was provided in this case. Enbridge has incorporated productivity into the budget in the form of constraints imposed and implied savings included. However, the Board finds that the level is not sufficient in light of the various concerns with the overall analysis identified above.

191 Enbridge implies that any increase which is less than inflation plus customer growth demonstrates efficiency and productivity improvements. Unless there is evidence that Enbridge has reached a point at which it cannot achieve any further economies of scale, the Board would expect that a period of customer growth would provide many opportunities for further productivity improvements.

192 In setting the Other O&M, the Board finds that it is appropriate to recognize the impacts of forecast inflation, incremental cost pressures from WAMS and integrity programs, the impact of embedded and incremental productivity improvements, Enbridge's history of earning in excess of its allowed ROE, and the company's communication to its Board of Directors that it expects to earn above the allowed return. Based on current and forecast inflation, the program costs included in the evidence, the rate of customer growth and expectations for productivity improvements, the Board concludes that Other O&M should be kept to a level which increases at 1% per year, beginning with the 2014 budget. This will result in a cumulative reduction of about $42.3 million, primarily coming in the later years of the plan. The Board notes that this category of O&M represents only about 55% of total O&M and that the remaining expenditures are subject to other adjustment mechanisms which have been agreed amongst the parties or set by the Board in other proceedings.

Other O&M Costs
Proposed and Approved
($ millions)

	2014	2015	2016	2017	2018
Other O&M Proposed	228.0	231.5	241.0	248.5	256.3
Other O&M Approved 1%	228.0	230.3	232.6	234.9	237.3

Cost of Capital

193 Enbridge proposed to maintain its current capital structure at 64% debt and 36% equity throughout the plan and presented a forecast of the cost of capital for each year of the Custom IR term and included it as a cost within the Allowed Revenues. The company cited the *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities* (EB-2009-0084, 2010 LNONOEB 250 "Cost of Capital Report") to argue that from a ratemaking perspective, the cost of capital is a cost to the utility just like operating and maintenance expense or capital spending.

194 For the cost of debt, the company provided a forecast of debt issuances for 2014 through 2018, including forecast cost rates and debt issuance costs. The mix of long term debt, short term debt, and preferred shares varies by a small amount each year because of the pacing of capital spending and cash flow requirements. For return on equity, Enbridge used interest rate projections from June 2013 to forecast the return on equity for the next five years, as follows:

Return on Equity
2013 Board approved and 2014-2018 Forecast

Year	2013 (approved)	2014	2105	2016	2017	2018
Return on Equity	8.93%	9.27%	9.72%	10.12%	10.17%	10.27%

195 The estimated revenue requirement increase associated with the return on equity forecast increase, over the Custom IR plan term, is $130 million. However, Enbridge forecast that its cost of debt will decline by $51 million over the Custom IR term, which has an offsetting impact on the revenue requirement. The net effect is an increase in the revenue requirement of $79 million over what it would be if the return on equity and cost of debt were fixed at 2013 levels for the duration of the Custom IR.

196 Parties were generally opposed to Enbridge's proposal. They argued that the approach was inconsistent with Board policy and proposed that the return on equity and cost of debt should be fixed at the 2013 levels for the duration of the Custom IR.

Board Findings

197 The Board accepts Enbridge's proposal to set the capital structure at 64% debt and 36% equity. This aspect was not contentious.

198 Enbridge argued that return on equity and cost of debt should be determined in a consistent way. The Board agrees with this position. Most arguments focussed on the return on equity, so the Board will consider that component first.

199 Energy Probe and BOMA argued that Enbridge's proposal to forecast return on equity for five years based on first quarter 2013 data is inconsistent with Board policy. The Board agrees. Although the Board's RRFE Report does not establish a policy for how the cost of capital should be determined under Custom IR, the cost of capital is a genuine cost to the company and theoretically a Custom IR could incorporate a forecast of the return on equity for each year of the Custom IR term. However, Enbridge's approach to developing the forecast return on equity stretches the Board cost of capital policy beyond what was contemplated by the Board. In its Cost of Capital Report the Board confirmed that it would continue to use a formula-based equity risk premium approach to set the return on equity for distributors that had filed a cost of service application - a single year application. At the time that policy was set, the Board had not contemplated applications for a five year revenue requirement.

200 The Board could consider applying its cost of capital policy to setting the return on equity for a longer term, but there would need to be a sufficient evidentiary basis. SEC and APPrO submitted that there was insufficient evidence to support the return on equity forecast because interest rates are inherently difficult to forecast and typically require expert evidence, and this was not provided. Board staff submitted that interest rate projections are notoriously inaccurate especially when extending to five years. The Board agrees with these arguments. Using interest rate forecasts made in the first half of 2013 to project estimates for five years is not sufficient evidence to set the return on equity for five years. The Board finds that expert testimony and appropriate discovery would be required to substantiate the forecast element of the formula-based equity risk premium and to assess fully the alternatives and consequences.

201 Finding that there is insufficient evidence to approve a five year forecast for return on equity, the Board has two options: fix the return on equity now for the duration of the Custom IR or update the return on equity each year during the annual rate adjustment proceeding.

202 Many parties submitted that the return on equity should be fixed now for the duration of the Custom IR, arguing that under traditional IR, the return on equity is set in base rates and remains in place throughout the IR term. In the view of some parties, the base year should be the 2013 cost of service proceeding. CME argued that fixing the cost of capital at the base year levels for the full term of the IR Plan is one of the added risks assumed by the utility as part of an IR structure. BOMA pointed out that fixing the cost components at the base year levels was the practice in the prior Enbridge IR Plan (as well as Union Gas' two recent IR plans) and that there is no justification to change the approach.

203 Enbridge responded that these arguments were flawed in two respects. First, Enbridge noted that no party contended that interest rates and credit spreads (which drive the determination of return on equity under the Board's formula), will be constant over the IR term. Second, the company submitted that the suggestion that the return on equity is fixed under traditional IR is misleading because under traditional IR the return on equity is part of the overall revenue requirement that is subject to annual formulaic increases through the escalation factor. The Board accepts Enbridge's characterization that the return on equity under traditional IR has an implied escalation factor. In comparison, fixing the return on equity under a Custom IR would truly fix the return on equity over the full term. Whether this would be to the benefit of the company or ratepayers would depend on how rising or falling equity and debt rates contributed to the net position.

204 The other option would be to set the return on equity each year as part of the annual rate adjustment process. Enbridge included this proposal in its reply argument. The company noted that before making its application it had considered whether the return on equity should be re-set each year. However, it had decided against that approach and advanced a forecast approach in its application in order to minimize the number of annual adjustments. Having considered stakeholder submissions, Enbridge proposed that the return on equity (and the cost of debt) be set for each year during the annual rate adjustment proceeding using the Board's established methodology. Under this revised approach the cost of capital for 2014 would be set on a final basis in this proceeding. The cost of capital for 2015 to 2018 would be set on a placeholder basis in this proceeding, and then be set on a final basis in the relevant annual rate adjustment proceeding. Enbridge proposed that the return on equity (and cost of debt) would be determined using the most up-to-date data available at the time of each application. If timing permitted, Enbridge proposed to use the Board-approved return on equity, which is currently prepared in October and published in November each year.

205 If the Board were to update the return on equity each year using the Board approved parameters the process would be fairly straightforward, but the company would be shielded from any forecast risk. When compared to fixing the cost of capital now, the company might be better or worse off. Having considered the two options and the circumstances of this application, the Board

concludes that the preferred approach is to update the return on equity each year during the annual rate adjustment proceeding using the Board approved parameters. The Board publishes these figures in November which should provide Enbridge with adequate time to incorporate them into the final rates.

206 Having already determined that the return on equity and cost of debt should be determined on a consistent basis, the Board concludes that the cost of debt should also be set each year through the annual rate adjustment proceeding. The Board accepts that setting the cost of debt may be somewhat more contentious than setting the return on equity since it will not be formulaic; however, there is evidence in this proceeding which provides an indication of the expected timing for future debt issues and, as a result, the issue may be amenable to negotiation among the parties.

Site Restoration Costs ("SRC")

207 Site restoration costs ("SRC") are also referred to as net salvage. Net salvage values can be positive or negative. When assets are retired and replaced, if the proceeds of disposal do not cover the costs of removal then the net salvage is negative. The Board has approved the recovery of SRC as part of Enbridge's composite depreciation rates since at least 1959, either directly or through the acceptance of settlement agreements.

208 For regulatory purposes, SRC forms part of accumulated depreciation. Rate base and the return on rate base are lower as a consequence. Enbridge recovers SRC annually through depreciation expense included in its revenue requirement. Enbridge's audited financial statements have been prepared in accordance with US Generally Accepted Accounting Principles ("US GAAP"). For purposes of financial statement disclosure, Enbridge reports SRC as a long-term liability as a result of rate regulation. As of December 31, 2013, SRC is $903.9 million.

209 Enbridge retained Gannett Fleming to complete a number of comprehensive depreciation studies for Enbridge. Its most recent 2011 study was based on a review of assets in service through December 31, 2010, and at that time, Enbridge's SRC was calculated to be more than $700 million. Gannett Fleming carried out a two-phase review of net salvage calculations and recommended that Enbridge stop using the traditional method for SRC and instead adopt the Constant Dollar Net Salvage ("CDNS") method. The primary difference between the traditional method and the CDNS method is the treatment of inflation and expected lives. Enbridge described it as follows:

> *Under the CDNS approach, historic transactions are revalued to a current cost to allow for a current cost percentage of net salvage with the impacts of historic inflation removed; the current cost estimate is then inflated using appropriate estimates for future inflation*.[17]

210 Historic inflation rates were substantially higher than current and expected inflation rates. By adopting the CDNS method beginning in 2014, the result is that substantially more SRC has been collected in the past than is now considered necessary. In addition, under CDNS, lower depreciation

rates are required on a going-forward basis. These two impacts would reduce costs to ratepayers. While CDNS has not been widely adopted in Canada, Mr. Kennedy, the expert witness from Gannett Fleming explained that often its adoption results in higher rates but that Enbridge was unique amongst Canadian utilities in terms of the timing of its growth and retirements. Mr. Kennedy was confident that the circumstances which led to a reduction in SRC under CDNS for Enbridge would not change over the next five years.

211 Enbridge submitted that the CDNS approach is a conceptually preferable methodology which results in both a substantial refund to ratepayers and reduced rates over the term of the Custom IR. Enbridge proposed to return the excess SRC to ratepayers using a rate rider over the Custom IR period, and the amount was calculated to be $259.8 million. This rate rider would not directly affect rates and would not be included in revenue requirement, but would have the impact of lowering ratepayer bills from what they would otherwise be.

212 The return of $259.8 million to ratepayers does indirectly affect revenue requirement (and therefore rates) in three ways. First, as amounts are refunded to ratepayers, accumulated depreciation is reduced, net rate base increases and Enbridge's cost of capital is applied to a higher rate base. Second, the return of amounts to ratepayers gives rise to a tax deduction which lowers taxes payable. Third, lower depreciation rates going forward reduce the revenue requirement. These three effects result in a cumulative revenue requirement reduction of $241.4 million during the Custom IR plan.

213 There was little support for Enbridge's proposal. Board staff argued that there should be no refund; some intervenors argued that the refund should be greater than $259.8 million, while others, led by SEC, argued that the full $900 million should be returned. Many parties argued that the amount collected through rates going forward should be reduced to the amount forecast to be spent on SRC. A number of parties also recommended a generic proceeding on the issue.

Board Findings

214 The Board will accept Enbridge's proposal to adopt the CDNS method for site recovery costs, including the amounts to be collected during the Custom IR period. However, the Board will make some adjustments to the refund amount which will also impact rates through the three effects described above. The Board will consider further whether a generic proceeding is warranted, but will require Enbridge to undertake additional work regarding the discount rate to be used and whether a segregated fund should be established.

215 The arguments raised four main issues, which the Board will address in turn:

1. Should the CDNS method be adopted?

2. If the CDNS method is adopted, should there be any adjustments to

Enbridge's proposal?

3. What amount should be collected for SRC going forward?

4. Should the Board conduct a generic proceeding or review?

Should the CDNS method be adopted?

216 SEC agreed with Enbridge that the CDNS method is better than the traditional method, but argued that the Board should reject both methods. SEC submitted that Enbridge should not recover SRC from ratepayers as part of depreciation expense within revenue requirement; instead the company should recover SRC as an annual expense using amounts to be spent in the test period. In SEC's view, this would be consistent with US GAAP. As a result, SEC also submitted that the Board should order the return of the total accumulated SRC to ratepayers (approximately $903.9 million) over ten years. SEC provided a detailed explanation of how the refund should be implemented taking into account rate base and income tax effects, and the objective of preventing a significant rate increase when the refund period ends.

217 IGUA, the Federation of Rental Property Owners ("FRPO"), and CCC supported SEC's position. CME largely supported SEC's position, but argued that $500 million should be refunded to ratepayers during the IR term, and a generic proceeding should be used to determine what should be done with the remaining balance. CME also submitted there was conceptually little difference between SRC and deferred taxes. Energy Probe agreed with CME and submitted that the Board should follow a similar approach to that used by Union Gas for the refund of accumulated deferred tax balances in the late 1990's. VECC supported SEC's argument and recommended drawing down the SRC to a more appropriate balance by providing ratepayers with a phased, front-end loaded offset to revenue requirement.

218 Enbridge responded that its proposal had the support of Mr. Kennedy and that no other witnesses testified on the issue. Enbridge urged the Board to assess the proposals made by others by considering the extent to which they have appropriate evidentiary grounding. Specifically, Enbridge argued that the Board should consider whether the various proposals should have been the subject of evidence called specifically to support them, whether they should have been tested during the evidentiary phase of the hearing and, in some instances, whether they should at least have been put to the witnesses.

219 SEC maintained that its proposal was fully consistent with US GAAP, and that its proposal was essentially the default approach under US GAAP, and argued the following:

> *Now that US GAAP has been adopted and approved, the question should be whether there is a good regulatory reason for the Board to overrule the normal*

> *accounting rule for removal and site restoration costs, and instead impose its own rule (for example, net negative salvage).*[18]

220 The Board finds that this is not the appropriate question. The Board is not "overruling" US GAAP; the Board is considering whether to approve the continuation of a long-standing regulatory approach to dealing with site restoration costs with a change in the methodology to adopt CDNS. In that context, the appropriate consideration is whether there are significant flaws in the current overall approach and whether there is sufficient evidence to adopt an alternative approach to SRC.

221 The Board finds that, in principle, it is reasonable for current ratepayers to pay toward the cost of eventually retiring the assets which they are currently using. The timing and the extent of these future costs are inherently uncertain, hence the reliance on specialized studies by depreciation experts, and periodic reviews and updates. This overall approach has been approved by the Board, and in many instances agreed to by the parties through settlements, for a long period of time. Enbridge is proposing to modify the overall approach to use CDNS, but SEC is proposing a very significant change to the overall approach. Given the long-standing approval of the overall approach, the Board would need compelling reasons to make a significant change and robust evidence as to all the associated impacts. The Board has neither in this case. There are three reasons for this conclusion.

222 First, the objections to Enbridge's overall approach are largely grounded in the view that the amount being recovered will never be used to cover actual costs because asset lives are getting longer and Enbridge continues to grow. A number of parties have likened the issue to deferred taxes. SEC argued that collections will continue to exceed outlays for the foreseeable future and therefore the situation is like deferred taxes for which there is little likelihood of eventual payment as long as the company continues to grow. However, there was little evidence or analysis to support this analogy or examine how the two issues might differ. For example, if Enbridge's growth slows or stops, the return of the total SRC now would appear to shift a considerable SRC burden to future ratepayers at a time when those ratepayers might also be burdened by the other potential rate impacts of a slow-growth or no-growth utility.

223 Second, SEC argued that the National Energy Board has already decided that similar costs should be dealt with on a current cost basis. However, there was no evidence on this point, and in its reply, Enbridge disputed SEC's interpretation of the National Energy Board's approach.

224 Third, SEC further argued that there is no segregated fund to protect ratepayers. But that is not a reason to return the funds now to ratepayers - that is an argument to examine whether some additional ratepayer protection is warranted, perhaps in the form of a segregated fund. This issue is addressed later in this section.

225 The Board concludes that there is no compelling reason to reject the overall approach to SRC. Having determined that it is appropriate to maintain the current practice of collecting money from current ratepayers to fund the future retirement and restoration costs, the Board must consider

whether it is appropriate to change from the traditional method to the CDNS method. Other than Board staff, no party argued for the retention of the traditional approach.

226 Board staff argued that there is uncertainty about asset lives and asset replacements and therefore the SRC should be retained in full. Board staff submitted that Enbridge had provided sufficient evidence that the company will require several billion dollars in the future to remove and replace assets at the end of their useful lives and noted Mr. Kennedy's view that the amount would exceed $3 billion. Board staff was not opposed to the adoption of the CDNS method, but submitted that it should not be implemented until a new asset plan has been completed.

227 While Enbridge's future site restoration costs may be significant, there is no compelling evidence that those requirements will be of the magnitude and timing that would warrant setting aside Gannett Fleming's analysis of the appropriate SRC level. The evidence was in fact more weighted toward the conclusion that as Enbridge continues to grow, the recoveries for SRC will exceed the outlays. The Board concludes that the CDNS should be adopted.

If the CDNS approach is adopted, should there be any adjustments to Enbridge's proposal regarding the determination of the refund?

228 Enbridge proposed to refund $259.8 million in excess SRC over the Custom IR term. Three areas were raised in submissions: foregone interest, the discount rate, and the point in time to be used for the calculation. The Board will address each in turn.

229 BOMA supported Enbridge's proposal but argued that an additional amount should be deducted from the revenue requirement each year for foregone interest. In BOMA's view, Enbridge has received an interest free loan from ratepayers in the form of the SRC funds and this "foregone interest" should be returned. BOMA is incorrect. The evidence is clear that interest was not paid on the SRC balance because the amount operated as a reduction to rate base and hence the return on rate base (paid by ratepayers) was lower than it otherwise would have been.

230 Gannett Fleming performed its analysis using a discount rate of 2.38%, the then current rate for long Canada bonds (October 2012). This is comparable to the rate mandated under Canadian GAAP for Asset Retirement Obligations ("ARO"). SEC argued that if the proposal is accepted, the discount rate should be adjusted for three reasons:

1. Under US GAAP, the discount rate for ARO is the credit-adjusted risk free rate, which in SEC's view is the weighted average debt rate for Enbridge.

2. The rate is to be a proxy for the expected investment returns on the reserve, and 2.38% is unreasonably low.

3. Pension funds have a similar structure and Enbridge used a discount rate of 4.3% which was recommended by its advisors as of December 2012.

231 CME agreed that a higher discount rate should be used and submitted that the refund amount over the period 2014 to 2018 should be at least $500 million, which is essentially the level of refund by 2018 under SEC's proposal.

232 Enbridge responded that there is no evidence to support any discount rate other than the one used by Gannett Fleming. The Board does not agree. SEC has identified a number of facts which strongly suggest that an appropriate discount rate would be higher than 2.38%, and in particular the fact that 4.3% is being used for the pension funds. In addition, Mr. Kennedy supported his use of 2.38% as being comparable to what he has used in other analyses, but he acknowledged "*I'll admit to not thinking about trying to normalize that discount rate with other net present value calculations the company had made in other areas*."[19] The Board finds that this is a significant consideration.

233 The evidence is that if the discount rate were increased to 4.95%, which SEC identified as Enbridge's weighted cost of debt, the excess SRC would increase by an estimated $243 million and the annual SRC provision over the Custom IR term would decline by an estimated $174 million. The Board concludes that the discount rate should be examined in more detail at the next rebasing, however, for the 2014 to 2018 period, the refund will be increased by $120 million and the SRC provision will be reduced by $85 million. This represents half of the estimated impact of using a discount rate of 4.95% and the Board finds that to be a reasonable proxy for a more appropriate discount rate based on the evidence in this proceeding.

234 The excess SRC has been calculated as of December 31, 2010, but SEC argued that if Enbridge's proposal is accepted, at a minimum the amount should be updated to December 31, 2013. SEC argued that the evidence suggests that excess SRC was higher at the end of 2013 than at the end of 2010 by about $100 million, Mr. Kennedy acknowledged that there would likely be additional excess SRC, but did not recommend that the refund amount be re-calculated or re-estimated. Mr. Kennedy testified that it would be a complex undertaking to do an accurate re-evaluation as of the end of 2013 and he also explained that lags were not uncommon given the time required to produce the necessary studies and the periodic nature of major depreciation studies. The expectation is that another major study would be done in 2017 or 2018.

235 The Board accepts that studies of this nature will create some amount of lag which will be corrected with the subsequent study. The Board will not order an additional refund of excess SRC. Although the lag will be substantial by the time the next depreciation study is completed, the Board has already increased the refund to address the discount rate issue. The Board wishes to be cautious, pending the resolution of the discount rate issue, to ensure that the refund does not end up being too high.

236 Enbridge proposed to refund $259.8 million; the Board will require a refund of $379.8 million. The adjustment will have consequential impacts on the rate base and income tax

calculations. Enbridge will be required to calculate these impacts as part of the rate order process.

What amount should be collected for SRC going forward?

237 Enbridge proposed to recover $247.3 million for SRC over the IR period. The company forecast that it would spend $76.4 million on restoration projects in that period. Board staff, CME and SEC argued the amounts collected should be limited to the forecast expenditure.

238 The Board has decided that it will continue to approve Enbridge's overall approach to SRC with the modification to use CDNS. Part of that approach is that the annual collections for SRC may exceed the actual expenditures. As discussed above, the Board finds no compelling reason to depart from this approach at this time. The Board has addressed the issue of the discount rate above and has directed that the SRC collected over the IR period be reduced by $85 million. This will reduce the amount collected from the proposed level of $247.3 million to $162.3 million.

239 SEC pointed to the National Energy Board and claimed that it approved the recovery of retirement costs as a current expense. Enbridge disagreed with this interpretation. There is limited evidence in this proceeding about the National Energy Board's approach to this issue, and there is no analysis of whether the approach would be applicable to Enbridge.

Should the Board conduct a generic proceeding or review?

240 Board staff recommended that the Board require Enbridge to produce a report addressing the implications of creating an irrevocable trust for the SRC amounts. Staff suggested that the report could be filed and form a part of the 2014 ESM application expected to be filed in the spring of 2015.

241 CME and SEC recommended that the Board conduct a generic review of SRC and that the review should be informed by the National Energy Board proceeding on abandonment costs and the National Energy Board principles related to abandonment costs and removal costs. SEC submitted that the generic review should include gas and electricity distributors and electricity transmitters and should address issues related to how funds should be collected and whether they should be segregated. In SEC's view, the generic review could be done in parallel with the SEC proposal to refund the entire balance over 10 years, as the amounts to be returned by the end of 2018 would still allow for adjustments going forward. FRPO, CCC, and IGUA supported a generic review.

242 Enbridge responded that there is no evidence of a live issue with respect to SRC involving any other utility regulated by the Board. Enbridge also expressed doubt that Union Gas will be addressing an SRC issue in the near future or at all, given that Union Gas is in the first year of a five-year IR plan and no SRC issue is evident within that plan.

243 The evidence in this case shows that the approach to SRC is case specific in terms of the age of the utility's assets, the replacement schedule, expected growth, and SRC accumulated to date. A

generic review might be used to assess the current situation and set principles, but it is not clear that the issue warrants such a review at this time. The Board will consider the recommendations by parties as it conducts its business planning over the next period. However, the Board will direct Enbridge to examine the issue of whether a segregated fund should be established as a means of protecting ratepayers. Enbridge shall present this evidence as part of the first application following this Custom IR.

Deferral and Variance Accounts

244 Enbridge has a number of deferral and variance accounts in place. For some, it has proposed to retain the accounts unchanged; for a few accounts Enbridge has proposed changes. Enbridge also proposed several new accounts. Each category is addressed below.

Existing Accounts - no changes proposed

245 Enbridge proposed to maintain a number of previously approved accounts. Each would be in place for the full IR term, with the exception of the Design Day Criteria Transportation Deferral Account, which would be in place for 2014 only:

* Design Day Criteria Transportation Deferral Account ("DDCTDA") (2014 only)

* Purchased Gas Variance Account ("PGVA")

* Unaccounted for Gas Variance Account ("UAFVA")

* Storage and Transportation Deferral Account ("S& TDA")

* Deferred Rebate Account ("DRA")

* Customer Care CIS Rate Smoothing Deferral Account ("CCCISRSDA")

* Average Use True Up Variance Account ("AUTUVA")

* Manufactured Gas Plant Deferral Account ("MGPDA")

* Ontario Hearing Costs Variance Account ("OHCVA")

    * Electric Program Earnings Sharing Deferral Account ("EPESDA")

    * Ex-Franchise Third-party Billing Services Deferral Account ("EFTPBSDA")

* Post-Retirement True-Up Variance Account ("PTUVA")

    * Lost Revenue Adjustment Mechanism Variance Account ("LRAM")

    * Demand Side Management Incentive Deferral Account ("DSMIDA")

    * Transition Impact of Accounting Changes Deferral Account ("TIACDA")

* Open Bill Revenue Variance Account ("OBRVA")

246 Parties only made submissions on two of the accounts: the OHCVA and the DDCTDA.

247 Board staff, CCC, SEC and EP all submitted that the OHCVA should be discontinued. They argued that hearing costs are part of a normal business activity and that no other Ontario utility has a similar account. Enbridge argued that the account is necessary because the expenses are unpredictable and out of company control. The company noted that the account has been in place for 15 years, often under the framework of a settlement agreement.

248 FRPO submitted that the DDCTDA should be retained beyond 2014 and kept separate from the new UDCDA to ensure transparency. In FRPO's view, it is not appropriate to merge accounting of a number of factors given the current uncertainty about infrastructure development and possible National Energy Board decisions. Enbridge responded that the account does not need to be maintained, arguing that it would not be possible to distinguish the amounts due to historic changes in design day and those related to procuring long haul Firm Transportation ("FT") rather than short haul.

Board Findings

249 The Board will discontinue the OHCVA. The Board finds no evidence of an ongoing need for a cost pass-through for what is a standard activity for a regulated utility.

250 The Board concludes that the DDCTDA should be discontinued after 2014, as proposed by Enbridge. The Board agrees with the company that it will be impractical to attempt to distinguish the balances in the way proposed by FRPO. The Board notes the extensive gas supply reporting agreed to by the company and finds that this information will provide sufficient transparency in this area.

251 All the other accounts in the list above are approved for continuation.

Existing Accounts - changes proposed

252 Enbridge proposed to make modifications to a number of previously approved accounts:

* Gas Distribution Access Rule Impact Deferral Account ("GDARIDA")

* Demand-Side Management Variance Accounts ("DSMVA")

* Transactional Services Deferral Account ("TSDA")

Gas Distribution Access Rule Impact Deferral Account ("GDARIDA")

253 The GDARIDA is used to record all incremental unbudgeted capital and operating costs associated with the development, implementation, and operation of the Gas Distribution Access Rule ("GDAR") and any amendments to the rule. The GDARIDA was previously approved as, and known as, the Gas Distribution Access Rule Cost Deferral Account, ("GDARCDA"). The company is proposing an alteration to the scope of the account to include all financial impacts which could arise as a result of changes in GDAR. No party objected to this proposal.

Demand-Side Management Variance Accounts ("DSMVA")

254 Enbridge has three DSM deferral and variance accounts for 2014. The company proposed to establish that same group of accounts for 2015 through 2018, but indicated that it has not received any direction from the Board. Additionally, Enbridge proposed that any further variances in DSM spending and results, beyond those included within the 2014-2018 forecasts, which occur as a result of Board decisions in any other proceeding be included within each of the 2014-2018 DSM variance accounts. Enbridge explained that it has included the approved or projected level of DSM spending in each of its 2014-2018 forecasts of costs. No party objected to this proposal.

Transactional Services Deferral Account ("TSDA")

255 The proposal for the 2014-2018 TSDA is to record the incremental net revenue from transportation and storage related Transactional Services, to be shared 90/10 between Enbridge's ratepayers and shareholders. While Enbridge proposed to continue to include a forecast of $12

million in Transactional Services revenue as an offset to rates, the company proposed to remove the $8 million guarantee (a maximum $4 million credit to the company). The result would be that up to the full $12 million could be returned to Enbridge. Enbridge justified this proposal on the basis of recent changes in TCPL tolls and the resulting uncertainty about future prices and potential related impacts.

256 A number of parties objected to this proposal. Board staff argued that the base amount should be increased to $24 million from $12 million, based on performance in 2012 and 2013, and that the maximum credit should be increased from $4 million to $8 million. The net effect would be a $16 million guarantee to ratepayers. FRPO considered staff's position, but acknowledged that the company will be managing significant exposure to unabsorbed demand charges and submitted that increasing the amount and the guarantee would not be justified. FRPO concluded that no change should be made to the account. BOMA and CCC also argued that the guarantee should remain unchanged. Enbridge responded that the current approach is not appropriate because of current and expected changes in TCPL's tolls and services, as well as the company's own service changes. Enbridge noted that the FT-RAM program (which has been a large proportion of Transactional Services revenues) has been discontinued, the amount of capacity available for release is high, there will be reduced reliance on long-haul because of the GTA project, and the revenue from storage continues to decline. Enbridge concluded that the opportunities to earn Transactional Services will be reduced, so it would be appropriate to remove the $8 million guarantee.

Board Findings

257 The proposed changes to DSMVA and GDARIVA were unopposed and will be accepted by the Board. The Board notes that further direction regarding DSM accounts may arise from the current DSM consultation.

258 The Board approves the proposed change to the TSDA. The Board accepts the company's evidence that a number of significant changes have taken place in the market and these changes are likely to reduce the opportunities for Transactional Services and therefore the associated revenues. Once there is more experience under the new market conditions, the Board will consider whether a ratepayer guarantee should be reinstated.

Proposed New Accounts

259 Enbridge proposed eight new accounts:

* Earnings Sharing Mechanism Deferral Account ("ESMDA") (2014-2018)

* Unabsorbed Demand Cost Deferral Account ("UDCDA") (2014 only)

* Customer Care Services Procurement Deferral Account ("CCSPDA") (2014-2016)

* Greenhouse Gas Emissions Impact Deferral Account ("GGEIDA") (2014-2018)

* Constant Dollar Net Salvage Adjustment Deferral Account ("CDNSADA") (2014-2018)

* Greater Toronto Area Project Variance Account ("GTAPVA") (2014-2018)

* Relocation Mains Variance Account ("RLMVA") (2017-2018)

* Replacement Mains Variance Account ("RPMVA") (2017-2018)

Earnings Sharing Mechanism Deferral Account ("ESMDA")

260 The purpose of the ESMDA is to record the ratepayer share of annual utility earnings that result from the earnings sharing mechanism throughout the term of the Custom IR.

261 This issue has been addressed earlier in this decision, and the account will be structured accordingly. Simple interest will be calculated on the opening monthly balance of the account using the Board approved EB-2006-0117 interest rate methodology.

Unabsorbed Demand Cost Deferral Account ("UDCDA") (2014 only)

262 Enbridge intends to contract for incremental one-year long-haul FT capacity on TCPL to meet its Peak Day requirements in 2014. If the company is unable to use 100% of its capacity, then the associated Unabsorbed Demand Costs "UDC" will be debited in the UDCDA (excluding the amounts that will be captured in the DDCTDA). Enbridge's forecast of UDC costs for 2014 is $62.8 million (excluding amounts that may be recorded in the 2014 DDCTDA), and that is the maximum amount that may be recorded in the 2014 UDCDA. Enbridge committed to using its best efforts to mitigate the UDC and will provide the balance in the UDCDA and DDCTDA through the QRAM process. Simple interest will be calculated on the opening monthly balance of the account using the Board approved EB-2006-0117 interest rate methodology.

Board Findings

263 No party objected to this account, and the Board will approve it.

Customer Care Services Procurement Deferral Account ("CCSPDA")

264 Enbridge proposed that the CCSPDA be in place for 2014, 2015 and 2016 to capture the costs associated with the benchmarking, tendering and potential transition of customer care services to a new service provider(s). Enbridge would then bring forward the costs recorded in this account for recovery in rates in 2017. Simple interest is to be calculated using the Board approved EB-2006-0117 interest rate methodology.

265 Energy Probe supported the account, but submitted that there should be a cap of $5 million to provide an incentive to Enbridge to manage its costs. BOMA supported Energy Probe's position. Enbridge responded by accepting the $5 million limitation proposed by Energy Probe.

Board Findings

266 The Board will approve the account, with the $5 million limit.

Greenhouse Gas Emissions Impact Deferral Account ("GGEIDA")

267 The GGEIDA would be used to record the impacts of provincial and federal regulations related to greenhouse gas emission requirements along with the impacts resulting from the sale of, or other dealings in, earned carbon dioxide offset credits. This new account would replace the more limited Carbon Dioxide Offset Credits Deferral Account ("CDOCDA"). Simple interest is to be calculated on the opening monthly balance using the Board approved EB-2006-0117 interest rate methodology.

Board Findings

268 No party objected to this account, and the Board will approve it.

Constant Dollar Net Salvage Adjustment Deferral Account ("CDNSADA")

269 The CDNSADA is part of the company's proposal related to site restoration costs (the SRC issue). The SRC issue has been addressed earlier in this decision, and the CDNSADA account will be structured accordingly. Because the balance in the account will offset rate base, Enbridge proposed that no interest be calculated for this account. The Board accepts this approach.

Greater Toronto Area Project Variance Account ("GTAPVA")

270 This account request has already been addressed in the capital expenditure section.

Relocation Mains Variance Account ("RLMVA") and Replacement Mains Variance Account ("RPMVA")

271 These account requests have already been addressed in the capital expenditure section.

Cost Allocation and Rate Design

Introduction

272 Enbridge is not proposing any changes to its Board approved cost allocation methodology for 2014. The company is proposing some modifications to Rate 100 and Rate 110, and to the Rate Handbook.

273 This decision addresses the following issues:

* Allocation of costs to Rate 125
* Allocation of costs to non-utility storage
* Changes to Rate 100 and Rate 110
* Rate 332
* Rate Handbook changes

Allocation of Costs to Rate 125

274 APPrO submitted that costs are being over-allocated to Rate 125. APPrO identified two specific concerns:

1. the allocation of extra-high pressure (XHP) pipeline assets to Rate 125 when those pipes are not used to serve Rate 125 customer and are not capable of serving those customers; and,
2. the impact of the economic feasibility analysis conducted for new Rate 125 customers (to determine the initial contribution) combined with the cost allocation process for major new reinforcement projects (to determine ongoing charges).

275 APPrO sponsored expert evidence by Mr. Todd and Mr. Roger of Elenchus. The Board will address each of the concerns separately.

Allocation of XHP assets

276 Rate 125 is currently allocated a portion of the costs of all XHP pipeline assets. These pipelines vary in size from 1.5" to 36". APPrO submitted that Rate 125 customers should only be allocated costs for pipelines actually used to serve Rate 125 customers, specifically only pipes which are 12" and larger. APPrO argued that its proposal is not contrary to the principle of postage stamp rates because the issue is not related to making distinctions based on the vintage of the assets, which is a key concept of postage stamp rates. In APPrO's view, the issue is between higher and lower capacity assets (i.e. pipe diameter). APPrO pointed out that Enbridge already distinguishes between higher capacity (TP) and lower capacity (HP and LP) pipelines and argued that a further distinction of TP assets which better reflected cost causality would be appropriate. APPrO also submitted that it was appropriate to make incremental changes to the cost allocation process where justified, and that it was not necessary to undertake a complete cost allocation study before making an incremental change.

277 Enbridge responded that it would be inappropriate to make one change in isolation of a broader examination of cost allocation. Energy Probe took the same position. Enbridge argued that looking at isolated cost elements (such as pipeline assets) is contrary to postage stamp rates:

> *Therefore, should the current Board approved postage stamp cost allocation methodology be changed (i.e. to make it more detailed), it could not be done appropriately (reflecting postage stamp principles) based on an isolated parameter such as the pipe size. Other elements comprising the total cost of the XHP (TP) system and the allocation of these to the customer classes would need to be taken into account as well in order to maintain cost causality. The approach proposed by APPrO does not accomplish this.*[20]

278 Enbridge noted that different options would have different consequences, including possibly increasing the level of costs allocated to Rate 125 (for example, allocating costs based on peak hourly demand rather than peak daily demand). Enbridge submitted that even if the Board adopts APPrO's proposal, then Rate 125 customers should at least be allocated the costs of pipes that can serve Rate 125 customers. Enbridge pointed out that this would be consistent with Elenchus' approach and would result in pipes 6" and larger being allocated to Rate 125. Enbridge also argued that if this change were made, then the allocation factor would need to be changed.

279 APPrO maintained that no change to the associated allocation factor would be necessary. APPrO argued that because gas generally flows through larger diameter XHP system before the smaller diameter XHP, if the XHP system is divided into two categories (over and under 12"), there is still no change in the customers which are using the larger section of the system:

> *It is still the same customers (all of them) with the same cost responsibility as determined by the peak day allocator. The allocator is still valid, based on cost causality, to allocate category one XHP, since the allocator reflects how the*

> *XHP category is used. If not all customers use XHP category one, then the allocator would have to be different, but that clearly is not the case*.[21]

280 The company responded:

> *...cost causality would not be maintained if certain pipeline diameters and associated costs are removed from the cost of the XHP system, without making a corresponding adjustment to the Delivery Demand TP allocator to account for the demand that is met through those pipelines*.[22]

281 Enbridge did not present evidence as to how the allocators should change, but instead argued that any changes to the cost allocation should be done only on a holistic basis which would include an examination of other cost elements as well as the allocation factors.

Board Findings

282 There are two main issues at play: 1) to what level of detail should assets be divided to ensure a fair allocation within the overall framework of appropriate cost allocation; and 2) is it appropriate to make incremental changes in the absence of a complete review of the cost allocation.

283 With respect to the division of assets, the Board finds that it is generally inappropriate to allocate the costs of assets to a class of customers if those assets are incapable of serving that class of customers. The evidence is clear that high pressure pipelines less than 6" in diameter cannot be used to serve Rate 125 customers. On that basis, pipelines under 6" should not be allocated to Rate 125. APPrO pointed out that no Rate 125 customers are served using pipes less than 12" and that Enbridge's evidence is that it would be unlikely to attach a new Rate 125 customer to an existing 6" or 8" line. However, Rate 125 covers a wide range of load sizes. The addition of a smaller Rate 125 customer using a 6" or 8" pipeline would have the effect of introducing instability into the cost allocation process if the allocation were based on what is used to serve, as opposed to what is capable of serving. The Board finds, therefore, at a minimum, Rate 125 should be allocated the costs of pipelines which are physically capable of serving the load; in other words, 6" and greater. This is consistent with Elenchus' recommendation.

284 There has not been a systematic review of all cost categories related to Rate 125. It may be that such an analysis would result in additional costs allocated to Rate 125. This is one of the concerns with making incremental changes in the absence of a full cost allocation study. However, the Board finds that ratepayers should be able to make a case for an incremental change without bearing the responsibility for conducting a complete cost allocation analysis. It was open to Enbridge to provide responding evidence outlining other specific modifications which should be considered. It did not do so. For example, Enbridge asserted that the allocation factor should be changed if the XHP assets were sub-divided, but it did not provide evidence as to why or how the allocation factor should be changed. In addition, the Board is prepared to make this incremental change because it will have a negligible impact on the rates of other classes, and therefore other

ratepayers are not materially adversely impacted.

Economic Feasibility Analysis and Ongoing Rates

285 APPrO submitted that Rate 125 customers are paying twice for excess capacity in the system: at the time of the initial economic feasibility analysis through contribution charges and again through ongoing charges for additional capacity which is designed to meet 20-year growth for general service customers. APPrO was unable to estimate the impact of this issue because Enbridge declined to provide a working copy of the cost allocation model. APPrO proposed that the issue should be addressed at the next application and that the Board should direct Enbridge to study the issue with stakeholders and make a proposal. Enbridge responded that there is very little excess capacity and it only exists for a short period. In Enbridge's view, there is no meaningful issue to be addressed.

Board Findings

286 The Board will not adopt APPrO's proposal. The economic feasibility analysis and capital cost recovery is done in order to offer a Rate 125 customer a billing contract demand which results in a bypass competitive rate. Once a customer is connected, it becomes part of the larger system and should share in the cost responsibility for that system. The Board accepts Enbridge's evidence that the excess capacity associated with reinforcement projects is limited in size and duration and concludes that there is no compelling basis on which to require further analysis of this issue at this time. It is open to APPrO to pursue this issue when a full cost allocation is presented.

Allocation of Costs to Non-Utility Storage

287 FRPO raised concerns about two related storage cost allocation issues: base pressure gas and lost and unaccounted for gas. FRPO argued that the question of whether base pressure gas should be allocated to non-utility storage on a fully allocated cost basis or on an incremental cost basis would need to be resolved at a future proceeding. FRPO further submitted that it was not clear whether any cost for lost and unaccounted for gas had been allocated to non-utility storage, but that some level of cost should be. FRPO proposed that 12.4% of total lost and unaccounted for gas should be allocated to non-utility storage (at the QRAM price), noting that this would provide an incentive to Enbridge to complete the necessary study. BOMA supported FRPO's position.

288 Enbridge responded that no incremental costs have been allocated to utility customers as a result of unregulated storage. Enbridge noted that it is doing an engineering study to see if lost and unaccounted for gas has changed and if it is higher, then the shareholder will bear that cost if it is the direct result of unregulated storage. Enbridge maintained that any change in lost and unaccounted for gas will be allocated on cost causation principles.

Board Findings

289 Based on the evidence in this proceeding and Enbridge's submissions, it appears that costs for base pressure gas and lost and unaccounted for gas are being allocated to non-utility storage operations on an incremental cost basis. It is not clear to the Board that an incremental cost basis is appropriate. Generally, costs should be allocated to non-utility operations on a fully allocated cost basis to ensure there is no cross-subsidy to the competitive business from the regulated business. Union Gas uses a volumetric approach to allocate costs between utility and non-utility storage.

290 The Board will not order a specific allocation at this time, however, the Board directs Enbridge to prepare the necessary evidence and proposal in time for the 2015 or 2016 rate application. Regardless of the company's proposal, the evidence must contain the information necessary to make an allocation of base pressure gas and lost and unaccounted for gas to non-utility storage on a fully allocated cost basis and on a volumetric basis. Suitable estimations or approximations will be acceptable.

Changes to Rate 100 and Rate 110

291 Enbridge proposed to change Rate 100 (Firm Contract Service) to provide an additional service option for customers that have low load factor operations. Enbridge explained that, currently, a number of larger customers are not using Rate 100 service and instead are taking service under Rate 6. There are about 33 general service and two potential customers that would be candidates to choose the revised Rate 100 service.

292 Enbridge also proposed to lower the minimum load factor for service provided under Rate 110 (Large Volume Load Factor Service) from 50% to 40%. The lower load factor requirement would facilitate continuity of service for Rate 110 customers who undertake energy conservation and energy efficiency initiatives (because their load factor has declined as result of the energy conservation and efficiency initiatives). It would also provide an option for general service customers with load factors greater than 40% to take service under Rate 110.

Board Findings

293 IGUA and BOMA supported the changes. The Board accepts Enbridge's evidence that the changes will improve the service offerings under these rates and therefore accepts the proposed changes.

Rate 332: Parkway to Albion (GTA related)

294 Rate 332 (Parkway to Albion Transportation Service) relates to Segment A of the GTA Project and would be applicable to the proposed transportation service agreement with Rate 332 shippers for transportation service on Segment A. The Rate 332 monthly charge is designed to recover the shipper's portion of the Segment A costs. In the GTA leave to construct proceeding, Enbridge proposed that the derivation of the annual revenue requirement and determination of Rate 332 monthly charge be considered on a stand-alone basis. The revenue requirement for Segment A

would be based on a cost-of-service methodology and include costs for administration, operation, maintenance, depreciation, cost of debt, return on equity, and municipal and income taxes. In accordance with the Board's GTA Decision and Order (EB-2012-0451, 2014 LNONOEB 2), which approved the methodology, 60% of the annual revenue requirement for Segment A will be recovered from shippers through a contract demand charge for contracted capacity. The actual Rate 332 is being set in this proceeding.

Board Findings

295 The Board accepts Enbridge's proposal.

296 BOMA argued that this issue should be moved to the 2013 ESM or 2015 rate proceeding. BOMA noted that the incremental capital cost associated with this service has increased and argued that there was a lack of detailed evidence and examination of the rate in this case, including how the shipper's share of costs is to be determined or whether a range rate will be used as originally proposed. Enbridge responded that BOMA was incorrect. What BOMA referred to as a range rate in fact is a range of potential rates which the company provided as information for shippers. In Enbridge's view, the evidence is clear that Rate 332 will be allocated 60% of the fully allocated revenue requirement for Segment A of the GTA project and this will be recovered using a demand charge.

297 The Board agrees that BOMA's assessment is incorrect. The derivation of the rate was initially presented in the leave to construct proceeding, and the evidence in the current proceeding is consistent with the previous evidence. In addition, the evidence is clear that Rate 332 will bear 60% of the fully allocated costs of Segment A.

298 APPrO had no comments on Rate 332, but recommended that Enbridge proactively develop daily interruptible service. Enbridge responded that no changes would be needed to be able to offer Transactional Services and if the opportunity to offer further services arises then the company will bring forward a proposal during the IR period. The Board is satisfied with Enbridge's response to APPrO's suggestion.

Rate Handbook Changes - change to Terms & Conditions for Large Customers

299 Enbridge proposed an additional provision to its Terms and Conditions of service in its Rate Handbook which would require Enbridge and its largest customers to meet once annually to review the customer's expected consumption and to confirm the emergency contact information that Enbridge has on file for the customer.

300 APPrO noted the commercially sensitive nature of the information being requested and submitted that it was not clear how Enbridge would use the information. APPrO submitted that the provision should not apply to contract customers because the provision of information should be negotiated between the parties and put into the contract. Enbridge responded that the information is

needed from a safety and reliability perspective whether or not the customer is buying gas from the company because of the size of the customers and the potential impact on system. The company noted that annual contract customers are already complying with the proposed provisions, and for customers with longer term contracts (Rate 125) the intent of the provision is fulfilled through the "annual consumption forecast". Enbridge concluded that the proposal effectively only impacts General Service customers.

Board Findings

301 The Board concludes that there is no adverse impact on customers arising from the proposal. The Board finds that Enbridge has justified the need for the information and has provided adequate assurance that commercially sensitive information will be treated appropriately. The Board notes that in all material respects large contract customers are already operating under the proposed provisions.

Reporting

302 This section summarizes the various reporting requirements which were either proposed by Enbridge, or agreed to by Enbridge as a result of requests from intervenors:

* Enbridge's plan includes a proposed performance measurement framework which consists of an Annual Productivity Report to be filed as part of the ESM application, and a Performance Metrics Benchmarking Report to be filed at the end of the Custom IR term.

* Enbridge agreed to provide the same information as Union Gas agreed to provide in section 12.1 of the Union Gas settlement. Enbridge indicated that it will provide the information as part of its ESM proceedings, or at the end of the Custom IR term. Enbridge indicated that it would not provide the items from the Union Gas list which are not relevant to Enbridge, such as audited statements for utility operations which have not been prepared for Enbridge.

* Enbridge agreed to annually provide intervenors with its Reporting and Record Keeping Requirements "RRR" filings that are relevant to the regulated utility such as SQR's and affiliate transaction reporting. Union Gas has also agreed to provide its annual RRR filing to intervenors,

* Enbridge agreed to hold annual stakeholder meetings during the Custom IR term, similar to what Union Gas agreed to in its Settlement Agreement.

Enbridge proposed an annual funded stakeholder meeting, including funding for reasonable preparation for the meeting and follow up comments from the meeting, after the public release of year-end financial results but prior to Enbridge's filing its annual non-commodity deferral accounts disposition application (March/April timeframe).

At the annual stakeholder meeting, Enbridge proposes to:

1. review previous year's financial results (i.e. earnings, capital spending) and other key operating parameters (i.e. SQR performance) for the most recently completed year;

2. present and explain market conditions and expected changes/trends and the impact these may have on the regulated operations;

3. present and review the current gas supply plan memorandum; and

4. present results of any customer surveys undertaken during the year.

Enbridge proposes to file all information resulting from this annual meeting with the Board and ensure it is available to any party not able to attend.

* For Gas Supply reporting, Enbridge agreed within the October 2013 Settlement Agreement related to Enbridge's 2014 Gas Supply Plan to provide monthly reporting related to the use of new FT services acquired from TCPL and associated UDC. Subsequently, in response to discussions with FRPO, Enbridge agreed to provide further items within the monthly reporting. Then, during the examination of the gas supply panel at the hearing, Enbridge agreed to provide one additional item (monthly storage targets).

In is submission, FRPO requested further monthly reporting be added to the items noted above. Specifically, FRPO requested that Enbridge provide monthly reporting on the amount of FT capacity that is assigned to third parties through a UDC-related "outright release" (as differentiated from a capacity release

exchange transaction), and the revenue generated from such transactions.

Enbridge responded that it is prepared to provide this additional gas supply reporting, and began doing so within its latest monthly report, which was filed with the Board on April 30, 2014.

FRPO also requested that Enbridge prepare an annual Gas Supply Plan memorandum consistent with what is being prepared and provided by Union Gas. The Gas Supply Plan memorandum would include the following:

1. a summary of the current natural gas market situation;

2. the results of the design day demand forecast with a discussion of the underpinning assumptions;

3. an overview of the current gas supply portfolio;

4. the identification of near term portfolio decisions and a description of how the Enbridge strategy for the specific portfolio decision conforms to the gas supply planning principles; and

5. a summary of major upstream pipeline regulatory filings and/or recent regulatory orders (e.g. RH-003-2011); physical infrastructure projects that will likely impact Enbridge; and the implications associated with gas supply basins.

Enbridge responded that it is prepared to prepare the requested Gas Supply Plan memorandum on an annual basis. The contents of the memorandum would be consistent with what is set out within the April 2014 Union Gas Supply Plan memorandum that was presented at the Union Gas Stakeholder Meeting. Enbridge proposed to include the Gas Supply Plan memorandum as part of the materials to be provided to stakeholders for the annual stakeholder meeting.

* For capital expenditures, Enbridge agreed to provide whatever annual

reporting on actual amounts spent that is required by the Board. Enbridge acknowledged that this may go beyond the reporting that is already included within ESM applications, to identify differences between annual spending and the amounts that were approved and included in Allowed Revenues. This reporting would allow the Board, according to Enbridge, to assess whether the company's actual spending is consistent with the approved Custom IR plan.

Board Findings

303 The Board accepts Enbridge's reporting commitments which are outlined above. In addition, as stated in the Board Findings sections associated with Capital Expenditures, the Board will require Enbridge to report, on an annual basis, on the following aspects:

* Progress of GTA and WAMS projects, including actual cost and schedule versus forecast

* Status and expenditures for the system integrity program

* Progress in efforts to improve the asset management plan

* Status of work programs comprising the productivity savings

* Progress on the benchmarking study (capital and O& M), including stakeholder consultation and independent, third-party involvement.

304 The Board directs Enbridge to compile a comprehensive list of all its reporting commitments for inclusion in the Draft Rate Order.

Implementation

305 On November 28, 2013, the Board declared Enbridge's existing rates to be interim effective January 1, 2014, pending the final resolution of the matters in this proceeding. No orders have superseded the November 28, 2013 Interim Rate Order and therefore the rates remain interim.

2014 Rates

306 The Board must determine when the new 2014 rates should be implemented and the effective date of the new 2014 rates. Enbridge proposed that the new 2014 rates be made effective January 1, 2014 and be implemented in conjunction with the October 1, 2014 QRAM. Under Enbridge's

proposal, there would be two rate riders:

* Rider D would credit ratepayers with the 2014 portion of any SRC reserve that is to be refunded. Rider D would apply to a customer's monthly consumption and would appear as a separate line item on the monthly bill.

* Rider E would credit ratepayers with the difference in revenue between interim and final 2014 rates for the period from January 1, 2014 to the date when final rates are implemented.

307 If Enbridge's application had been approved as proposed, an average residential ratepayer would have seen a rate decrease of 1.7% or $9 in 2014 along with an additional credit of $27 for the SRC refund, followed by rate increases ranging from 2.1% to 4.6% in later years of the Custom IR. As a result of this decision, the Board expects that the reduction in 2014 will be the same or slightly larger and that the rate increases in 2015 and beyond will be somewhat lower than proposed by Enbridge. Enbridge will be required to calculate the new impact levels and present them as part of the Draft Rate Order process.

308 No party opposed setting an effective date of January 1, 2014, because it is widely expected that the new rates will be lower than the interim rates, which will result in a ratepayer credit in 2014.

309 Energy Probe submitted that the 2014 rates should be implemented in the first month after they are approved, rather than waiting for a QRAM application. Other parties noted the recent gas commodity price increases and submitted that 2014 rates should not be delayed, so as to pass on the lower rates as soon as possible. Enbridge responded that aligning implementation with the October 1, 2014 QRAM would reduce confusion which might otherwise arise from having a rate change billing outside of the established quarterly rate change mechanism. However, Enbridge noted that if the October 1 date could not be met, then implementation should be done before the January 1, 2015 QRAM, on either November 1 or December 1.

Board Findings

310 The Board finds that the new 2014 rates should be made effective January 1, 2014 and will be implemented with the October 1, 2014 QRAM. Normally, the Board would be reluctant to implement rates with an effective date so far back. However, the timing is due in part to the nature and timing of the application, and the new rates will be lower than the current interim rates. Therefore, the Board finds that it is appropriate in these circumstances to set an effective date of January 1, 2104.

311 The Board expects that the rate order process can be completed to allow for implementation along with the October 1 QRAM. CME proposed that a technical conference be held following the

release of the decision to enable interested parties to address any matters pertaining to implementation. The Board will provide for a technical conference to be held shortly after the Draft Rate Order is submitted in order for Enbridge to explain how it has derived the new 2014 rates from the Board decision.

2015-2018 Rates

312 The Custom IR proposal provides for an annual rate adjustment process. Enbridge requested that the Board set "Allowed Revenues" for each year from 2015 through 2018 as part of the current approval process. Revenue requirements for 2014 are established separately as a final amount and do not require an "Allowed Revenue" step. The Allowed Revenue amounts would serve as a placeholder for rates, and would be updated annually with more current forecasts of specific elements (described below) prior to the start of each year of the plan.

Board Findings

313 The Board will accept Enbridge's proposal for setting rates in 2015, 2016, 2017 and 2018. While most elements of Allowed Revenue have been determined in this proceeding, certain specific elements will have a placeholder amount set at this time and then be updated in advance of the start of each rate year. The elements to be updated include:

* Volumes (including customer additions and a probability weighted large volume customer forecast).

* Gas-cost related items

* Customer care/CIS costs, in accordance with the Board-approved EB-2011-0226 Settlement Agreement

* DSM

* Pension and OPEB costs

* Return on equity (set using the Board's policy)

* Cost of debt

314 Enbridge is directed to include a complete list of the elements which will be updated

annually as a result of its proposal and this decision. The list shall be included as part of the Draft Rate Order.

Draft Rate Order

315 The Board directs Enbridge to file a Draft Rate Order and a Draft Accounting Order which together will comprehensively reflect the Board's findings in this decision and allow the decision to be implemented as soon as possible. The Board expects that the Draft Rate Order and Draft Accounting Order will contain sufficient detail and supporting documentation to allow the Board and parties to verify that the Board's findings are properly addressed. The Draft Accounting Order will address the Deferral and Variance Accounts. The Board will provide for a technical conference and will also allow interested parties to file submissions on the Draft Rate Order and Draft Accounting Order. Enbridge will have an opportunity to reply. The Board's expectation is that its Final Rate Order and Accounting Order will be available for an October 1, 2014 implementation timeframe.

316 The process for the filing of claims for cost awards will be set out after the Draft Rate Order process is complete.

317 THE BOARD ORDERS THAT:

1. Enbridge shall file with the Board and serve on the other parties a Draft Rate Order and Draft Accounting Order by **Thursday July 31, 2014**.

2. A Technical Conference involving Board staff, intervenors and Enbridge will be convened on **Wednesday August 6, 2014 at 9:30 a.m.** The Technical Conference will be held in the Board's hearing room at 2300 Yonge Street, 25th Floor, Toronto. The Technical Conference will pertain to the Draft Rate Order and Draft Accounting Order.

3. Parties wishing to make submissions on the Draft Rate Order or Draft Accounting Order shall file such submissions with the Board and serve a copy on all parties by **Thursday August 14, 2014**.

4. Enbridge may file a reply by **Tuesday August 19, 2014**.

DATED at Toronto July 17, 2014

ONTARIO ENERGY BOARD

Original Signed By

Paula Conboy
Presiding Member

Original Signed By

Cynthia Chaplin
Member

Original Signed By

Emad Elsayed
Member

1 Enbridge recently received approval to charge higher natural gas commodity charges. That was a separate application process, under EB-2014-0039, 2014 LNONOEB 4.

2 *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18, 2012.

3 Enbridge defines "core capital" as "...all capital spending, except for three identified major projects: the GTA and Ottawa Reinforcements and the Work and Asset Management Project (WAMS)."

4 RRFE Report, p. 19.

5 RRFE Report, p. 37.

6 Enbridge retained London Economics International LLC ("LEI") to provide analysis of incentive regulation, and Ms. Frayer of LEI testified at the oral hearing.

7 Enbridge, Reply Argument, p. 101

8 Transactional services revenue is addressed separately in the section on deferral and variance accounts.

9 RRFE Report, p. 19.

10 Asset Plan (Ex B2, Tab 10, Sch 1, p 13).

11 Exhibit J1.6 page 3.

12 Exhibit J1.6 page 6.

13 Tr. 3, pp. 143-144.

14 RCAM is a separate line item, but municipal tax is a specific component of Other O&M.

15 Enbridge, Argument in Chief, p. 44.

16 Enbridge, Argument in Chief, p. 46.

17 Enbridge, Argument in Chief, p. 59.

18 SEC, Argument, p. 76.

19 Tr. 9, p. 126.

20 Enbridge, Reply Argument, p. 136.

21 APPrO, Argument, p. 26.

22 Enbridge, Reply Argument, p. 140.

TAB 7

Norfolk Power Distribution Inc. (Re), 2010 LNONOEB 71

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Paul Vlahos, Presiding Member

Decision: April 6, 2010.

No. EB-2009-0238

2010 LNONOEB 71

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B); AND IN THE MATTER OF an application by Norfolk Power Distribution Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2010.

(73 paras.)

DECISION AND ORDER

Introduction

1 Norfolk Power Distribution Inc. ("Norfolk"), a licensed distributor of electricity, filed an application with the Ontario Energy Board (the "Board") for an order or orders approving or fixing just and reasonable rates for the distribution of electricity and other charges, to be effective May 1, 2010.

2 Norfolk is one of about 80 electricity distributors in Ontario that are regulated by the Board. In 2008, the Board announced the establishment of a new multi-year electricity distribution rate-setting plan, the 3rd Generation Incentive Rate Mechanism ("IRM") process, that will be used to adjust electricity distribution rates starting in 2009 for those distributors whose 2008 rates were rebased through a cost of service review.

3 As part of the plan, Norfolk is one of the electricity distributors that will have its rates adjusted for 2010 on the basis of the IRM process, which provides for a mechanistic and formulaic adjustment to distribution rates and charges between cost of service applications.

4 To streamline the process for the approval of distribution rates and charges for distributors, the Board issued its *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* on July 14, 2008, its *Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* on September 17, 2008, and its *Addendum to the Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* on January 28, 2009 (together the "Reports"). Among other things, the Reports contained the relevant guidelines for 2010 rate adjustments (the "Guidelines") for distributors applying for distribution rate adjustments pursuant to the IRM process. On July 22, 2009 the Board issued an update to Chapter 3 of the Board's "Filing Requirements for Transmission and Distribution Applications" (the "Filing Requirements"), which outlined the filing requirements for IRM applications by electricity distributors.

5 Notice of Norfolk's rate application was given through newspaper publication in Norfolk's service area advising interested parties where the rate application could be viewed and advising how they could intervene in the proceeding or comment on the application. One letter of comment was received from an individual customer, asking that there be no increases in electricity rates. The School Energy Coalition ("SEC") and the Vulnerable Energy Consumers Coalition ("VECC") applied for and were granted intervenor status in this proceeding. The Board's Notice of Application noted that the Board may order costs in this proceeding in relation to Norfolk's requests for the approval of revenue-to-cost ratio adjustments, a Lost Revenue Adjustment Mechanism (LRAM) Recovery/Shared

Savings Mechanism (SSM) Recovery, and a storm damage costs recovery. SEC and VECC participated by way of interrogatories and submission. Board staff also participated in the proceeding. The Board proceeded by way of a written hearing.

6 While the Board has considered the entire record in this rate application, it has made reference only to such evidence as is necessary to provide context to its findings. The following issues are addressed in this Decision and Order:

* Price Cap Index Adjustment;
    * Changes in the Federal and Provincial Income Tax Rates;
* Harmonized Sales Tax;
* Smart Meter Funding Adder;
* Revenue-to-Cost Ratios;
* Retail Transmission Service Rates;
    * Review and Disposition of Group 1 Deferral and Variance Accounts;
* Storm Damage Costs; and
    * Review and Disposition of Lost Revenue Adjustment Mechanism and/or Shared Savings Mechanism; and
    * Introduction of MicroFIT Generator Service Classification and Rate.

Price Cap Index Adjustment

7 Norfolk's rate application was filed on the basis of the Guidelines. In fixing new distribution rates and charges for Norfolk, the Board has applied the policies described in the Reports.

8 As outlined in the Reports, distribution rates under the 3rd Generation IRM are to be adjusted by a price escalator less a productivity factor (X-factor) of 0.72% and Norfolk's utility specific stretch factor of 0.4%. Based on the final 2009 data published by Statistics Canada, the Board has established the price escalator to be 1.3%. The resulting price cap index adjustment is therefore 0.18%. The Board has adjusted the rate model to reflect the newly calculated price cap index adjustment. The price cap index adjustment applies to distribution rates (fixed and variable charges) uniformly across all customer classes. An adjustment for the transition to a common deemed capital structure of 60% debt and 40% equity was also effected.

9 The price cap index adjustment will not apply to the following components of distribution rates:

* Rate Riders;
* Rate Adders;
* Low Voltage Service Charges;
* Retail Transmission Service Rates;
* Wholesale Market Service Rate;
* Rural Rate Protection Charge;
* Standard Supply service -- Administrative Charge;
* Transformation and Primary Metering Allowances;
* Loss Factors;

* Specific Service Charges; and
* Retail Service Charges.

Changes in the Federal and Provincial Income Tax Rates

10 On December 13, 2007, the Ontario government introduced its 2007 Ontario Economic Outlook and Fiscal Review (the "Fiscal Review"). The enabling legislation received Royal Assent on May 14, 2008. Included in this Fiscal Review were changes to the Ontario capital tax provisions[1], and an increase in the small business income limit from $400,000 to $500,000 effective January 1, 2007.

11 The Federal Budget which was presented on January 27, 2009 and received Royal Assent on March 12, 2009 included an increase in the small business income limit from $400,000 to $500,000 effective January 1, 2009.

12 On March 26, 2009, the Ontario provincial budget was presented and Bill 218, the enabling legislation, received Royal Assent on December 15, 2009. For corporations, the basic income tax rates will decrease in stages from 14% to 10% by July 1, 2013, while on July 1, 2010, the small business rate will drop from 5.5% to 4.5%, after the small business deduction is made where applicable. A provincial small business surtax claws back the benefit of the small business deduction when taxable income of associated corporations exceeds $500,000 and eliminates the benefit completely once taxable income, on an associated basis, reaches $1,500,000. The surtax will be eliminated on July 1, 2010.

13 The following table summarizes past, current and impending tax changes.

Tax Rates Federal & Provincial As of December 15, 2009	Effective January 1, 2009	Effective January 1, 2010	Effective January 1, 2011	Effective January 1, 2012	Effective January 1, 2013	Effective January 1, 2014
Federal income tax						
General corporate rate	38.00%	38.00%	38.00%	38.00%	38.00%	38.00%
Federal tax abatement	-10.00%	-10.00%	-10.00%	-10.00%	-10.00%	-10.00%
Adjusted federal rate	28.00%	28.00%	28.00%	28.00%	28.00%	28.00%
Surtax (4% of line 3)	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	28.00%	28.00%	28.00%	28.00%	28.00%	28.00%
Rate reduction	-9.00%	-10.00%	-11.50%	-13.00%	-13.00%	-13.00%
	19.00%	18.00%	16.50%	15.00%	15.00%	15.00%
Ontario income tax	14.00%	13.00%	11.75%	11.25%	10.50%	10.00%
Combined federal and Ontario	**33.00%**	**31.00%**	**28.25%**	**26.25%**	**25.50%**	**25.00%**
Federal & Ontario Small Business						
Federal small business threshold	500,000	500,000	500,000	500,000	500,000	500,000
Ontario Small Business Threshold	500,000	500,000	500,000	500,000	500,000	500,000
Federal small business rate	11.00%	11.00%	11.00%	11.00%	11.00%	11.00%
Ontario small business rate	5.50%	5.00%	4.50%	4.50%	4.50%	4.50%
Ontario surtax claw-back of 4.25% (eliminated July 1, 2010) starts at $500,000 and eliminates the SBC at $1,500,000.						
Ontario surtax	4.25%	2.125%	0.00%	0.00%	0.00%	0.00%
Ontario Capital Tax						
Capital deduction	15,000,000	15,000,000	0	0	0	0
Capital tax rate	0.225%	0.075%	0.0%	0.0%	0.0%	0.0%
OCT will be eliminated on July 1, 2010 but tax will be prorated for the first 6 months in 2010.						

14 The Board is of the view that these tax changes when combined could be material and should be reflected in rates using a 50/50 sharing as determined by the Board in the Reports. Therefore the incentive regulation rate model shall be adjusted accordingly.

Harmonized Sales Tax

15 The 8% Ontario provincial sales tax ("PST") and the 5% Federal goods and services tax ("GST") will be harmonized effective July 1, 2010, at 13%, pursuant to Ontario Bill 218 which received Royal Assent on December 15, 2009.

16 The PST is currently included in a distributor's OM&A expenses and capital expenditures. The PST is therefore included in the distributor's revenue requirement and is recovered from ratepayers through distribution rates.

17 When the PST and GST are harmonized, distributors will pay the HST on purchased goods and services but will claim an input tax credit ("ITC") for the PST portion. Therefore, the distributor will no longer incur that portion of the tax that was formerly applied as PST.

18 Board staff submitted that the Board may wish to consider the establishment of a deferral account to record the amounts, after July 1, 2010 and until Norfolk's next cost-of-service rebasing application, that were formerly incorporated as the 8% PST on capital expenditures and expenses incurred, but which will now be eligible for an ITC. This account would track the incremental change due to the introduction of the HST that incorporates an increased ITC from the current 5% to a 13% level.

19 Norfolk commented that this process would be administratively burdensome and that incremental costs may be incurred to track these incremental changes.

20 The Board finds that it would not be incrementally onerous for distributors to track the ITC amounts as the distributor will need to file ITC information in GST/HST returns and go through the quantification process to satisfy the requirements by the tax authorities and that the final amounts will be confirmed by the tax authorities. In regulatory parlance, what Staff is suggesting is in the nature of a deferral account, not a variance account, and as such there is no need to compare these amounts with any reference to PST levels reflected in existing rates.

21 Rather, the issue in the Board's view is whether a distributor's cost reductions arising from the implementation of the HST should be returned to the ratepayers. In that regard, the Board notes that to do so would be consistent with what the Board has done with tax changes in second and third generation IRMs. In second generation IRM, the Board treated 100% of the tax changes as a Z factor. In the third generation IRM, the Board determined that tax changes would be shared equally between ratepayers and the shareholder. The 50% was considered appropriate as the changes in input prices will flow through the GDP-IPI over time to some degree. The same rationale applies in the case of the HST.

22 The Board therefore directs that, beginning July 1, 2010, Norfolk shall record in deferral account 1592 (PILs and Tax Variances, Sub-account HST / OVAT Input Tax Credits (ITCs)), the incremental ITC it receives on distribution revenue requirement items that were previously subject to PST and become subject to HST. Tracking of these amounts will continue in the deferral account until the effective date of Norfolk's next cost of service rate order. Fifty percent (50%) of the confirmed balances in the account shall be returnable to the ratepayers.

23 The Board may issue more detailed accounting guidance in the future. In that event, the Applicant should make the appropriate accounting entries, if and as applicable.

Smart Meter Funding Adder

24 On October 22, 2008 the Board issued a Guideline for Smart Meter Funding and Cost Recovery ("Smart Meter

Guideline") which sets out the Board's filing requirements in relation to the funding of, and the recovery of costs associated with, smart meter activities conducted by electricity distributors.

25 As set out in the Smart Meter Guideline, a distributor that plans to implement smart meters in the rate year must include, as part of the application, evidence that the distributor is authorized to conduct smart meter activities in accordance with applicable law. Norfolk is authorized conduct smart meter activities because it is covered by paragraph 8 of section 1(1) of *O. Reg. 427/06*.

26 Norfolk requested the continuation of its standard smart meter funding adder of $1.00 per metered customer per month. The Board approves the funding adder as proposed by Norfolk. This funding adder will be reflected in the Tariff of Rates and Charges. Norfolk's variance accounts for smart meter program implementation costs, previously authorized by the Board, shall also be continued.

27 The Board notes that the smart meter funding adder of $1.00 per metered customer per month is intended to provide funding for Norfolk's smart metering activities in the 2010 rate year. The Board has not made any finding on the prudence of the proposed smart meter activities, including any costs for smart meters or advanced metering infrastructure whose functionality exceeds the minimum functionality adopted in *O. Reg. 425/06*, or costs associated with functions for which the Smart Metering Entity has the exclusive authority to carry out pursuant to *O. Reg. 393/07*. Such costs will be considered at the time that Norfolk applies for the recovery of these costs.

Revenue-to-Cost Ratios

28 Revenue-to-cost ratios measure the relationship between the revenues expected from a class of customers and the level of costs allocated to that class. The Board has established target Ratio ranges (the "Target Ranges") for Ontario electricity distributors in its report *Application of Cost Allocation for Electricity Distributors*, dated November 28, 2007.

29 The Board's Decision (EB-2007-0753) for Norfolk's 2008 cost of service rate application prescribed a phase-in period to adjust its revenue-to-cost ratios.

30 Norfolk proposed to adjust its revenue-to-cost ratios as shown in Column 2 in the table below.

Norfolk's Revenue-to-Cost Ratios (%)

Rate Class	2009 Ratio Column 1	Proposed 2010 Ratio Column 2	Target Range Column 3
Residential	103.73	103.08	85 - 115
General Service Less Than 50 kW	101.17	101.17	80 - 120
General Service 50 to 4,999 kW	92.39	92.39	80 - 180
Unmetered Scattered Load	100.70	100.70	80 - 120
Sentinel Lighting	47.00	70.00	70 - 120
Street Lighting	54.66	70.00	70 - 120

31 The Board finds that the proposed revenue-to-cost ratios are in accordance with the Board's findings in the decision referenced above. The Board therefore approves the proposed revenue-to-cost ratios.

Retail Transmission Service Rates

32 Electricity distributors are charged the Ontario Uniform Transmission Rates ("UTRs") at the wholesale level and subsequently pass these charges on to their distribution customers through the Retail Transmission Service Rates ("RTSRs"). There are two RTSRs, whereas there are three UTRs. The two RTSRs are for network and connection. The wholesale line and transformation connection rates are combined into one retail connection service charge. Deferral accounts are used to capture timing differences and differences in the rate that a distributor pays for

wholesale transmission service compared to the retail rate that the distributor is authorized to charge when billing its customers (i.e., deferral accounts 1584 and 1586).

33 On May 28, 2009, the Board issued its Decision and Rate Order in proceeding EB-2008-0272, *2009 LNONOEB 53*, which set new UTRs for Ontario transmitters, effective July 1, 2009. The new UTRs effective July 1, 2009 were as follows:

* Network Service Rate was increased from $2.57 to $2.66 per kW per month, a 3.5% increase;

* Line Connection Service Rate remained unchanged at $0.70 per kW per month; and

* Transformation Connection Service Rate was decreased from $1.62 to $1.57 per kW per month, for a combined Line and Transformation Connection Service Rates reduction of 2.2%.

34 On July 22, 2009 the Board issued an amended "Guideline for *Electricity Distribution Retail Transmission Service Rates*" ("RTSR Guideline"), which provided electricity distributors with instructions on the evidence needed, and the process to be used, to adjust RTSRs to reflect the changes in the UTRs effective July 1, 2009. The Board set as a proxy at that time an increase of 3.5% for the Network Service Rate and reduction of 2.2% for the combined Line and Transformation Connection Service Rates. The Board also noted that there would be further changes to the UTRs in January 2010. The objective of resetting the rates is to minimize the prospective balances in deferral accounts 1584 and 1586.

35 On January 21, 2010, the Board approved new UTRs effective January 1, 2010. The new UTRs were as follows:

* Network Service Rate has increased from $2.66 to $2.97 per kW per month, an 11.7% increase over the July 1, 2009 level or 15.6% over the rate in effect prior to July 1, 2009;

* Line Connection Service Rate has increased from $0.70 to $0.73 per kW per month; and

* Transformation Connection Service Rate has increased from $1.57 to $1.71 per kW per month, for a combined Line and Transformation Connection Service Rates increase of 7.5% over the July 1, 2009 level or 5.2% over the rate in effect prior to July 1, 2009.

36 Norfolk proposed to change the existing RTS rates by the same proportions as the changes in the UTRs noted above effective July 1, 2009. Therefore, Norfolk has proposed to increase all of its RTS Network Rates by 3.5%, and decrease all of its RTS Connection Rates by 2.2%. However, in its reply submission, Norfolk agreed with Board staff that the RTSR rates should reflect the January 1, 2010 UTRs.

37 The Board notes that very few distributors, including Norfolk, included in their 2009 rates the July 1, 2009 level of UTRs since for most of them distribution rates would have been implemented on May 1, 2009. The Board also notes that Norfolk agreed to reflect the January 1, 2010 UTRs. Therefore, in accordance with the July 22, 2009 RTSR Guideline, the Board finds that the revisions to the RTSRs ought to reflect the changes from the current level (i.e. rate in effect prior to July 1, 2009) over the to the January 1, 2010 level. This represents an increase of about 15.6% to the RTSR Network Service Rates, and an increase of about 5.2% to the RTSR Line and Transformation Connection Service Rates. The Board will reflect these findings in Norfolk's draft Rate Order.

Review and Disposition of Group 1 Deferral and Variance Accounts

38 The *Report of the Board on Electricity Distributors' Deferral and Variance Account Review Report* (the "EDDVAR Report") provides that, during the IRM plan term, the distributor's Group 1 account balances will be reviewed and disposed of if the preset disposition threshold of $0.001 per kWh (debit or credit) is exceeded. The onus is on the distributor to justify why any account balance in excess of the threshold should not be disposed of.

39 With respect to the disposition period, the EDDVAR Report states that the default position would be one year.

(i) Balances

40 Norfolk has requested that the Board review and approve the disposition of the December 31, 2008 Group 1 account balances as defined by the EDDVAR Report since the preset disposition threshold of $0.001 per kWh was exceeded. The combined total of Group 1 account balance is a credit of $1,456,640, which includes a debit balance of $838,347 in the 1588 global adjustment sub-account. (Credit balances are amounts payable to customers and debit balances are amounts recoverable from customers). Norfolk has included interest on these account balances using the Board's prescribed interest rates to April 30, 2010. Norfolk's account balances as at December 31, 2008, plus projected carrying charges to April 30, 2010, are shown below.

Account Description	Account Number	Principal Amounts A	Interest Amounts B	Total Claim C = A + B
LV Variance Account	1550	12,111	(2,734)	9,377
RSVA - Wholesale Market Service Charge	1580	(683,024)	(41,988)	(725,012)
RSVA - Retail Transmission Network Charge	1584	4,102	6,767	10,869
RSVA - Retail Transmission Connection Charge	1586	(895,851)	(80,668)	(976,519)
RSVA - Power (Excluding Global Adjustment)	1588	(626,240)	(197,766)	(824,006)
RSVA - Power (Global Adjustment Sub-account)	1588	763,367	74,980	838,347
Recovery of Regulatory Asset Balances	1590	295,595	(85,291)	210,304
		(1,129,940)	**(326,700)**	**(1,456,640)**

41 In response to an interrogatory from Board staff, Norfolk stated that it had reviewed the Regulatory Audit & Accounting Bulletin 200901 and confirmed that it had accounted for its Account 1588 RSVA power and global adjustment sub-account in accordance with this Bulletin. Board staff noted that the proposed balances for disposition may no longer reconcile with previously audited balances nor with Norfolk's Reporting and Record-keeping Requirements ("RRR") filings. Board staff noted that the differences between the applied for account balances and the previously audited balances were material. Board staff suggested that, if the Board had any concerns about the proposed balances, the Board might consider declaring the disposition rate riders to be interim until the revised balance can be supported by a third party audit in a future application.

42 In its reply submission, Norfolk submitted that they have performed an extensive review and rebuild of its deferral variance account balances and noted that as a result of the OEB Regulatory Accounting and Audit staff review, Norfolk made two additional changes to its Group 1 account balances. The balances shown above reflect these changes. As a result, Norfolk requested that the Board approve the proposed deferral and variance account balances for disposition on a final basis.

43 The Board is concerned about the difference between the amount sought for disposition and the balances reported in Norfolk's audited financial statements. The Board notes that Norfolk indicated in its reply submission that it will have its 2008 audited financial statements restated to reflect the rebuilt account balances but that these are not yet available. As a result, the Board will approve the disposition of the December 31, 2008 balances and projected interest to April 30, 2010 as reported by Norfolk but not on a final basis. Any adjustment to the 2008 Group 1 account balances shall be brought forward to the Board in Norfolk's next rate proceeding. For accounting purposes, the respective balance in each of the Group 1 accounts shall be transferred to account 1595 as soon as possible but no later than June 30, 2010 so that the RRR data reported in the second quarter of 2010 reflect these adjustments.

(ii) ***Disposition***

44 The EDDVAR Report includes guidelines on the cost allocation methodology and the rate rider derivation for the disposition of deferral and variance account balances. The Board notes that Norfolk followed the guidelines outlined in the EDDVAR Report and approves Norfolk's proposals except for the treatment of global adjustment sub-account balance.

45 The EDDVAR Report adopted an allocation of the global adjustment sub-account balance based on kWh for non-RPP customers by rate class. Traditionally, this allocation would then be combined with all other allocated variance account balances by rate class. The combined balance by rate class would be divided by the volumetric billing determinants from the most recent audited year-end or Board-approved forecast, if available. This approach spreads the recovery or refund of the allocated account balances to all customers in the affected rate class.

46 This method was based on two premises. First, the recovery/refund of a variance unique to a subset of customers within a rate class would not be unfair to the rate class as a whole. Second, the distributors' existing billing system may not be capable of billing a subset of customers within a rate class.

47 Subsequent to the issuance of the EDDVAR Report, exogenous events have resulted in increased balances in the global adjustment sub-account for most electricity distributors. Board staff suggested that the Board may wish to consider establishing a separate rate rider for the disposition of the global adjustment sub-account balance enabling the prospective recovery solely from non-RPP customers, as this would be more reflective of cost causality since it was that group of customers that was undercharged by the distributor in the first place. Alternatively, Board staff suggested that the Board may wish to consider the recovery of the allocated global adjustment sub-account balance from all customers in each class, as this approach would recognize the customer migration that might occur both away from the non-RPP customer group and into the non-RPP customer group.

48 Norfolk agreed in principle with Board staff that the establishment of a separate rate rider that would be prospectively applied to non-RPP customers would be more reflective of cost causality.

49 In response to Board staff interrogatory, Norfolk indicated that its current billing system could accommodate with minor customization a separate rate rider that would apply prospectively to non-RPP customers to dispose of the global adjustment sub-account balance.

50 The Board will adopt the proposal of Board staff that a separate rate rider be established to dispose of the global adjustment sub-account balance. The rate rider would apply prospectively to non-RPP customers. The Board is of the view that it is appropriate to dispose of this account balance from the customer group that caused the variance (i.e. non-RPP customers). While customer migration makes this an imperfect solution, a separate rate rider applicable to non-RPP customers would result in enhanced cost causality compared to a disposition that would apply to all customers in the affected rate classes.

51 Norfolk's requested the disposition of its Group 1 account balance over a four year period. Board staff submitted that a disposition period no longer than one year would be appropriate for all Group 1 account since these balances have been accumulating over the last four year period and to delay any immediate action would not be in the interest of all parties. In its reply submission, Norfolk stated that refunding the Group 1 account balance over one year would have a significant impact on its cash flow. Norfolk also expressed concerns about rate volatility. Norfolk stated that it intends to file a 2011 cost of service application and anticipates upward pressure on rates due to rate base increase and approval to recover stranded meter costs. Norfolk submitted that if the Board were to disapprove a four year disposition period, the Board may wish to consider approving a two year disposition plan where 25% of the Group 1 account balances would be refunded in 2010 and the remaining amount in 2011.

52 The Board accepts in principle Board staff's rationale for a disposition period of one year and adopts it subject to any compelling evidence that the disposition period should be lengthened. The Board finds that Norfolk's rationale for proposing to extend the disposition period is reasonable but is of the view that a four year disposition

period is too long. The Board will accept Norfolk's alternative proposal to dispose 25% of the Group 1 account balances in 2010 and the remaining 75% in 2011. The Board will reflect these findings in Norfolk's draft Rate Order.

Z-Factor -- Storm Damage Costs

53 On January 14, 2007 Norfolk experienced an ice storm in its service territory. In November 2007 Norfolk filed a cost of service application where it requested to recover $213,851 of costs caused by the ice storm. In its Decision (EB-2007-0753, *2008 LNONOEB 13*), the Board denied Norfolk's request on the basis of insufficient evidence to support its claim. The Board noted that any further requests to dispose of this amount should be supported by an analysis of the historic spending on storm damage that has been built into the revenue requirement on which the current rates are based. The Board also noted that it would be helpful if a comparative analysis of the spending levels attributable to storm damages be included in a future application.

54 As part of the current IRM application, Norfolk filed evidence in support of its request to recover $179,448 in storm damage costs, which amount includes $15,214 in carrying charges to April 30, 2010. Norfolk requested that the amount be recovered by means of a volumetric rate rider over a period of one year, beginning May 1, 2010.

55 In its submission, Board staff noted that the 3rd Generation IRM report stated that distributors are expected to report promptly and apply to the Board for any amounts claimed under Z-factor treatment with the next rate application. Board staff also noted that Norfolk did not apply for Z-factor recovery in its 2009 3rd Generation IRM application. However, based on its review of the evidence, Board staff suggested that Norfolk was responsive to the Board's findings in its EB-2007-0753 Decision, and that the criteria of materiality, prudence and causation were met. As well, Board staff noted that Norfolk's request to dispose of the balance over one year based on a volumetric rate rider is consistent with the EDDVAR Report. Board staff took no issue with the amount requested for disposition with the exception of the carrying charges being claimed. Board staff suggested that given the time elapsed between the event and this application, the Board may wish to reduce the level of carrying charges to the level that would apply had Norfolk included this claim in its 2009 IRM application.

56 SEC noted that there may be an issue with the evidence regarding Norfolk charging interest on the account when it should have sought recovery no later than 2009. SEC however noted that this issue does not appear to be material and therefore, the storm damage claim should be approved as filed.

57 In its reply submission, Norfolk responded that the carrying charges were calculated using the prescribed interest rates that are applicable to all deferral and variance accounts. Norfolk stated however that it would have no issue removing the carrying charges if it was directed by the Board to do so.

58 The Board finds that the evidence filed by Norfolk is responsive to the Board's EB-2007-0753 Decision. The Board finds that Norfolk's proposed Z-factor event relating to the storm damages was genuinely external to the regulatory regime and beyond the control of the distributor. Additionally, the Z-factor amount satisfies the eligibility criteria of causation, materiality and prudence. Consequently, the Board approves Norfolk's request to recover the storm damage cost amount. However, the carrying charges shall be reduced to the level accumulated to April 30, 2009. The Board therefore will reflect these findings in Norfolk's draft Rate Order.

Review and Disposition of Lost Revenue Adjustment Mechanism and/or Shared Savings Mechanism)

59 Norfolk initially requested recovery of $158,995 (plus $9,600 in carrying charges) associated with the Lost Revenue Adjustment Mechanism ('LRAM") and $42,362 associated with the Shared Savings Mechanism ("SSM") over a one year period.

60 On January 10, 2010 Norfolk revised its LRAM request to $175,997 (plus $10,215 in carrying charges) and its SSM request to $83,111. The amounts were updated as a result of an update from the Ontario Power Authority's ("OPA") Conservation Program Results, as well as corrections required to address mistakes noted in the interrogatory response process.

61 In response to interrogatories, Norfolk explained the increased LRAM and SSM amounts was primarily the result of having EnerSpectrum provide recalculations of the figures for the Energy Audits for Major Customers. This recalculation was due to employee turnover at the utility and the loss of the original substantiation sheets.

62 With respect to the SSM claim, VECC, SEC and Board Staff expressed the view that Norfolk did not provide adequate evidence to support its revised SSM claim. SEC also noted that the higher adjusted LRAM and SSM claims were filed at the end of the process, when the discovery phase was completed, and where new evidence could not be tested. SEC further noted that Norfolk Power has not provided any evidence of expertise for the consultant who was tasked with updating the LRAM and SSM claims. Board Staff submitted that Norfolk did not provide adequate evidence to support its revised LRAM claim.

63 In its reply submission, Norfolk requested the withdrawal of its SSM claim at this time. With respect to the revised LRAM claim, Norfolk noted that the differences in the LRAM claim are due only to the OPA programs and not its third tranche CDM programs. Norfolk noted that the changes reflect the update of the OPA savings in the final 2006-2008 results made available by the OPA on November 10, 2009. Norfolk also noted that the lost revenue associated with the OPA programs account for more than 80% of the estimated lost revenues, which are not in dispute. Norfolk Power submitted that although the Energy Audits for Major Customers' LRAM claim has not changed throughout the process, it proposed that the lost revenues attributed to this program of $3,171 be assumed to be zero, thereby reducing the overall LRAM claim from $175,997 to $172,826.

64 The Board accepts Norfolk's withdrawal of its SSM claim at this time. With respect to the LRAM claim, the Board is of the view that Norfolk did not provide adequate evidence to support its revised LRAM claim in time for parties to test the evidence during the discovery phase of the proceeding. Therefore, the Board denies at this time Norfolk's request to dispose of the LRAM amount. The Board will reflect these findings in Norfolk's draft Rate Order. The Board invites Norfolk to re-apply at the next opportunity for the disposition of its LRAM and SSM amounts.

Introduction of MicroFit Generator Service Classification and Rate

65 Ontario's Feed-In Tariff (FIT) program for renewable energy generation was established in the *Green Energy and Green Economy Act, 2009.* The program includes a stream called Micro FIT, which is designed to encourage homeowners, businesses and others to generate renewable energy with projects of 10 kilowatts (kW) or less.

66 In its EB-2009-0326 Decision and Order, *2010 LNONOEB 165*, issued February 23, 2010, the Board approved the following service classification definition, which is to be used by all licensed distributors:

microFIT Generator

> *This classification applies to an electricity generation facility contracted under the Ontario Power Authority's microFIT program and connected to the distributor's distribution system.*

67 On March 17, 2010, the Board approved a province-wide fixed service charge of $5.25 per month for all electricity distributors effective September 21, 2009.

68 The microFIT Generator service classification and the service charge will be included in the Tariffs of Rates and Charges.

Rate Model

69 The Board is providing Norfolk with a rate model (spreadsheet) and a draft Tariff of Rates and Charges (Appendix A) that reflects the elements of this Decision. The Board also reviewed the entries in the rate model to ensure that they were in accordance with the 2009 Board approved Tariff of Rates and Charges and the rate model was adjusted, where applicable, to correct any discrepancies.

70 The Board Orders That:

1. Norfolk's new distribution rates shall be effective May 1, 2010.
2. Norfolk shall review the draft Tariff of Rates and Charges set out in Appendix A. Norfolk shall file with the Board a written confirmation assessing the completeness and accuracy of the draft Tariff of Rates and Charges, or provide a detailed explanation of any inaccuracies or missing information, within seven (7) calendar days of the date of this Decision and Order.

71 If the Board does not receive a submission by Norfolk to the effect that inaccuracies were found or information was missing pursuant to item 1 of this Decision and Order:

3. The draft Tariff of Rates and Charges set out in Appendix A of this order will become final, effective May 1, 2010, and will apply to electricity consumed or estimated to have been consumed on and after May 1, 2010.

72 If the Board receives a submission by Norfolk to the effect that inaccuracies were found or information was missing pursuant to item 1 of this Decision and Order, the Board will consider the submission of Norfolk and will issue a final Tariff of Rates and Charges.

4. Norfolk shall notify its customers of the rate changes no later than with the first bill reflecting the new rates.

Cost Awards

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

1. Intervenors eligible for cost awards shall submit their cost claims by no later than 7 days from the date of this Decision and Order.
2. Norfolk shall file its response, if any, by no later than 14 days from the date of this Decision and Order.
3. Intervenors shall file its reply to Norfolk's response by no later than 21 days from the date of this Decision and Order.
4. Pursuant to section 30 of the Ontario Energy Board Act, 1998, Norfolk shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, April 6, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

* * * * *

[Editor's note: Appendix A, a Tariff of Rates and Charges, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 10oebd071.PDF]

1 The Ontario capital tax rate decreased from 0.285% to 0.225% effective January 1, 2007. The Ontario capital tax deduction also increased from $10 million to $12.5 million effective January 1, 2007, and from $12.5 million to $15 million effective January 1, 2008.

End of Document

TAB 8

Case Name:

Kurukkal v. Canada (Minister of Citizenship and Immigration)

Between
Kamadchy Sundareswaraiye Gurumoorthi Kurukkal,
Applicant, and
The Minister of Citizenship and Immigration, Respondent

[2009] F.C.J. No. 866

[2009] A.C.F. no 866

2009 FC 695

[2010] 3 F.C.R. 195

[2010] 3 R.C.F. 195

347 F.T.R. 60

81 Imm. L.R. (3d) 263

98 Admin. L.R. (4th) 242

2009 CarswellNat 2147

179 A.C.W.S. (3d) 417

2011EXP-1905

Docket IMM-309-08

Federal Court
Toronto, Ontario

Mactavish J.

Heard: June 4, 2009.
Judgment: July 3, 2009.

Amended judgment: October 29, 2009.

(77 paras.)

Immigration law -- Immigrants -- Application for immigrant visa -- Humanitarian and compassionate considerations -- Practice and judicial review -- Evidence -- Judicial review (incl. jurisdiction of court) -- Certification of questions by Federal Court -- Application for judicial review of dismissal of residence application based on H&C grounds allowed -- The application was dismissed after the applicant failed to produce his wife's death certificate in timely fashion -- The officer cited the doctrine of functus officio in refusing to consider the subsequently produced certificate -- The court set aside the dismissal -- The doctrine of functus officio did not apply in the context of H&C decisions due to the informality of the process and the absence of a right of appeal from such decisions -- The issue was appropriate as a question for certification -- Immigration and Refugee Protection Act, s. 25(1).

Application by Kurukkal for judicial review of the dismissal of his application for permanent residence on humanitarian and compassionate (H&C) grounds. The applicant, age 68, was a Tamil from Sri Lanka. He entered Canada on a visitor's visa in 2001. He had one son in Canada and two daughters in Sri Lanka. His visitor's visa application mentioned his wife remaining in Sri Lanka. However, his H&C application stated that he was a widower. The H&C officer refused the permanent residence application on the basis that the applicant had failed to provide a death certificate for his late wife when asked to do so by an immigration officer. The applicant subsequently provided the death certificate and asked that the decision be reconsidered in light of the new evidence. The H&C officer refused to reopen the application, citing the doctrine of functus officio. At issue on review was whether the doctrine of functus officio applied in the context of an H&C application so as to prevent consideration of new evidence.

HELD: Application allowed. The doctrine of functus officio did not apply in the context of H&C decisions. s. 25(1) of the Immigration and Refugee Protection Act conferred broad discretion on immigration officers to approve deserving cases not anticipated by the legislation. The informality of the H&C process afforded greater procedural flexibility than more formalized or adjudicative processes. No right of appeal lay from an H&C decision. The limitation on admissibility of new evidence thus militated in favour of finding that functus officio did not apply to such decisions. The death certificate was a critical piece of evidence that would likely produce a different outcome were the matter reconsidered. The officer erred in the refusal to consider it as new evidence. The question of whether an H&C officer was functus officio after rendering a decision was certified.

Statutes, Regulations and Rules Cited:

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 31(3)

Counsel:

Max Berger, for the Applicant.

John Loncar, for the Respondent.

REASONS FOR JUDGMENT AND JUDGMENT

1 **MACTAVISH J.**:-- Kamadchy Sundareswaraiye Gurumoorthi Kurukkal's application for permanent residence on humanitarian and compassionate grounds was refused because he failed to provide a death certificate for his late wife when asked to do so by the immigration officer assessing his application.

2 Mr. Kurukkal provided the death certificate a few days after being notified of the negative decision, and asked that the decision be reconsidered in light of the new evidence. The respondent refused to reopen or re-visit Mr. Kurukkal's H&C application, asserting that there was no power to do so, as a result of the doctrine of *functus officio*.

3 The principle issue on this application for judicial review is whether the doctrine of *functus officio* applies in the context of H&C applications, so as to prevent an immigration officer from considering new evidence. For the reasons that follow, I have concluded that the doctrine of *functus officio* does not apply in the context of H&C decisions. As a consequence, the application for judicial review will be allowed.

I. Background

4 Mr. Kurukkal is a 68 year old Tamil from the north of Sri Lanka, who came to Canada on a visitor's visa in 2001. He has one son in Canada, and two daughters still living in Sri Lanka.

5 When the applicant applied for his visitor's visa in 2001, he stated on his application that his wife would not be accompanying him to Canada, because she did not have a passport. Having a wife staying behind in Sri Lanka would have assisted Mr. Kurukkal with his visa application, as it strengthened his ties to that country, making it more likely that he would return home at the end of his visit.

6 In contrast, in Mr. Kurukkal's H&C application, he stated that he was a widower, and that his wife had died in 2000. The inconsistency in the information provided by Mr. Kurukkal with respect to his wife's status was quite understandably a cause for concern, and led the immigration officer to ask him to produce a death certificate for his wife. This request was made on August 17, 2007.

7 When no death certificate was received, the officer spoke to Mr. Kurukkal's son by telephone on October 12, 2007, asking where the certificate was. Five days later, the officer followed up with a letter to Mr. Kurukkal, confirming the request for a copy of the death certificate. By letter dated October 29, 2007, Mr. Kurukkal's son advised the officer that another 15 days were needed to obtain the death certificate from Sri Lanka, and sought an extension of time.

8 Fifteen days came and went, and no death certificate was provided to the officer, nor was there a request for a further extension of time in which to provide the certificate from either Mr. Kurukkal or his son. Consequently, on November 26, 2007, the officer assessed Mr. Kurukkal's H&C application, and decided that it should be refused.

9 The officer's decision was communicated to Mr. Kurukkal on December 14, 2007. Although additional reasons are cited in the officer's notes, the only reason given in the decision letter for refusing the application was Mr. Kurukkal's failure to satisfy the officer that he was in fact a widower. I need not address the merits of this decision, as no application for judicial review has been brought in relation to it.

10 Mr. Kurukkal says that he received a copy of the death certificate for his wife by mail from Sri Lanka the following day. On December 18, 2007, Mr. Kurukkal's counsel wrote to the officer, explaining that the delay in producing the certificate was the result of the on-going state of turmoil in Colombo. Counsel enclosed a copy of the death certificate with the letter, and requested that the refusal decision be reconsidered.

11 By letter dated January 9, 2008, Mr. Kurukkal's request for reconsideration was refused. As was noted earlier, the respondent took the position that there was no power to reopen or re-visit Mr. Kurukkal's H&C application because of the doctrine of *functus officio*. No consideration appears to have been given to the death certificate itself, as it related to the merits of Mr. Kurukkal's H&C application.

12 It is the decision refusing to reconsider the original H&C decision that underlies this application.

13 Mr. Kurukkal sought a stay of his removal pending the determination of his application for judicial review. The motion was dismissed, without written reasons, although it appears from the record that the stay was refused because of the Court's finding in relation to the issue of irreparable harm. Mr. Kurukkal was returned to Sri Lanka in March of 2008.

14 An affidavit filed by the respondent indicates that since returning to Sri Lanka, Mr. Kurukkal has filed a further H&C application. Although there is some confusion in the record as to precisely when the second H&C application was filed, it is common ground that it was filed in the Spring of 2008.

15 While acknowledging that he has been able to file a further H&C application, which includes

a copy of his wife's death certificate, Mr. Kurukkal says that if he is required to apply from overseas, it could take up to four years for his second application to be processed. He asserts that this will cause him grave prejudice, as he says he has no home in Sri Lanka, and that his country is currently a war zone. Mr. Kurukkal says that the reconsideration of his inland H&C application would likely result in a much faster decision.

II. Standard of Review

16 If applicable, the effect of doctrine of *functus officio* is that a decision-maker will lose jurisdiction once a decision is made: see Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at 12-99.

17 As a consequence, the question of whether an H&C officer has the ongoing power to reconsider a decision once it has been made is a true question of jurisdiction, as contemplated by *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59. As such, the officer's determination that the doctrine of *functus officio* applies in the context of H&C decisions is reviewable on the standard of correctness.

III. Analysis

18 I should note at the outset that the respondent has not argued that the January 9, 2008 letter refusing to reconsider Mr. Kurukkal's H&C application was merely a courtesy letter, and was thus not a "decision" that was amenable to judicial review. I take the respondent to have conceded that the January 9, 2008 letter was indeed a fresh "decision" that is amenable to judicial review.

19 Moreover, there is no suggestion that Mr. Kurukkal's request for reconsideration of his H&C application was made for a collateral purpose -- namely to extend the time for bringing an application for judicial review.

20 It should also be noted that the question of whether an immigration officer is *functus officio* after rendering an H&C decision need only be decided if the additional information adduced by Mr. Kurukkal was significant enough to have potentially affected the outcome of a reconsideration decision.

21 As was noted earlier, the only reason given in the decision letter for refusing Mr. Kurukkal's H&C application was his failure to produce a copy of his wife's death certificate. It follows that the certificate was clearly an extremely important piece of evidence, which could well have resulted in a different outcome, were the matter reconsidered.

22 As a consequence, it is necessary to decide whether the doctrine of *functus officio* has any application in relation to decisions by immigration officers in relation to H&C applications.

A. The Doctrine of *Functus Officio*

23 Before turning to address the question of whether the doctrine of *functus officio* applies in the context of H&C decisions, it is helpful to start by considering the nature and purpose of the doctrine. It is also helpful to consider what the Courts have had to say in relation to its application in the context of administrative decision-making.

24 The doctrine of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at paras. 20-21.

25 The Supreme Court also noted in *Chandler* that the doctrine of *functus officio* is not limited to judicial decisions, but can apply as well to decisions of administrative tribunals. However, it may be necessary to apply the doctrine in a more flexible and less formalistic fashion in the administrative tribunal context, where, for example, a right of appeal may exist only on a point of law. Indeed, the Court held that "Justice may require the re-opening of administrative proceedings in order to provide relief which would otherwise be available on appeal": *Chandler*, at para. 21.

26 For the doctrine of *functus officio* to be engaged, it is necessary that the decision in issue be final. In the context of judicial decision making, a decision may be described as final when "... it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain ...". (G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata* 2d. ed. (London: Butterworths, 1969) at 132, as cited in *Judicial Review of Administrative Action in Canada*.

27 With this understanding of the nature and purpose of the doctrine of *functus officio*, I turn now to the examine the jurisprudence relating to the applicability of the doctrine in relation to non-adjudicative immigration decisions such as the H&C decision under consideration in this case.

B. The Federal Court Jurisprudence

28 A review of the Federal Court jurisprudence reveals that the question of whether the doctrine of *functus officio* applies to those charged with making non-adjudicative immigration decisions such as H&C decisions is one that arises with some regularity. However, the findings on this point are somewhat divided, with two divergent lines of authority having developed as to whether immigration officers such as H&C officers have the power to reconsider decisions on the basis of new evidence.

29 Both lines of authority will be considered in turn, commencing with a review of the cases that find that the doctrine of *functus officio* does not apply in cases such as this.

(i) *Functus Officio* Does Not Apply to Decisions of Immigration Officers

30 The first of these lines of authority is exemplified by the Court's decision in *Nouranidoust v. Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. No. 1100, which held the doctrine of *functus officio* does not apply in relation to non-adjudicative immigration decisions.

31 *Nouranidoust* involved the decision of an immigration officer who found that an individual was not entitled to landing pursuant to the deferred removal orders class (DROC) regulations [SOR/94-681]. The question to be decided was whether an immigration officer could reconsider that decision on the basis of new evidence.

32 Although the nature of the application in issue was a little different, the facts in *Nouranidoust* are quite similar to those in the present case. Mr. Nouranidoust's application for landing was refused because he had been unable to produce a passport or other travel document. Shortly after receiving the negative decision, Mr. Nouranidoust was able to obtain a passport from the Iranian Embassy, and forwarded to the immigration officer, who confirmed the original refusal. Justice Reed was then left to decide whether, in the circumstances, the immigration officer was *functus officio*, or had the authority to reconsider the application for landing.

33 Justice Reed commenced her analysis by adopting the Court's observation in *Chan v. Canada (Minister of Citizenship and Immigration)*, [1996] 3 F.C. 349 (T.D.) that there was nothing in the *Immigration Act*, R.S.C., 1985, c. I-2, that dealt with whether a visa officer could review decisions already made. In *Chan*, the Court had stated that "I would take this silence, however, not to be a prohibition against reconsideration of decisions. Rather, I think that the visa officer has jurisdiction to reconsider his decision, particularly when new information comes to light": *Chan*, at para. 28.

34 Consideration was also given to the decision in *Soimu v. Canada (Secretary of State)* (1994), 83 F.T.R. 285 (F.C.T.D.), where Justice Rothstein held that as the *Immigration Act* was silent on the question of whether visa officers could review decisions that had been made, it appeared that the officer would not be *functus* in relation to an application for reconsideration.

35 In concluding that the doctrine of *functus officio* did not apply in the case of immigration officers, Justice Reed had regard to the comments of the Supreme Court in *Chandler*, previously cited. In particular, she referred to Justice Sopinka's admonition that the application of the doctrine must be more flexible and less formalistic in relation to the decisions of administrative tribunals: *Nouranidoust*, at para. 13.

36 Justice Reed concluded her analysis by stating that:

> 24 I am not prepared, in the absence of a Federal Court of Appeal decision to the contrary, to conclude that the immigration officer had no such authority. It is clear that immigration officers and visa officers, as a matter of practice, often reconsider their decisions on the basis of new evidence (see Waldman, supra). As I read the jurisprudence, I think the need to find express or implied authority to reopen a decision in the relevant statute is directly related to the nature of the

> decision and the decision-making authority in question. Silence in a statute with respect to the reopening of a decision that has been made on an adjudicative basis, consequent on a formal hearing, and after proof of the relevant facts may indicate that no reopening is intended. Silence in a statute with respect to the reopening of a decision that is at the other end of the scale, a decision made by an official pursuant to a highly informal procedure, on whom no time limits are imposed, must be assessed in light of the statute as a whole. Silence in such cases may not indicate that Parliament intended that no reconsideration of the decision by the relevant official be allowed. It may merely mean that discretion to do so, or to refuse to do so was left with the official.
>
> 25 As noted, the *Chandler* decision states that the principle of *functus officio* should be applied flexibly in the case of administrative decisions since justice may require the reopening of those decisions. I am persuaded that Parliament's silence in the case of applications for landing, when the individual has been found eligible for such because he falls under DROC, was not intended to restrict the immigration officer from reopening a file when the officer considers it in the interests of justice to do so.

37 Other Judges of this Court have come to a similar conclusion in relation to various types of immigration applications involving informal processes similar to that involved in H&C applications: see, for example, *Chan v. Canada*, and *Soimu v.* Canada, both previously cited; *Tchassovnikov et al. v. Canada (Minister of Citizenship and Immigration)* (1998), 152 F.T.R. 144; *Kherei v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1383; *McLaren v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 618.

38 Moreover, as the Court observed in *Kherei*, the literature supports this less technical view: see, for example, Waldman, *Immigration Law and Practice*, (Second Ed.) at paras. 11:20 to 11:29.

(ii) *Functus Officio* Does Apply to Decisions of Immigration Officers

39 There is also a substantial body of case law going the other way. One of the leading cases in this regard is the decision in *Dumbrava v. Canada (MCI)* (1995), 101 F.T.R. 230.

40 *Dumbrava* involved an application for permanent residence in Canada. After the applicant received the officer's original refusal decision, the applicant sought reconsideration of that decision on the basis that it was "wrong in law". On judicial review, the Court identified the "real issue" on the application as being whether the visa officer had the authority to reconsider her earlier decision in the manner that she did: at para. 18.

41 In this regard, the Court stated that:

> [A]bsent an express grant of jurisdiction, it is doubtful that a decision-maker has the power to reconsider a prior decision on new grounds and exercise his or her discretion anew. The decision-making powers of a visa officer are statutory and, as such, they must be found in the statute. While I have no doubt that slips, typos and obvious errors can be corrected after a decision has been rendered, the discretion of a decision-maker is, in my view, fully exhausted once the discretionary authority to decide has been exercised in the manner contemplated by statute. As such a decision-maker cannot pronounce more than once on the same matter. [*Dumbrava*, at para. 19, footnote omitted]

42 The Court went on to observe that once the visa officer rejected the applicant's application, the officer did not have the jurisdiction to render a further decision reconsidering the earlier decision. As a consequence, the application for judicial review was "without object".

43 A number of decisions have followed the reasoning in *Dumbrava* in relation to immigration applications involving informal processes similar to that involved in H&C applications: see, for example, *Jiminez v. Canada (MCI)* (1998), 147 F.T.R. 199; *Duque v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1762; *Dimenene v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1525; *Phuti v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1233; *Brar v. Canada (M.C.I.)*, [1997] F.C.J. No. 1527).

C. The Federal Court of Appeal Jurisprudence

44 In *Selliah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1134, Justice Blanchard was asked to certify the following question:

> Where an immigration officer has made a decision in respect of ... a humanitarian and compassionate application, is an officer *functus*, such that further evidence may not be considered to determine if it might lead the officer to reach a different conclusion?

Justice Blanchard held that the Officer's failure to consider the further information in issue in that case would not have materially affected her ultimate decision. As a consequence, the question could not have been determinative of an appeal and was not certified.

45 Justice Blanchard did certify a different question in *Selliah*, however, and the matter went on appeal: see *Selliah v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 755. In its brief reasons, the Federal Court of Appeal dealt with the reconsideration issue, stating that:

> 4 As for the new evidence offered to the officer after the decision had been made, but before notice of that decision was received by the applicant, we are not inclined to interfere. Though not expressly provided for in the legislation, *an application for reconsideration on the basis of that new evidence could have*

> *been made by the applicant following receipt of the notice of the decision*.
>
> 5 It is therefore, not necessary for us to decide the *functus officio* issue in this case.
>
> [my emphasis]

46 Thus, although the Federal Court of Appeal expressly declined to deal with the *functus* issue in *Selliah*, the reasons in that case seem to suggest that reconsideration of an H&C decision may indeed be possible.

47 Two other decisions of the Federal Court of Appeal warrant brief consideration, as they are referred to in a number of the decisions cited earlier in these reasons. These are *Park v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 848 and *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 179.

48 In *Park*, an individual was advised that an immigrant visa would be issued. However, before the visa was actually issued, it was determined that the applicant was inadmissible to Canada. The Court found that the only exercise of power authorized by the statute was to issue or refuse a visa. Given that no statutory power had been exercised at the time that the applicant was advised that the visa would issue, it followed that the doctrine of *functus officio* had no application. Given the differences in the facts and statutory basis of the *Park* matter, I am of the view that this decision is of limited assistance in this case.

49 *Nazifpour* involved the power of the Immigration Appeal Divisions of the Immigration and Refugee Board to reopen an appeal. The *Immigration and Refugee Protection Act* specifically authorized the reopening of appeals in certain specified situations. The question for the Court was whether appeals could be reopened in other situations.

50 Much of the Court's attention in *Nazifpour* was taken up with a consideration of the interpretation of the statutory provision in issue, and with its legislative history, in order to determine Parliament's intent. Once again, this decision is readily distinguishable from the present situation.

D. Which Line of Authority Should be Followed?

51 Given the fundamental disagreement in the jurisprudence in relation to the applicability of the doctrine of *functus officio* to informal, non-adjudicative immigration applications such as applications for H&C exemptions, how is one to determine which approach should be followed?

52 In *Judicial Review of Administrative Action in Canada*, Brown and Evans suggest that a

pragmatic and functional analysis should be carried out in order to ascertain whether the doctrine of *functus officio* should be applied in the context of a particular type of decision-making process.

53 That is, one must weigh "any unfairness to the individual that might arise as a result of the re-opening, against the public harm that might be caused by preventing the agency from discharging its statutory mandate if it could not reopen". In addition, the Court must consider "the statutory mandate, the breadth of the discretion conferred on the decision-maker, and the availability of other relief, such as a right of appeal": *Judicial Review of Administrative Action in Canada*, at para. 12:6221.

54 In other words, the task for the Court is to determine whether "the benefits of finality and certainty in decision-making outweigh those of responsiveness to changing circumstances, new information and second thoughts": *Judicial Review of Administrative Action in Canada*, at para. 12:6221.

55 The starting point for the Court's analysis must be the relevant legislative provisions. Neither section 25(1) of the *Immigration and Refugee Protection Act*, nor the *Immigration and Refugee Protection Regulations* provide explicit guidance, as both are silent on the reconsideration question.

56 Also relevant is subsection 31(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that "Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires". According to Brown and Evans, the effect of this provision is that "unless the legislation precludes a further decision or the decision is subject to some form of estoppel, non-adjudicative decisions may be reconsidered and varied from time to time: see *Judicial Review of Administrative Action in Canada*, at para. 12:6100.

57 There are a number of considerations that militate in favour of finding that immigration officers can reconsider negative H&C decisions in appropriate circumstances, as well as other considerations that lead to a contrary conclusion.

58 The first issue to consider is the fact that neither *IRPA* nor the Regulations provide an express power of reconsideration on immigration officers in the context of H&C applications. It does not, however, necessarily follow from this legislative silence that there is no power of reconsideration in relation to H&C applications.

59 In this regard, I adopt the comments of Justice Reid in *Nouranidoust*, previously cited, where she observed that although it may be necessary for there to be an express statutory power to reconsider decisions arrived at through an adjudicative process, the same could not be said of decisions arrived at through more informal processes, by officials on whom no time limits are imposed.

60 According to Justice Reid, legislative silence in this latter category of cases may not reflect an intention by Parliament that no reconsideration of the decision be allowed, but may instead mean

that the discretion to do so, or to refuse to do so, was left with the official: *Nouranidoust*, at para 24.

61 The significance of the kind of functions carried out by administrative tribunals insofar as the applicability of the doctrine of *functus officio* was also recognized by the Federal Court of Appeal in *Herzig v. Canada (Industry)*, [2002] F.C.J. No. 127. There the Court seemed to limit the application of the doctrine of *functus officio* to those administrative tribunals that carry out adjudicative functions, stating that:

> The principle of *functus officio* holds that, as a general rule, where a final decision has been rendered by an administrative tribunal *acting in an adjudicative capacity*, the matter is concluded and no amendment can be made to the decision in the absence of a right of appeal. [at para. 16, my emphasis]

62 A very broad discretion is conferred on immigration officers under subsection 25(1) of *IRPA*. This provision confers discretion on immigration officers to allow them the flexibility to approve deserving cases not anticipated in the legislation: see IP 5, the CIC Manual dealing with *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*, at section 2.

63 Moreover, unlike judicial or adjudicative tribunal processes, the H&C process is quite informal. This suggests that there be greater procedural flexibility than in the case of more formalized or adjudicative decision-making processes.

64 Insofar as the availability of other relief such as a right of appeal is concerned, there is no right of appeal from the decision of an immigration officer in relation to H&C decisions. Where there is a right of appeal, new evidence can be put before the appellate court, provided that the party seeking to adduce such evidence can meet the relevant test.

65 However, in the case of H&C decisions, the only recourse that an unsuccessful applicant has is by way of judicial review in this Court, and then only with leave of the Court. Generally speaking, a reviewing court will limit its consideration to the material that was before the original decision-maker, and will not consider new evidence. This limitation on the admissibility of new evidence would tend to militate in favour of a finding that *functus officio* should not apply in relation to H&C decisions.

66 That said, a negative H&C decision will not necessarily be the last word on an individual's ability to stay in Canada on H&C grounds. Unlike a judgment or tribunal decision that finally determines an individual's rights, it is always open to an individual to file a further H&C application, after the first is refused. Indeed, Mr. Kurukkal has himself taken advantage of this opportunity.

67 Nevertheless, the substantial filing fees and significant processing times may make this an unattractive option for many people, and limit its effectiveness as a way in which to overcome a negative decision.

68 Moreover, while recognizing that there is always a benefit to finality in the decision-making process, it must also be recognized that the nature of an H&C decision is fundamentally different than, for example, a civil judgment or a tribunal decision that resolves a dispute between two or more parties. In these latter types of cases, the successful party or parties may rely on court or tribunal rulings in the conduct of their affairs. These individuals may then be detrimentally affected in the event that the court or tribunal decision is subsequently reconsidered and changed.

69 In contrast, there is no true *lis inter partes*, or live controversy or dispute, between parties in the H&C context. A decision on an H&C application will likely only have a direct effect on the applicant or applicants themselves. No one else is likely to rely on an H&C decision to his or her detriment.

70 It is true that H&C applicants bear the onus of demonstrating that they would suffer unusual, undeserved or disproportionate hardship if required to apply for permanent residency from outside Canada. Applicants are obligated to "put their best foot forward" in their applications, and they omit pertinent information from their applications at their peril: see, for example, *Owusu v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 158, at para. 8, and *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para. 45.

71 It does not, however, follow from this that an officer can never consider additional information provided by an applicant after the initial H&C decision has been made. Rather, these cases simply stand for the proposition that there is no obligation on an immigration officer assessing an H&C application to go back to an applicant in an effort to ferret out additional information supporting the application, when that information has not been provided by the applicant him- or herself.

72 Finally, there is a concern that the ability of immigration officers to reconsider negative H&C applications could lead to an abuse of the immigration system. That is, removals officers are often asked to defer a removal because a decision is outstanding in a pending H&C application. Indeed, stays of removal are sometimes granted by this Court where the H&C decision is expected imminently. The ability of applicants to provide additional evidence, and to request reconsideration of their H&C applications, could potentially interfere with the ability to remove individuals without status in Canada as soon as is reasonably practicable.

73 This concern could, however, be addressed if, upon receiving a request for consideration, immigration officers promptly considered the materiality and reliability of the evidence in question. The officers would also have to consider whether the evidence in question was truly "new", or could have been obtained earlier with the exercise of reasonable diligence. An immigration officer should also be able to assess whether a request to reopen an H&C application was being made for *bona fide* reasons, or was being sought for a collateral purpose, such as to support a request to defer an imminent removal from Canada.

IV. Conclusion

74 Having carefully weighed the various considerations discussed in the preceding paragraphs, I have concluded that the need for flexibility and responsiveness to changing circumstances and new information in the H&C assessment process outweighs the desirability of having finality and certainty in the decision-making process. I would note that conclusion is consistent with the teachings of the Federal Court of Appeal in *Selliah*, previously cited, at para. 4.

75 I have further concluded that the doctrine of *functus officio* does not apply to the informal, non-adjudicative decision-making process involved in the determination of H&C applications. As a consequence, I find that the immigration officer erred in refusing to consider the death certificate provided by Mr. Kurukkal in this case, and the application for judicial review is allowed.

V. Certification

76 The question of whether an H&C officer is *functus officio* after rendering a decision in relation to an application for a Humanitarian and Compassionate exemption is a question of law that is not only dispositive of this case, but transcends the interests of these parties.

77 Neither party has proposed a question for certification in this case. However, in light of the unsettled nature of the law on this point, I am satisfied that those involved with the immigration process would benefit from the views of the Federal Court of Appeal on this question. As a consequence, I will certify the following question:

> Once a decision has been rendered in relation to an application for a humanitarian and compassionate exemption, is the ability of the decision-maker to reopen or reconsider the application on the basis of further evidence provided by an applicant limited by the doctrine of *functus officio*?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different immigration officer for re-determination in accordance with these reasons. In addition to the other information filed by Mr. Kurukkal in connection with his first H&C application, the officer is directed to consider the death certificate for Mr. Kurukkal's wife, and to decide what if any weight should be attributed to it; and
2. The following question is certified:

> Once a decision has been rendered in relation to an application for a humanitarian and compassionate exemption, is the ability of the

decision-maker to reopen or reconsider the application on the basis of further evidence provided by an applicant limited by the doctrine of *functus officio*?

MACTAVISH J.

TAB 9

Case Name:

Kurukkal v. Canada (Minister of Citizenship and Immigration)

Between
The Minister of Citizenship and Immigration, Appellant, and
Kamadchy Sundareswaraive Gurumoorthi Kurukkal, Respondent, and
Canadian Council for Refugees, Intervener

[2010] F.C.J. No. 1159

[2010] A.C.F. no 1159

2010 FCA 230

2010 CAF 230

8 Admin. L.R. (5th) 271

91 Imm. L.R. (3d) 1

2010 CarswellNat 3298

406 N.R. 313

324 D.L.R. (4th) 292

193 A.C.W.S. (3d) 1273

Docket A-308-09

Federal Court of Appeal
Toronto, Ontario

Blais C.J., Nadon and Layden-Stevenson JJ.A.

Heard: September 15, 2010.
Oral judgment: September 15, 2010.

(6 paras.)

Administrative law -- Bodies under review -- Nature of body -- Types -- Crown -- Ministers and their agents -- Jurisdiction -- Functus officio -- Appeal by Minister from Federal Court decision allowing respondent's application for judicial review allowed in part -- Immigration officer refused to reconsider decision refusing to permit respondent to apply for permanent residence from within Canada -- On appeal, Federal Court held that doctrine of functus officio did not prohibit reconsideration -- Principle of functus officio did not strictly apply in non-adjudicative administrative proceedings -- Matter remitted to immigration officer for reconsideration of whether discretion to reconsider should be exercised.

Immigration law -- Immigrants -- Application for immigrant visa -- Duties and powers of officer -- Appeal by Minister from Federal Court decision allowing respondent's application for judicial review allowed in part -- Immigration officer refused to reconsider decision refusing to permit respondent to apply for permanent residence from within Canada -- On appeal, Federal Court held that doctrine of functus officio did not prohibit reconsideration -- Principle of functus officio did not strictly apply in non-adjudicative administrative proceedings -- Matter remitted to immigration officer for reconsideration of whether discretion to reconsider should be exercised.

Appeal by the Minister from a Federal Court decision allowing the respondent's application for judicial review. The respondent's application to apply for permanent residence from within Canada on humanitarian and compassionate grounds was dismissed by an immigration officer. The respondent asked for reconsideration of the decision. The immigration officer refused on the basis that he was functus officio. On appeal, the Federal Court judge held that the doctrine of functus officio did not preclude the immigration officer from reconsidering the mater.

HELD: Appeal allowed in part. The principle of functus officio did not strictly apply in non-adjudicative administrative proceedings and, in appropriate circumstances, discretion did exist to enable an administrative decision-maker to reconsider his or her decision. The matter was remitted to an immigration officer for reconsideration of whether the discretion to reconsider should be exercised.

Statutes, Regulations and Rules Cited:

Immigration and Refugee Protection Act, S.C. 2000, c. 27, s. 25

Appeal from a judgment of the Honourable Madam Justice Mactavish in the Federal Court, dated July 3, 2009, in Docket No. IMM-309-08, [2009] F.C.J. No. 866.

Counsel:

John Loncar and Eleanor Elstub, for the Appellant.

No appearance, for the Respondent.

Angus Grant and Aviva Basman (Self-Represented), for the Intervener.

The judgment of the Court was delivered by

1 **LAYDEN-STEVENSON J.A.** (orally):-- The Minister of Citizenship and Immigration (the Minister) appeals from the judgment of Mactavish J. of the Federal Court (the judge). The judge allowed the respondent's application for judicial review of the decision of an immigration officer dated January 9, 2008 and certified the following question:

> Once a decision has been rendered in relation to an application for a humanitarian and compassionate exemption, is the ability of the decision-maker to reopen or reconsider the application on the basis of further evidence provided by an applicant limited by the doctrine of *functus officio*?

The judge answered the question in the negative. Her reasons for judgment are reported at 347 F.T.R. 60; 81 Imm. L.R. (3d) 263; 2009 FC 695.

2 The respondent's application under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2000, c. 27 for relief on humanitarian and compassionate grounds, from the requirement to apply for permanent residence from outside Canada, was refused on November 26, 2007 and communicated to the respondent in person on December 14, 2007. By letter dated December 18, 2007, received by the Minister on December 28, 2007, the respondent asked for a reconsideration of the negative decision. In correspondence dated January 9, 2008, an immigration officer refused the request for reconsideration on the basis that the principle of *functus officio* "means that once a decision is taken, the decision-maker has no more authority on the matter." The respondent successfully applied for judicial review of the decision refusing the request for reconsideration. The judge concluded that the doctrine of *functus officio* did not preclude the immigration officer from reconsidering the matter. It is the latter decision that is the subject of this appeal.

3 We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision. The Minister and the Intervener agreed in this regard on this appeal (Minister's memorandum of fact and law at paragraphs 1, 24-26; Intervener's memorandum of fact and law at paragraphs 24, 25, 33, 36, 47). However, in our view, a definitive list of the specific circumstances in which a decision-maker has such discretion to reconsider is neither necessary nor advisable.

4 In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay

the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.

5 The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

6 Accordingly, the appeal is allowed in part. The Federal Court judgment is set aside. Rendering the judgment that ought to have been made, the application for judicial review is allowed and the matter is remitted to an immigration officer for reconsideration in accordance with these reasons. The certified question is answered in the negative.

LAYDEN-STEVENSON J.A.

TAB 10

Indexed as:

Sawatsky v. Norris

Sawatsky v. Norris and St. Thomas Psychiatric Hospital

[1992] O.J. No. 1253

10 O.R. (3d) 67

93 D.L.R. (4th) 238

6 Admin. L.R. (2d) 228

34 A.C.W.S. (3d) 148

Action No. 330/92

Ontario Court (General Division),

Misener J.

June 11, 1992

Counsel:

Janice Collins, for appellant (applicant).

Janice B. Crawford, for respondent.

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1 MISENER J.:--The Mental Health Act, R.S.O. 1990, c. M.7, gives to a patient in a psychiatric facility the absolute right to refuse psychiatric treatment if he is mentally competent to give or withhold his informed consent. However, it permits compelled psychiatric treatment if the patient is mentally incompetent to give or withhold his informed consent. The Act establishes a review board and charges the board with the obligation of protecting both the objective welfare and the individual rights of mentally incompetent patients. Section 51(1) gives to such a patient the right to apply at any time, and from time to time, without any expressed temporal restriction, to the board to inquire

as to whether he is mentally competent to give or withhold his informed consent. The issue in this appeal is whether the board is entitled, under any circumstances, to refuse to make that inquiry.

2 The relevant facts are these. At some time Ms. Nellie Sawatsky was charged with a criminal offence. She was found to be mentally unfit to stand her trial. Accordingly she was ordered to be kept in custody until the pleasure of the Lieutenant Governor was known, and in due course she was admitted to and detained in the St. Thomas Psychiatric Hospital (the hospital) under the authority of his warrant. She was at all material times detained in the hospital as an involuntary patient, incapable of giving or withholding her informed consent to psychiatric treatment.

3 While it makes no difference, I assume that at some time her attending physician at the hospital, Dr. Philip Norris, applied for and obtained an order of the board authorizing certain specified psychiatric and related medical treatment. Ms. Sawatsky brought a number of applications pursuant to s. 51(1) of the Mental Health Act (it was then s. 35b(1) of R.S.O. 1980, c. 262), in effect seeking a finding that she was competent to give or withhold her informed consent to such treatment. Her first application was heard on April 3, 1991. The board decided that she was mentally incompetent. Her next application was heard on June 5, 1991, with the same result. Her next application was heard on July 24, 1991, with the same result. Her next application was heard on September 24, 1991, with the same result. On October 28, 1991, Ms. Sawatsky brought another application, and it is the manner in which the board dealt with that application that is the subject-matter of this appeal.

4 The board met on November 1, 1991 with a view to considering the October 28 application. As I understand it, Ms. Sawatsky was represented by counsel on her appearance before the board on that date. The hospital appeared by an agent. The board did not proceed with the hearing, but decided rather that it should first hold a preliminary hearing to decide whether it should hold a hearing at all. The matter was then adjourned on consent to November 22, and then on November 22 to December 5.

5 On December 5, counsel for Ms. Sawatsky took the position that the board had no jurisdiction to hold a preliminary hearing into whether it should hold a hearing. She submitted that the board was statutorily bound by the provisions of s. 51(1) to hold a hearing and to make a determination of Ms. Sawatsky's mental competency on the evidence there presented. She complained as well of insufficient notice that it was the intention of the board to conduct such a preliminary hearing. The chairman of the board then offered to grant a further adjournment so that any prejudice arising from insufficient notice might be overcome. Ms. Sawatsky's counsel refused that offer, and insisted that the board proceed with the hearing into Ms. Sawatsky's mental competency without further delay.

6 The chairman then proceeded to set out the dates of Ms. Sawatsky's previous applications and the dispositions made of them. He then posed the following question:

> The question that arises, -- is this current application for another hearing an abuse of the Board's process? The Board is of the position that unless there has been a material change in the circumstances of the patient since the date of the last

> hearing, being September 24, 1991, or there is new evidence which was not presented at that hearing, then the Board will not proceed with the hearing to determine whether or not Ms. Sawatsky is competent to consent to psychiatric and related medical treatment. If counsel is prepared to advise the Board that there has been a material change in the circumstances of the patient since the date of the last hearing, the Board will proceed with the hearing to determine whether the patient is, in fact, competent to consent to psychiatric and/or related medical treatment. If counsel for the patient is prepared to indicate that there is new evidence that is available today which was not presented at the September 24th hearing, then the Board will proceed with the hearing.

7 Counsel for Ms. Sawatsky refused to make any such indication to the board, apparently on the ground that to do so might be construed as an "attornment to the jurisdiction that the Board has to [hold a preliminary hearing before inquiring] into the merits".

8 The board then recessed briefly, and on the resumption of the hearing, the chairman gave the decision of the board orally, with the advice that full reasons for the board's decision would be provided to the parties in writing. The substance of the oral reasons is as follows:

> The Board is of the opinion that it does have the power under the Statutory Powers Procedure Act to refuse to schedule a hearing in circumstances where it considers that to do so would constitute an abuse of its process. The Board is of the opinion that to proceed with the hearing today would be an abuse of its process unless the Board were to be advised that there has been a material change in circumstances or there is evidence available that was not available at the prior hearing. For this reason, the Board will not be proceeding with the hearing to determine whether or not (Ms. Sawatsky) is competent to consent to psychiatric and related medical treatment.

9 Written reasons were sent to the parties on December 6, 1991. These reasons are ten pages in length and I do not propose to attempt a precis of them. It is sufficient for me to say that the board appears in those reasons to limit the criteria for determining whether or not a hearing to inquire into mental competency should be held, to whether there has been "a material change in the circumstances" since the last hearing. It appears to define "a material change in the circumstances" to mean whether or not the circumstances are now such that "the Board can infer that it will not be either simply reconsidering the same evidence or hearing evidence that it could have heard before, but for the lack of diligence on the part of the parties", always giving the benefit of the doubt to the applicant patient. In short, the board appears in the written reasons to have abandoned the alternative that it expressed earlier, viz., whether there is evidence available that was not available at the prior hearing.

10 I complete the facts by saying that on December 31, 1991 counsel for Ms. Sawatsky launched

this appeal, and, although there are other grounds stated, the only ground of appeal that has substance is the claim that the board had no jurisdiction to hold the preliminary hearing and no jurisdiction to refuse a hearing into Ms. Sawatsky's mental competency.

11 Before I deal with the submissions that counsel made before me, it is necessary to comment, at least in a broad way, on the scheme of the Mental Health Act , so that I can provide a legal framework for the issue.

12 Essentially the Mental Health Act is concerned with two things. It is concerned with the rights of persons who, because of mental disorder, find themselves in attendance at a psychiatric hospital. It is concerned as well with society's obligation to provide treatment to those patients for the mental disorders from which they suffer. These two concerns are not always in harmony.

13 Section 1 of the Act is the definition section, and for my purposes I need only note the definition of "officer in charge", "attending physician", and "mentally competent". "Officer in charge" is defined as "the officer who is responsible for the administration and management of a psychiatric facility" (i.e., hospital). "Attending physician" is defined as "the physician to whom responsibility for the observation, care and treatment of a patient [of the psychiatric facility] has been assigned". "Mentally competent" is defined as a person who has "the ability to understand the subject-matter in respect of which consent is requested and able to appreciate the consequences of giving or withholding consent".

14 Part I of the Act, consisting of ss. 7 to 10, deals broadly with the government of psychiatric facilities.

15 Part II of the Act, consisting of ss. 11 to 53, relates to the hospitalization of patients in a psychiatric facility, and it is this part that has particular importance in this appeal.

16 Section 12 provides for the admission of informal or voluntary patients. Section 19 provides a procedure for changing the status of an informal patient to that of an involuntary patient. Sections 15, 16, 21, 22, and 32 provide for the detention of (prior to admission to the psychiatric facility) and for the admission of involuntary patients in a variety of ways -- upon the application of a physician, by information heard by a justice of the peace, by order of a judge, by the Minister of Health or by way of remand by a judge where the patient is a person accused of a crime. Section 25 provides for admission under the authority of a warrant of the Lieutenant Governor, and since Ms. Sawatsky was confined to the hospital in this way, it is perhaps appropriate to set out s. 25 of the Act in full. It provides as follows:

> 25. Any person who, under the Criminal Code (Canada), is,
>
> (a) remanded to custody for observation; or
> (b) detained under the authority of a warrant of the Lieutenant Governor,

> may be admitted to, detained in, and discharged from a psychiatric facility in accordance with the law.

17 Section 20 limits the continued detention of an involuntary patient to not more than three months unless a certificate is issued or re-issued by the attending physician certifying that involuntary detention is required or continues to be required on the ground that, without it, serious bodily harm is likely to result or serious physical impairment is imminent, and that the patient is not suitable for continued admission as an informal or voluntary patient.

18 Sections 35 and 36 deal with the clinical record of the patient. Generally speaking, it is declared to be confidential, and exempt from disclosure except as specifically provided for by ss. 35 and 36. It is to be noted, however, that s. 35 expressly entitles both the attending physician and the officer in charge to examine the clinical record.

19 Section 37 provides for the establishment of a review board to oversee the care of patients in psychiatric facilities in the manner expressly provided by the provisions of the Act. The scheme is to cast the board in the role of the protector of both the objective welfare and the subjective rights of involuntary patients. Section 39 gives an involuntary patient or any person on behalf of an involuntary patient the right to apply to the board to inquire whether the patient is in fact suffering from mental disorder justifying continued detention as an involuntary patient. Section 41 imposes an obligation on the board, on the hearing of such an application, to promptly review the patient's status to determine whether or not the prerequisites set out in the Act for admission as an involuntary patient continue to be met.

20 Sections 49 to 53 deal with the psychiatric treatment of patients, and with the jurisdiction of the board to supervise and control the treatment of involuntary patients, and it is the purported exercise by the board of that jurisdiction that has given rise to this appeal.

21 Section 49(2) prohibits the psychiatric treatment of a patient who is mentally competent unless the patient gives his informed consent to such treatment. If, however, the patient is not mentally competent, then psychiatric treatment is prohibited (except only in cases of extreme emergency) without the consent of a person authorized by s. 2 to give consent on behalf of the patient, unless the board makes an order authorizing the giving of such treatment. Section 50(1) gives the attending physician of an involuntary patient standing to apply to the board for an order authorizing the giving of such treatment, and s. 50(4) gives the board jurisdiction to grant the order. However, s. 51(1) gives the patient standing to apply to the board to inquire into whether he is in fact mentally competent to give his informed consent. If he is found to be mentally competent to give his informed consent, then, of course, he acquires the absolute right to prohibit such treatment. Section 51(2) completes the framework for conflict and stalemate by providing that if an application is made by the patient under s. 51(1), then the proposed treatment shall not be given until the matter is determined by the board. And it is appropriate to note here that there is nothing in Part II of the Act

limiting the number of applications that can be brought pursuant to s. 51(1), and indeed there ought not to be since a patient may -- and I am sure often does -- become mentally competent to give or withhold informed consent, almost literally overnight.

22 It should now be clear that what is involved in this appeal is whether, under any circumstances, the board can prevent an involuntary patient from continually invoking s. 51(1), and by so doing perpetually prevent treatment, or whether, on a true construction of the Mental Health Act, the perpetual prevention of treatment is a necessary and secondary risk that must be taken in order to insure to an involuntary patient the right, should he so wish, to have his mental competency under constant review.

23 There are a number of other provisions of the Mental Health Act that I must note. Section 36 provides a rather elaborate procedure that a mentally competent patient is entitled to invoke in order to exercise his right to examine his own clinical record, and, not surprisingly, where such a patient encounters difficulties with the officer in charge in doing so, then the review board is given jurisdiction to determine, in effect, whether the best interests of the patient require a suspension of the patient's right. Section 36(4) is the subsection that expressly authorizes the application to the board to make the determination. Section 36(12) expressly provides that the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, does not apply to an application under s. 36(4).

24 Section 47(3) refers again to the Statutory Powers Procedure Act. This section provides that the findings of fact of a review board at a hearing shall be based exclusively on admissible evidence or on matters that may be noticed under ss. 15 and 16 of the Statutory Powers Procedure Act.

25 Section 81 gives to the Lieutenant Governor in Council the authority to make regulations prescribing the manner in which applications may be made to the board, and governing and regulating hearings and the proceedings before it.

26 Part III of the Mental Health Act deals with the estates of patients in a psychiatric facility. Section 61 provides that where a certificate of incompetence has been issued or continued, the patient may apply to the review board to inquire whether or not he is competent to manage his own estate. However, there is an express temporal limitation on that right. Such an application may not be made more frequently than once in any six-month period.

27 Finally, s. 51(2), in addition to prohibiting proposed psychiatric treatment until an application under s. 51(1) is heard by the board, prohibits the treatment until any appeal from the decision of the board is disposed of, unless otherwise ordered by a judge of the appeal court (the Ontario Court -- General Division).

28 I complete this aspect of my reasons with a brief comment on the Statutory Powers Procedure Act . This legislation lays down procedural rules for the conduct of proceedings before tribunals. Tribunals are defined in s. 1(1) thereof to mean "one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a

statute". Obviously (and it was conceded), the review board established by the Mental Health Act is such a tribunal.

29 Section 23(1) of the Statutory Powers Procedure Act provides as follows:

> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

30 I can now outline the competing submissions of counsel, and the conclusions at which I have arrived.

31 Ms. Collins submitted that, on a proper construction of the provisions of the Mental Health Act, the application of s. 23 of the Statutory Powers Procedure Act to a hearing held pursuant to s. 51(1) was, by implication, excluded. In the first place, s. 61 of the Act expressly restricts applications to the board to determine the competency of a patient to manage his estate to a six-month interval. Section 51(1) places no limitation on the number of applications a patient may make to determine his competency to consent to psychiatric treatment. Therefore, by necessary implication, the legislature must have intended a right to apply and to re-apply, pursuant to s. 51(1), unrestricted by any other statutory provision.

32 In the second place, s. 81 provides for the making of regulations to govern and regulate hearings by the review board and the proceedings before it -- again, by implication, directing that all procedural rules that relate in any way to the conduct of the board should be the concern of the Lieutenant Governor in Council, to the exclusion of any other legislation of general application (unless expressly adopted), and, indeed, to the exclusion of any rules of the board's own creation.

33 Ms. Collins submitted that her interpretation was in complete accord with -- indeed, that it was dictated by -- the overriding common law right and the constitutional right of mentally competent patients to refuse treatment of any kind, however necessary or beneficial it might be to their life or well-being, and she invoked the express proclamation of that right found in the judgment of Judge McDermid in Howlett v. Karunaratne (1988), 64 O.R. (2d) 418 (Dist. Ct.), and its forceful iteration by the Ontario Court of Appeal in Fleming v. Reid (1991), 4 O.R. (3d) 74, 82 D.L.R. (4th) 298, and yet again in Kahn v. St. Thomas Psychiatric Hospital (1992), 7 O.R. (3d) 303, 87 D.L.R. (4th) 289.

34 Ms. Collins' alternative submission was that s. 23 had no application to the circumstances of this case, even assuming it applied generally, because s. 23 contemplates orders or directions in the course of a hearing. It does not give jurisdiction to deny entitlement to a hearing.

35 Ms. Crawford submitted that s. 51(1) and s. 23 were not in conflict. It was conceded that the review board was a tribunal as defined by the Statutory Powers Procedure Act . Therefore, by the very terms of that Act -- s. 3 -- all of its provisions applied to proceedings before the board absent express provision to the contrary in the Mental Health Act. There was no express exclusion with respect to hearings held pursuant to an application made under s. 51(1). Therefore s. 23 applied to

those hearings.

36 Ms. Crawford relied upon a number of previous decisions of review boards that have declared that s. 23 gives the board jurisdiction to refuse a hearing on the ground that it would be an abuse of its process to grant it. She relied as well on the judgment of the Ontario Divisional Court in Milton (Town) v. Ontario Regional Assessment Commissioner, Region No. 15 (1985), 52 O.R. (2d) 734, 23 D.L.R. (4th) 157, as support for an interpretation of s. 23 that grants to tribunals the right to control its process beyond the confines of an actual hearing, and therefore the right to refuse a hearing.

37 I have no difficulty in saying that s. 23 of the Statutory Powers Procedure Act gives the review board the jurisdiction to refuse to conduct a hearing under s. 51(1), if to do so would amount to an abuse of its process. Before I give my reasons for saying that, however, I think that I should point out, in the clearest terms, what, in my view at least, is the truly significant -- I would say remarkable -- feature of Ms. Collins' submission. The significant feature of her submission is that s. 51(1), properly construed, abrogates the policy of the common law that, from time immemorial, and by one device or another, has firmly refused to permit a previously resolved issue to be re-litigated on the same evidence.

38 Accordingly, two principles of statutory interpretation are brought into play, both of which impose a very serious impediment to Ms. Collins' argument. The first is the one that Ms. Crawford invoked. There is a presumption that the legislature is consistent and that its various statutes are in harmony. The legislature has declared that the provisions of the Statutory Powers Procedure Act shall apply to all tribunals created by its various statutes (except those tribunals expressly named in s. 3(2)). There is, therefore, a strong presumption that it does exactly that, absent express provision to the contrary in a particular statute.

39 The second is the principle that, while a fair, large, and liberal construction is always mandated, nevertheless there is a presumption that a statute is intended to be consistent with the general principles of law, and an interpretation that violates any of those general principles is to be avoided, unless the legislative intent to do so is demonstrably manifest.

40 Certainly there is nothing expressly stated in any of the provisions of the Mental Health Act to exclude the application of s. 23 of the Statutory Powers Procedure Act to a hearing held pursuant to s. 51(1). Any argument for exclusion by implication is more than met by the argument that, by expressly providing both for the application of and the exclusion of provisions of the Statutory Powers Procedure Act to discrete aspects of the board's proceedings, and providing for an appeal from the board's decision, the legislature, by implication, intended its application to a hearing authorized by s. 51(1).

41 And so, when all is said and done, the principles of statutory interpretation that I enunciated at the outset of this aspect of my reasons must prevail to make s. 23 of the Statutory Powers Procedure Act apply, unless one declares that the right of a mentally competent patient to consent and

withhold consent is of such fundamental significance that it compels a different conclusion. I do not think that the legislature has accorded to the right that degree of significance, and I am certainly not prepared to do so. Indeed, I would have thought that the board did not need to invoke s. 23. I would have thought that the board has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right.

42 That said, however, I entirely agree with Ms. Collins' submission that the test of "material change of circumstances" is too vague a test, and indeed one that would deny justice to an applicant. The right test, in my view, is the test that the board stated in its oral reasons -- in its compendious form, whether or not there is any evidence that was not presented at the previous hearing that might result in a different decision.

43 Spelled out, I would simply declare that where the board in fact has good reason for concern, the board is entitled to inquire of the applicant whether there is any evidence to be presented at the proposed hearing that was not presented at the previous hearing. If counsel is unable or unwilling to declare that there is, the board is entitled to refuse a hearing on the ground that to grant one would be an abuse of its process. If counsel declares that there is, the board is entitled to request a summary of the proposed evidence, and if the summary is not forthcoming, then to refuse a hearing. If the summary is forthcoming, and the board is satisfied that, making the assumption that that evidence is accepted, there is no reasonable possibility that the previous decision of the board would have been different, then the board is entitled to refuse a hearing. If, however, in the opinion of the board, it is reasonably possible that the new evidence, if accepted, would have resulted in a finding of competency, then the board is bound to hold a hearing, and in the end, to reach a decision as to competency on all of the evidence presented to it.

44 I should briefly comment on the remaining submissions that Ms. Collins made. First, I do not agree with Ms. Collins' alternative submission relating to the application of s. 23. Quite apart from what seems to be authority to the contrary (the Milton (Town) case, supra), it requires a far too restrictive interpretation of s. 23.

45 Second, Ms. Collins submitted that Ms. Sawatsky and her counsel were not given proper notice of the intention to hold the preliminary hearing. That may be so, but the board offered an adjournment to overcome any prejudice arising therefrom, and the offer was refused. That is surely a complete answer to this submission.

46 Third, Ms. Collins submitted that the board was in breach of the Mental Health Act in, apparently of its own motion, obtaining information with respect to previous hearings. Quite apart from anything else, the board, in my view, is entitled to take notice of the dates of its previous hearings, the parties thereto, and the dispositions it made.

47 Since, in my view, the board had reason to be concerned as to whether there was an abuse of its process, since I am satisfied that the board actually applied the very test that I have propounded, regardless of what it might have said in its written reasons, and since I am unable to find any other

error of substance in this case, there is simply no ground for my interference. The appeal is therefore dismissed.

48 Before I leave the matter I should note that, at the conclusion of the argument on April 10, I advised counsel of the decision that I have just announced, and I attempted to give brief oral reasons for that decision. I then expressed the hope that counsel would be satisfied with those oral reasons. They were not. Both requested written reasons, and I felt compelled to honour that request. And so, in the end, I reserved my decision, and these written reasons are the result. While they are much longer than the oral reasons, and while it is to be hoped that they are more clearly expressed, I do not think they are any different in substance.

49 I have endorsed what is entitled "Proceedings at Hearing" and what appears to be, in fact, the Appeal Book -- "June 11, 1992. For written reasons given on this date, the appeal is dismissed."

Appeal dismissed.

TAB 11

Français

Legislation Act, 2006

S.O. 2006, CHAPTER 21
Schedule F

Consolidation Period: From March 22, 2017 to the e-Laws currency date.

Last amendment: 2017, c. 2, Sched. 2, s. 25.

Legislative History: 2009, c. 33, Sched. 2, s. 43; 2016, c. 23, s. 56; 2017, c. 2, Sched. 2, s. 25.

CONTENTS

PART I
GENERAL

Definitions

1 (1) In this Act,

"consolidated law" means a source law into which are incorporated,

(a) amendments, if any, that are enacted by the Legislature or filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part, and

(b) changes, if any, that are made under Part V (Change Powers); ("texte législatif codifié")

"e-Laws website" means the website of the Government of Ontario for statutes, regulations and related materials that is available on the Internet at www.e-laws.gov.on.ca or at another website address specified by a regulation made under subsection (3); ("site Web Lois-en-ligne")

"legislation" means Acts and regulations; ("législation")

"source law" means,

(a) in the case of an Act, the Act as enacted by the Legislature, and

(b) in the case of a regulation, the regulation as filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part. ("texte législatif source") 2006, c. 21, Sched. F, s. 1 (1); 2009, c. 33, Sched. 2, s. 43 (1-3).

Reference to amendment includes reference to repeal, revocation

(2) A reference in this Act to amendment in relation to legislation is also a reference to repeal or revocation, unless a contrary intention appears. 2006, c. 21, Sched. F, s. 1 (2).

Regulations re e-Laws website

(3) The Attorney General may, by regulation, specify another website address for the purpose of the definition of "e-Laws website" in subsection (1). 2006, c. 21, Sched. F, s. 1 (3).

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

2009, c. 33, Sched. 2, s. 43 (1-3) - 15/12/2009

Role of Attorney General

2 The Attorney General shall,

(a) maintain the electronic database of source law and consolidated law for the e-Laws website so as to facilitate convenient and reliable public access to Ontario legislation;

(b) safeguard the accuracy and integrity of the electronic database of source law and consolidated law that appears on the e-Laws website; and

(c) safeguard the accuracy and integrity of publications of source law and consolidated law printed by the Queen's Printer or by an entity prescribed under clause 41 (1) (a). 2006, c. 21, Sched. F, s. 2.

Designation by Chief Legislative Counsel

3 The Chief Legislative Counsel may designate one or more lawyers employed in the Office of Legislative Counsel to exercise the powers and perform the duties of the Chief Legislative Counsel in his or her place. 2006, c. 21, Sched. F, s. 3.

Date of change

44 No legal significance shall be inferred from the timing of the exercise of a power under this Part. 2006, c. 21, Sched. F, s. 44.

Interpretation

45 Regardless of when a change is made to a consolidated law under this Part, the change may be read, if it is appropriate to do so,

(a) into the source law as of the date it was enacted or filed; or

(b) into earlier consolidations of the Act or regulation. 2006, c. 21, Sched. F, s. 45.

PART VI
INTERPRETATION

APPLICATION

Application to Acts and regulations

46 Every provision of this Part applies to every Act and regulation. 2006, c. 21, Sched. F, s. 46.

Contrary intention or context requiring otherwise

47 Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context. 2006, c. 21, Sched. F, s. 47.

Existing and future legislation

48 Section 46 applies whether the Act or regulation was enacted or made before, on or after the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. F, s. 48.

Other documents

49 The following provisions also apply, in the same way as to a regulation, to every document that is made under an Act but is not a regulation:

1. Subsection 52 (6) (regulation continues).
2. Section 54 (regulations – power to make, amend, etc.).
3. Section 58 (reference to Act or regulation includes reference to individual provisions).
4. Section 59 (rolling incorporation of Ontario legislation), but only with respect to the document that contains the reference.
5. Section 86 (terms used in regulations).
6. Section 89 (computation of time). 2006, c. 21, Sched. F, s. 49.

Interpretation and definition provisions

50 The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in section 47. 2006, c. 21, Sched. F, s. 50.

LEGISLATIVE CHANGES

Effect of repeal and revocation

51 (1) The repeal of an Act or the revocation of a regulation does not,

(a) affect the previous operation of the repealed or revoked Act or regulation;

(b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

(c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;

(d) affect an investigation, proceeding or remedy in respect of,

(i) a right, privilege, obligation or liability described in clause (b), or

(ii) a penalty, forfeiture or punishment described in clause (c). 2006, c. 21, Sched. F, s. 51 (1).

Same

(2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (2).

Same

(3) A penalty, forfeiture or punishment described in clause (1) (c) may be imposed as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (3).

Effect of amendment and replacement

Application

52 (1) This section applies,

(a) if an Act is repealed and replaced;

(b) if a regulation is revoked and replaced;

(c) if an Act or regulation is amended. 2006, c. 21, Sched. F, s. 52 (1).

Authorized persons continue to act

(2) A person authorized to act under the former Act or regulation has authority to act under the corresponding provisions, if any, of the new or amended one until another person becomes authorized to do so. 2006, c. 21, Sched. F, s. 52 (2).

Proceedings continued

(3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible. 2006, c. 21, Sched. F, s. 52 (3).

New procedure

(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment. 2006, c. 21, Sched. F, s. 52 (4).

Reduction of penalty

(5) If the new or amended Act or regulation provides for a lesser penalty, forfeiture or punishment, the lesser one applies when a sanction is imposed, after the replacement or amendment, in respect of matters that happened before that time. 2006, c. 21, Sched. F, s. 52 (5).

Regulation continues

(6) If an Act under which a regulation has been made is replaced or amended, the regulation remains in force to the extent that it is authorized by the new or amended Act. 2006, c. 21, Sched. F, s. 52 (6).

Effect of repeal and revocation on amendments

53 The repeal or revocation of an Act or regulation includes the repeal or revocation of any amendment to the Act or regulation. 2006, c. 21, Sched. F, s. 53.

Regulations – power to make, amend, etc.

54 (1) Power to make regulations includes power to amend, revoke or replace them from time to time. 2006, c. 21, Sched. F, s. 54 (1).

Survival of power to revoke

(2) Power to revoke a regulation remains even if the provision conferring power to make it has been repealed. 2006, c. 21, Sched. F, s. 54 (2).

New regulation-maker

(3) If a provision conferring power on a person or entity to make a regulation is amended, or repealed and replaced, so as to confer the power or substantially the same power on a different person or entity, the second person or entity has power to revoke, amend or replace the regulation made by the first one. 2006, c. 21, Sched. F, s. 54 (3).

Obsolete regulations

55 (1) If a provision of an Act under which a regulation is made is repealed and not replaced, the regulation ceases to have effect, subject to section 51 and subsection 59 (3). 2006, c. 21, Sched. F, s. 55 (1).

Same

(2) The Lieutenant Governor in Council may, by regulation, revoke a regulation,

(a) that has ceased to have effect under subsection (1); or

(b) that has been rendered obsolete by events or the passage of time. 2006, c. 21, Sched. F, s. 55 (2).

TAB 12

1998 CarswellOnt 3718
Ontario Court of Justice, General Division

Treesann Management Inc. v. Richmond Hill (Town)

1998 CarswellOnt 3718, 41 O.R. (3d) 625, 48 M.P.L.R. (2d) 139, 77 O.T.C. 69, 82 A.C.W.S. (3d) 1018

Treesann Management Inc. and 593288 Ontario Limited, Applicants and The Corporation of the Town of Richmond Hill Respondent

Klowak J.

Judgment: September 23, 1998
Docket: 43654/97

Counsel: *Morris Manning*, for the applicant.
George H. Rust-D'Eye and *Barnet H. Kussner*, for the respondent.

Subject: Public; Municipal

Headnote

Municipal law --- Regulation and licensing — Regulation of businesses — Entertainment businesses — Adult entertainment

Applicant ran adult entertainment establishment in area not designated for such use since respondent town passed by-law changing permissible location for such activity — Applicants challenged new by-law or its application to them and town applied for injunctive relief prohibiting continuation of adult entertainment activity in non-designated area — Section 225(3) of Municipal Act gave town power to pass by-law abrogating existing rights related to location of adult entertainment parlours as long as town did so in good faith — History of relations between parties and procedure followed by town in holding public meetings, requesting planning input, reports and studies, indicated town had acted in good faith and with proper planning objectives in mind in passing relocation by-law — By-law prohibited adult entertainment parlours in location of applicant's business and town's cross-application for injunction granted — Municipal Act, R.S.O. 1990, c. M.45, s. 225(3).

APPLICATION by owner of adult entertainment parlour to quash or limit application of municipality's adult entertainment establishment by-law; CROSS-APPLICATION by municipality for injunction prohibiting applicant from continuing operation of adult entertainment parlour.

***Klowak J.*:**

1 The applicants run an adult entertainment establishment on Yonge Street, being an area designated by the respondent in 1982 for that activity under what is now s. 225(3) of the *Municipal Act*, R.S.O. 1990, c. M.45 and reads as follows;

> **S. 225 (3)**
>
> Despite subsection 257.2(4), a by-law passed under this section may define the area or areas of the municipality in which adult entertainment parlours or any class or classes thereof may or may not operate and may limit the number of licences to be granted in respect of adult entertainment parlours or any class or classes thereof in any such area or areas in which they are permitted.

Subsection 257.2(4) reads as follows:

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> A council shall not refuse to grant a licence to carry on or engage in any business by reason only of the location of the business if the business was being carried on or engaged in at that location at the time the by-law requiring the licence came into force.

In 1996, the Town, acting under that same legislative authority, enacted a by-law changing the permissible location for such activity to an industrial park.

2 The applicants seek to attack that last by-law, or its application to themselves, while the respondent Town seeks injunctive relief prohibiting the continuation of the adult entertainment activity carried on at the Yonge street premises.

3 With respect to the issue of whether a municipality has the power to pass a by-law abrogating existing rights which it itself created by earlier by-law, the cases of *Oshawa (City) v. 505191 Ontario Ltd.* (1986), 27 D.L.R. (4th) 236 (Ont. C.A.) at 242-247; leave to appeal refused (1986), 58 O.R. (2d) 535 (note) (S.C.C.) and *538745 Ontario Inc. v. Windsor (City)* (1988), 37 M.P.L.R. 1 (Ont. C.A.); leave to appeal refused (1988), 30 O.A.C. 79 (note) (S.C.C.) clearly establish that a municipality has the power under s. 225(3) of the *Municipal Act* to pass a by-law abrogating the existing rights of adult entertainment facilities, and make no distinction on the basis of the nature or source of the existing right. The non obstante clause at the beginning of s. 225(3) constitutes clear and convincing evidence of an intent to override existing rights, and this court should not re-write that section to except adult entertainment parlour locations permitted under a previous by-law enacted under that section. That is a matter for the legislature, not the courts.

4 A further argument attempting to distinguish the *Oshawa* case *supra*, as dealing with land use rather than activity, leads nowhere, and any distinction had no bearing on the result in that case. In any event, it is clear that the legislature gave municipalities the choice of dealing with adult entertainment as an activity through a licensing regime, or of dealing with it as a land use by conventional zoning by-law. I see no express or implied intention in the legislation to create different vested rights, or lack thereof, depending on the method selected by the municipality.

5 Finally, s. 28(g) of the *Interpretation Act*:

> s.28 In every Act, unless the contrary intention appears, as to jurisdiction
>
> > (g) where power is conferred to make by-laws, regulations, rules or orders, it includes power to alter or revoke the same from time to time and make others;

allows a municipality to amend its by-laws from time to time, and its jurisdiction in this regard should not be fettered except by clear and express legislation. The applicants' argument that the *Municipal Act* provision does not specifically provide for amendments to adult entertainment by-laws would result in the absurd conclusion that an adult entertainment parlour location, once designated is always designated, thereby creating the very rights the legislation purports to take away.

6 Although the Town had the jurisdiction to enact the amending by-law abrogating the applicants' rights, it had to have done so in good faith, keeping proper planning principles in mind. The issue is whether it did so, or whether it acted capriciously, or at whim, singling out the applicants because of rate payer pressure and personal biases of councillors. Although the good faith of municipal councils might ordinarily be presumed, it bears some closer scrutiny where the powers exercised by the Town have the effect of abrogating existing rights.

7 In that regard, the actions of the Town must be taken in context, including that the applicant facility has been operating without an adult entertainment parlour license since December 31, 1991; its liquor license has been revoked; the Town denied the applicant an adult entertainment parlour license in 1992 and 1996 due to the nature of the activities carried on in the premises; and the Town forbore any sort of prosecution pending the majority of the applicants' various unsuccessful hearings and appeals.

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8 I bear in mind it is not just one aspect of the Town's conduct, but its conduct as a whole, which should determine whether or not it acted in good faith. Should they have acted without having open meetings, without giving the applicants notice, precipitously and without planning considerations, or with undeniable and unshakeable bias, there is no doubt in my mind the amending by-law, as with any other by-law, could not stand.

9 Applicants' counsel submits there should at least be a trial of various aspects of the good faith issue. It seems to me the only aspect of good faith where a trial might be considered is that dealing with the comments and statements made by various Town councillors and their reaction to pressure by rate payers. In this case, however, wholly accepting that the statements indicative of bias by the councillors and rate payers were made, and even if they are taken to give rise to an appearance of bias, they fall far short of establishing in all the circumstances that any member of Council who voted in favour of the new location had such a closed mind that they were utterly incapable of being persuaded that the by-law ought not to be amended.

> *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.) at 1197. *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213 (S.C.C.) and 1224.

10 Indeed, the councillors were obligated to take the views of residents into account, and this court should not be quick to find bad faith because they did so. On the assumption the applicants have put their best foot forward, I find there is no issue requiring the test of a trial.

11 Although it may not always be necessary, the request by the Town for planning input is relevant to whether they acted with planning principles in mind, or arbitrarily and in bad faith. Council here requested and provided to the applicants reports from the Town's Commissioner of Planning and Development prior to the public meeting at which proposed amendments to the adult entertainment by-law were placed before Council. Although the Town had previously received other reports more favourable to the applicants, I see nothing sinister in the Town's request for a further study, particularly on whether adult entertainment can be an accessory use to a restaurant, and whether the Yonge Street location as well as the new industrial park location should both be designated. The entire process of preparing reports and recommendations, giving notice to the applicants, and holding public meetings in which the applicants could participate supports the conclusion that the Town was acting in a responsible fashion with proper planning objectives in mind.

12 The applicants themselves obtained the services of a planner who also prepared a report, and made the point that there has been little change, if any, in the character of the surrounding neighbourhood since it was first designated for adult entertainment in 1982. That may be so, but it seems to me there has been considerable change in the breadth of activity carried on in the establishment, and surely both the character of the neighbourhood as well as the specific nature of the activity carried on must both play a part in determining the appropriateness of a location for adult entertainment. Until at least 1981, the services provided at the premises consisting of stripping (with "g-strings" left on) and mud wrestling. Incident reports from police officers running routine checks of the premises show that the dancers were not in physical contact with the patrons of the establishment during the performances observed from 1979 to 1981. By 1993, the nature of the adult entertainment offered had changed, and two police constables testified at the hearing of the applicants application for a 1996 adult entertainment parlour license to having witnessed lap dancing and towel dancing. Lap dancing was described as an activity in which the dancer, invariably female, disrobed in front of a patron, invariably male, then sat on his lap. Towel dancing was described as lap dancing with a small towel placed on the patron's lap. With both activities, there would follow some type of grinding on the part of the dancer and some degree of touching, primarily of the dancer's breasts, shoulders, and legs.

13 Although both officers were cross-examined by applicants' counsel, the applicants did not call evidence at the meeting and there is no evidence before me directly challenging the testimony of these two officers with respect to what they observed at the premises from 1993 to 1996.

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14 Another police officer visited the premises twice in April of 1997 and observed several incidents of touching between patrons and dancers and between dancers and dancers, patrons touching dancers breasts and genitals, and patrons and dancers engaging in various sexual acts, including masturbation, cunnilingus, and digital penetration. This officer was also cross-examined with a focus, in my view, on whether the incidents observed would in law support a criminal charge against management.

15 In any event, the designation of an appropriate location for adult entertainment in Richmond Hill has been a continuing process for the Town and the applicants should have been well aware of the risk they were taking in developing and expanding their location in the Yonge Street area, as well as the activities carried on within it. While mud wrestling and stripping carried on in the centre of Town may have been acceptable at one time, other more aggressive and overt sexual activity within the same character of neighbourhood can constitute a change inconsistent with the continued designation of the neighbourhood for adult entertainment. The owners of the adult entertainment parlour bear that risk.

16 This is not to say that a municipality can abuse its power by enacting relocation by-laws whenever there is an escalation of otherwise permissible sexual activity in the adult entertainment parlour, but is simply an observation that there are many aspects as to whether or not a neighbourhood continues to be appropriate for adult entertainment designation, and the change, or lack of change, in the neighbourhood itself is only one of those aspects. Other aspects may support a change of location, provided it is otherwise done in good faith.

17 Finally, I have been particularly concerned with the applicants' submission, supported by their planner, that adult entertainment parlours are not permitted by the zoning in the newly designated industrial area. It would seem to me that a designation or a re-designation of adult entertainment to an area whose zoning will not accommodate it is not only a strong indicia of bad faith, but is beyond the jurisdiction of a municipality since it would be doing indirectly what it cannot do directly, namely, prohibiting adult entertainment parlours altogether.

18 The Town's position is that restaurants are included in the zoning of the industrial area, and adult entertainment is an accessory use to a restaurant. I agree with the decision of Craig J. in *Toronto (City) v. Merit Corp.* (1983), 23 M.P.L.R. 125 (Ont. H.C.) that an adult entertainment parlour is not an accessory use to an eating establishment, for the reasoning he expressed in that case.

19 Had the Town before me taken no other action with respect to allowing an adult entertainment parlour in the new industrial area, other than stating it interpreted restaurant to include adult entertainment parlour, I would not accept their good faith in passing the re-designating by-law. Such interpretation could be readily challenged, and the by-law would in effect be prohibitory.

20 In this case, however, another applicant has been successful in obtaining a license in the new industrial area and the Town has already re-zoned that applicant's property from specific zoning which accommodated a Legion Hall to one which includes a tavern and entertainment. This supports the Town's contention that it is prepared to accommodate an adult entertainment parlour in the redesignated area, and also shows they will re-zone if necessary, even though they have maintained to date it is not necessary to do so.

21 Although the intention of the legislature was to give municipalities the choice and flexibility afforded by the licensing regime with respect to adult entertainment parlours, thereby dealing with adult entertainment as an activity rather than as a land use requiring re-zoning, the Town may have put itself in the position in this case of having to re-zone because of the existing zoning in the re-designated area it has selected. The by-law does not become prohibitive, however, just because re-zoning may be required.

Soo Mill & Lumber Co. v. Sault Ste. Marie (City) (1974), [1975] 2 S.C.R. 78 (S.C.C.)

22 For the purposes of the issue of good faith before me, in taking the whole of the Town's actions into account, including those preceding the by-law, surrounding the enactment of the by-law, and its subsequent actions in

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accommodating and facilitating another adult entertainment parlour in the new industrial area, all support that the Town acted in good faith in enacting the by-law re-designating the location of adult entertainment parlours in Richmond Hill.

23 I consequently dismiss the application.

24 The Town has brought a cross-application for an injunction on the basis that the applicant has no license to carry on an adult entertainment parlour, that the by-law which I have just upheld prohibits adult entertainment parlours in the applicants' current location, and that the services provided at the applicants' establishment are in breach of the no-touching aspect of the Town by-law, and of the *Criminal Code* in respect to lap dancing. I find it unnecessary for me to deal with that last submission. A permanent injunction will issue restraining the respondents on the cross-motion from operating an adult entertainment parlour on the Yonge Street facility on the basis that the by-law prohibits adult entertainment parlours in that location, and that it has no license to operate such a facility. Rather than thwart the owners' efforts to get such license, I find the Town of Richmond Hill consistently refrained from taking any precipitous course of action and in fact forbore taking any action for many years while the applicants pursued various courses of legal action and appeals, all unsuccessfully. The Town has waited until the applicant has exhausted all of the other avenues before applying for injunctive relief. In these circumstances, it was appropriate for the Town to refuse the allow the applicant to apply for a 1997 adult entertainment parlour license while awaiting the decision of this court.

25 The parties may make submissions to me in writing with respect to costs on or by October 15, 1998.

Application dismissed; cross-application granted.

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TAB 13

2000 CarswellOnt 414
Ontario Court of Appeal

Treesann Management Inc. v. Richmond Hill (Town)

2000 CarswellOnt 414, [2000] O.J. No. 406, 10 M.P.L.R. (3d) 273, 130 O.A.C. 359, 184 D.L.R. (4th) 68, 47 O.R. (3d) 221, 95 A.C.W.S. (3d) 380

Treesann Management Inc. and 593288 Ontario Ltd., Appellants and The Corporation of the Town of Richmond Hill, Respondent

Carthy, Goudge, O'Connor JJ.A.

Heard: December 22, 1999
Judgment: February 22, 2000
Docket: CA C30613

Proceedings: reversing in part (1998), 48 M.P.L.R. (2d) 139 (Ont. Gen. Div.)

Counsel: *Noel D. Gerry*, for Appellant.
George H. Rust-D'Eye and *Barnet H. Kussner*, for Respondent.

Subject: Public; Civil Practice and Procedure; Municipal

Headnote

Municipal law --- Regulation and licensing — Regulation of businesses — Entertainment businesses — Adult entertainment — Strip clubs

Owner and operator had adult entertainment establishment in area not designated for such use since town passed by-law changing permissible location for such activity — Zoning category of "places of entertainment" was not included in new industrial zoning — Owner and operator's application challenging new by-law or its application to them as illegal as effectively prohibiting adult entertainment parlours in town was dismissed — Town's application for injunctive relief prohibiting continuation of adult entertainment activity in non-designated area was granted — Owner and operator appealed both decisions — Appeal allowed in part — Fact that rezoning was available or that another property was rezoned did not bear upon issue of whether existing zoning was prohibitory — By-law was illegal to extent that it changed area designations where adult entertainment licences might be issued, in way which prohibited adult entertainment uses and was void to that extent — Injunction should therefore be set aside and judgment below varied to allow owner's and operator's application.

APPEAL by operator and owner of adult entertainment parlour from judgment reported at (1998), 48 M.P.L.R. (2d) 139, 41 O.R. (3d) 625 (Ont. Gen. Div.), dismissing application for order quashing by-law and granting town's application for permanent injunction restraining operator and owner from using premises as adult entertainment parlour.

The judgment of the court was delivered by *Carthy J.A.*:

1 The appellants appeal from two judgments of Klowak J. dated September 23, 1998, one dismissing an application for an order quashing By-law 321-96 of the respondent and ancillary relief; the other, granting a permanent injunction restraining the appellants from using premises on Yonge Street in Richmond Hill as an adult entertainment parlour.

2 In the background of the present proceedings were some years of skirmishing and litigation between the Town and Treesann over the latter's operation of an adult entertainment parlour (as it is termed in the by-law) known as the Major Mack Hotel. By my observation of the evidence, as the entertainment became more and more erotic, the political opposition became more and more resolute. Finally, in 1996 the Town passed By-law 321-96 amending its adult

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entertainment licensing by-law by deleting the Yonge Street, frontage, where the Major Mack Hotel was located. The by-law creates a new area for the operation of adult entertainment parlours known as the Enford Road Industrial Area.

3 Treesann, the operator, and 593288 Ontario Ltd., the owner brought proceedings alleging bias, bad faith and illegality and the Town countered with an application for a permanent injunction enjoining further operation. Klowak J. upheld the by-law and granted the injunction.

4 Thereafter, Treesann ceased operations and this appeal was pursued, as explained by counsel, to establish the owner's rights to the use of this property. Further, the issues on appeal were refined to focus on the legality of the by-law. Bad faith was only pressed as associated with the alleged excess of authority in passing the by-law. In effect, this court is only asked to determine if the by-law was one the municipality was empowered to enact.

5 The reasons of Klowak J. are cited as *Treesann Management Inc. v. Richmond Hill (Town)* (1998), 41 O.R. (3d) 625 (Ont. Gen. Div.). Before analyzing those reasons I will set forth the relevant legislation. S. 225 of the *Municipal Act*, R.S.O. 1990, c. M.45 reads in part:

> 225.(1) **Licensing, regulating, etc., adult entertainment parlours**. — By-laws may be passed by the councils of local municipalities for licensing, regulating, governing, classifying and inspecting adult entertainment parlours or any class or classes thereof and for revoking or suspending any such licence and for limiting the number of such licences to be granted, in accordance with subsection (3).
>
> ...
>
> (3) **Defined areas, limitation on numbers**. — Despite subsection 257.2(4), a by-law passed under this section may define the area or areas of the municipality in which adult entertainment parlours or any class or classes thereof may or may not operate and may limit the number of licences to be granted in respect of adult entertainment parlours or any class or classes thereof in any such area or areas in which they are permitted.

Section 257.2(4) (referred to in s. 225.(3)) reads:

> 257.2(4) **Limitation**. — A council shall not refuse to grant a licence to carry on or engage in any business by reason only of the location of the business if the business was being carried on or engaged in at that location at the time the by-law requiring the licence came into force.

6 By-law 321-96 effectively amended earlier by-laws passed pursuant to s.225 by deleting the designated Yonge Street frontage and replacing it with the Enford Road Industrial Area. The balance of the licensing regime in the by-law as amended sets out comprehensive regulatory provisions as authorized by the legislation and as one might expect in a licensing by-law.

7 Klowak J. first found that the Town had the power to amend the by-law so as to abrogate existing rights which had been created by that very by-law. She cites strong authority for that conclusion and this was not challenged on appeal. The motions judge then deals with the alleged bias of the members of council and the imputed lack of planning rationale for the amendment. She found in favour of the municipality and that conclusion was not contested on the appeal.

8 The appeal issue was whether the by-law amendment was illegal as effectively prohibiting adult entertainment parlours in the Town. The zoning category of "places of entertainment" was not included in the industrial zoning of the substituted district.

9 The Town's position was, and is, that adult entertainment is an accessory use to restaurant use, which is permitted in the industrial zoning. Further, it is the Town's position that it has committed itself to that position as evidenced by the planning reports leading to By-law 321-96, and has demonstrated its good faith by permitting a rezoning of a Legion Hall in the industrial district to include tavern and entertainment uses.

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10 Klowak J. relied on the reasons of Craig J. in *Toronto (City) v. Merit Corp.* (1983), 23 M.P.L.R. 125 (Ont. H.C.) to find that adult entertainment could not be considered an accessory use to a restaurant. She then concluded:

> Had the Town before me taken no other action with respect to allowing an adult entertainment parlour in the new industrial area, other than stating it interpreted restaurant to include adult entertainment parlour, I would not accept their good faith in passing the re-designating by-law. Such interpretation could be readily challenged, and the by-law would in effect be prohibitory.
>
> In this case, however, another applicant has been successful in obtaining a licence in the new industrial area and the Town has already re-zoned that applicant's property from specific zoning which accommodated a Legion Hall to one which includes a tavern and entertainment. This supports the Town's contention that it is prepared to accommodate an adult entertainment parlour in the re-designated area, and also shows they will re-zone if necessary, even though they have maintained to date it is not necessary to do so.
>
> Although the intention of the legislature was to give municipalities the choice and flexibility afforded by the licensing regime with respect to adult entertainment parlours, thereby dealing with adult entertainment as an activity rather than as a land use requiring re-zoning, the Town may have put itself in the position in this case of having to re-zone because of the existing zoning in the re-designated area it has selected. The by-law does not become prohibitive, however, just because re-zoning may be required: *Soo Mill & Lumber Co. v. Sault Ste. Marie (City)*, [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1.
>
> For the purposes of the issue of good faith before me, in taking the whole of the Town's actions into account, including those preceding the by-law, surrounding the enactment of the by-law, and its subsequent actions in accommodating and facilitating another adult entertainment parlour in the new industrial area, all support that the Town acted in good faith in enacting the by-law re-designating the location of adult entertainment parlours in Richmond Hill.

11 I will deal first with the argument that adult entertainment is an accessory use to a restaurant. The definition of "accessory use" in the Town's zoning by-law is that it be "naturally and normally incidental, subordinate and exclusively devoted to a principal use." I agree with Klowak J.'s conclusion. One can only offer a patronizing smile to the argument that such activities as towel dancing, touching of breasts and masturbation are naturally and ordinarily incidental to a dining out experience. Yet, the fundamental rationale of the planning department in recommending the area designation was that it would be a permitted accessory use. See, also on this subject, *Bayfield (Village) v. MacDonald* (1997), 39 M.P.L.R. (2d) 63 (Ont. C.A.), and *1121472 Ontario Inc. v. Toronto (City)* (1998), 39 O.R. (3d) 535 (Ont. C.A.).

12 Moving forward, I respectfully disagree with the remaining conclusions of Klowak J. The fact that a rezoning is available or that another property was rezoned does not bear upon the issue of whether existing zoning is prohibitory. It may indicate a sense of fairness, but it is at best *ad hoc* fairness. The best intentions of council members are subject to future planning processes and appropriate decisions in respect thereof. Furthermore, even if council chose to ignore its present zoning and grant a licence, any ratepayer would be entitled to bring action to enforce the present industrial zoning. See *Municipal Act*, R.S.O. 1990, c. M.45, s. 328 which reads:

> Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board. R.S.O. 1990, c. M.45, s.328.

13 A comparison between two cases makes the point.

14 In *Pro Catering Ltd. v. Vaughan (Town)* (1986), 17 O.A.C. 238 (Ont. Div. Ct.) at 238 the Divisional Court held such a by-law invalid, saying at p. 239:

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> [3] The present general zoning bylaw No. 2523 and bylaw 2961, which deals specifically with the regulation of lands and buildings for industrial purposes in the Township of Vaughan, do not list that use as a permitted use. As the town has interpreted its zoning bylaw and as it reads; the bylaw prohibits the operation of such Adult Entertainment Parlours in the said industrially zoned areas. Therefore, the bylaw is prohibitory and invalid.

15 This court upheld such a by-law in *538745 Ontario Inc. v. Windsor (City)* (1988), 64 O.R. (2d) 38 (Ont. C.A.) where the municipality passed zoning by-laws to permit adult entertainment in the newly designated areas.

16 I disagree with the motion judge's interpretation of *Soo Mill & Lumber Co. v. Sault Ste. Marie (City)* (1974), [1975] 2 S.C.R. 78 (S.C.C.). In that case certain of the land uses ostensibly permitted in the zoning by-law were in a "hold" category indicating proposed future uses in accordance with the long range planning envisaged in the Official Plan. It was argued that this "hold" category was a prohibition rendering the by-law illegal. Laskin C.J. concluded at p. 84:

> The fact of a freeze on development, in accordance with the precepts of the Official Plan as implemented by the zoning by-law, does not amount to a violation of s. 35(1) when agriculture and related uses (and pre-existing uses) are permitted. Nor can the appellant complain of discrimination merely because the result of the freeze is to sterilize its land in respect of development when this has been done in the context of an overall Official Plan and a general zoning by-law in furtherance thereof. There was no suggestion of bad faith on the part of the respondent in bringing the appellant's land within the holding category. That was a discretion which was reposed in the municipality under the zoning scheme.

17 The Court was considering whether land uses were prohibited and held that they were not — some were permitted and others postponed to Official Plan considerations. Here, we are considering whether adult entertainment uses are prohibited, and clearly they are. If all land uses had required a zoning application in *Soo Mills* the result would, in my view, have been very different.

18 Thus, it is my conclusion that By-law 321-96 of the Town of Richmond Hill was illegal to the extent that it changed the area designations where adult entertainment licences might be issued, in a way which prohibited adult entertainment uses and is void to that extent. The injunction should therefore be set aside and the judgment below varied to allow the appellants' application and grant a declaration in the terms of these reasons.

19 In setting aside the injunction I am mindful of the fact that the operator, Treesann, is no longer in possession of the premises and there appears to be no immediate threat of a resumption of operations without a licence. In respect of costs, I note that this facility continued in business without a licence from 1992 through to 1998 when an injunction was granted. The municipality patiently awaited the outcome of various proceedings before seeking a restraining order and in the meantime the business apparently thrived. I think it a fair observation that the appellant Treesann was in the game of litigation so long as profits continued and lost interest in the merits when they could not continue. The owner appellant has been successful, but it is probably only a moral victory. It is still faced with the prospect that the Town will process proper by-laws, with due process, and directed to its original purpose of eliminating adult entertainment from the Yonge corridor. In all the circumstances, I would order no costs here or below.

Appeal allowed in part.

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TAB 14

Case Name:

DEP MINISTER OF NATIONAL REVENUE CUSTOMS & EXCISE v. KIPP KELLY LTD

Deputy Minister of National Revenue for Customs and Excise
(Appellant)
v.
Kipp Kelly Limited (Respondent)

[1981] F.C.J. No. 143

[1982] 1 F.C. 571

37 N.R. 311

3 C.E.R. 196

9 A.C.W.S. (2d) 264

1981 CarswellNat 108

Action No. A-486-80

Federal Court of Canada
COURT OF APPEAL

URIE AND LE DAIN JJ. AND KERR D.J.

OTTAWA, JUNE 1 AND 8, 1981.

COUNSEL:

W.I.C. Binnie, Q.C. for appellant.
M.E. Corlett, Q.C. for respondent.

SOLICITORS:

Deputy Attorney General of Canada for appellant.
Maclaren, Corlett, Tanner & Greenwood, Ottawa, for respondent.

The following are the reasons for judgment rendered in English by

1 **URIE J.**: This is an appeal from a declaration of the Tariff Board in Appeal No. 1479 wherein it was held that three Allis-Chalmers diesel engines imported by the respondent were classifiable under tariff item 42865-1, as amended on December 22, 1977 by P.C. 1977-3599 [SOR/78-19], on the basis that the respondent used the imported engines in the manufacture of electricity generating sets, (hereinafter, for convenience, to be referred to as "gen sets").

2 The Tariff Board had held, on July 20, 1977 in its declaration in Appeal No. 1182, that similar diesel engines were used in the manufacture of gen sets and that, therefore, they fell within the scope of tariff item 42865-1 as it then read and could therefore, be imported into Canada duty free. Before the amendment, made on December 22, 1977, item 42865-1 appeared as follows:

> Diesel and semi-diesel engines;
> Diesel dual fuel engines;
> L.P.G. engines;
> Four-cycle gasoline internal combustion engines not less than four horsepower nor greater than forty horsepower;
> Reciprocating natural gas engines;
>
> When of a class or kind not made in Canada and for use in the manufacture of electricity generating sets consisting essentially of an internal combustion engine and one or more generators mounted on a common base [emphasis added].

3 Upon issuance of Order in Council P.C. 1977-3599 the underlined words were deleted and the item thus now reads as follows:

> Diesel and semi-diesel engines;
> Diesel dual fuel engines;
> L.P.G. engines;
> Gasoline internal combustion engines;
> Reciprocating natural gas engines;
>
> When of a class or kind not made in Canada; parts thereof; all of the foregoing for use in the manufacture of electricity generating sets classifiable under tariff item 42701-1 [emphasis added].

4 It is appellant's contention that the diesel engines in issue are not used by the respondent in the manufacture of gen sets and that, therefore, they are not exempt from duty pursuant to tariff item 42865-1. Rather, in his submission, the respondent is a distributor of gen sets which it does not manufacture but which it merely assembles in its plant at Winnipeg. Therefore, in his view, the proper tariff item in respect of the diesel engine imports is item 42815-1 upon which a duty of 15% is applied and which item reads as follows:

> Diesel and semi-diesel engines, and complete parts thereof, n.o.p.

5 Before examining the merits of the appeal the submission of counsel for the respondent that the matter, as between the parties, is res judicata, should be dealt with. In Tariff Board Appeal No. 1182 the Board held that the respondent manufactured gen sets. In Appeal No. 1479, the same parties were involved, the same production functions were employed by the respondent, and, in counsel's view, the same tariff item was applicable because in both the original and amended versions of item 42865-1 it was necessary to ascertain whether or not the diesel engines were imported "for use in the manufacture of electricity generating sets."

6 Quite aside from the very real doubt as to the applicability of the principle of res judicata in administrative law[1] with respect to orders or decisions of even quasi-judicial bodies, the doctrine is not applicable in the case at bar. Res judicata, in one of its several aspects, may be raised as a defence where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. That is the aspect in which, as I understood him, counsel for the respondent pleaded res judicata. However, while undoubtedly in Tariff Appeal No. 1182 the Board found as a fact that the diesel engines there in issue were for use in the manufacture of gen sets that finding was made, as the Board's reasons disclose, in the light of the tariff item as it then existed. Its finding was thus on a question of mixed law and fact. What the Board was called upon to decide in Tariff Appeal No. 1479 was, in essence, whether that finding of mixed law and fact was affected by the change in the wording of the tariff item. The matter thus was not, in my view, res judicata as between the parties.

7 I turn now to the merits of the appellant's appeal. Briefly the relevant facts, which are not in dispute, are these. The respondent has been for some years the Manitoba dealer and distributor for ONAN, an American manufacturer of gen sets. ONAN manufactures the generator, the engine and the control panel. It exports 2,000 gen sets annually to the respondent. A gen set is a generator (frequently described also as an alternator) driven by an engine mounted on a base with certain controls. According to appellant's memorandum of fact and law, a distributor, dealer and installer of gen sets performs the following functions, the description of which is not disputed by the respondent:

> (a) uncrates the gen sets and attaches the controls and control panel which cannot be shipped assembled to the gen set;

(b) tests the gen set on load banks to ensure that it is performing in accordance with its specifications;
(c) adjusts and repairs the imported gen set as is necessary. The Respondent's employees are factory-trained by ONAN at its United States headquarters;
(d) mounts the gen set to the customer's specifications such as on a pad, on a floor, or on a trailer;
(e) if the gen set is to be placed in a building,

(i) connects the gen set to the commercial power;
(ii) attaches the transfer switch to the wall or to the base of the gen set (the transfer switch starts the gen set when the commercial power fails); and,
(iii) installs the heat exchange and exhaust mechanisms for the gen set as specified by the customer.

8 ONAN does not manufacture engines able to turn the largest generators that it manufactures so that it purchases engines with sufficient power output to operate those generators from engine manufacturers such as Allis-Chalmers Ltd. Sometimes the respondent purchases the engines, along with the generators, from ONAN. On other occasions, such as in the case of the three units in issue in this appeal, it purchases the engines directly from Allis-Chalmers Ltd. The control panels were, in each case, imported with the generator. Transfer switches, control devices and shut down switches are purchased from a Winnipeg supplier and, at least in some cases, are designed by the respondent. The following additional operations, inter alia, are performed by the respondent at its Winnipeg plant and are said to be of a manufacturing nature:

(a) connects the generator with the engine and instals, where necessary, the control panel and transfer switches, control devices and shut down switches;
(b) manufactures the base which consists of two steel channels with a platform upon which the gen set is welded;
(c) manufactures the battery rack;
(d) paints the assembled set;
(e) tests the assembled set on the load banks;
(f) instals the gen set in the building of the customer with a cooling system and exhaust system according to the customer's requirements.

The labour time expended by the respondent in all of the foregoing operations for the three gen sets varied from 58.15 hours to 75.85 hours.

9 On the above facts, the Board made the following finding:

> The Board notes that a condition for classification under 42865-1 is that the imported diesel engines be for use in the manufacture of electric generating sets. Formerly this tariff item defined a generating set as having three

components, a combustion engine and one or more generators mounted on a common base. In the amended tariff item these requirements have been removed so that the nature of a generating set must now be determined from the evidence.

As in Appeal No. 1182 the evidence was that the appellant imported the basic components, added bases, switches and controls, which it purchased locally, and installed the completed units on the premises of the purchasers. There is no dispute that the finished installations were generating sets within the meaning of that term as it is understood by suppliers and users.

In the opinion of the Board these functions were no less manufacturing than they were in the previous case, Appeal No. 1182. There is no provision in the Customs Tariff that a manufacturer of generating sets also be a manufacturer of generators. The end use provision in tariff item 42865-1 requires only that the imported diesel engine be for use in the manufacture of electricity generating sets.

10 The appellant attacked the Board's finding on the ground that it erred in considering that the operations outlined above constituted manufacturing. His contention was that the respondent's operations were rather an assembly of component parts, only the construction of the base and the battery rack being manufacturing operations. Counsel submitted further that while the same type of diesel engines were the subject of Appeal No. 1182, the ruling was made pursuant to tariff item 42865-1 as it read in 1977. In his view the words deleted from that item by the amendment thereto made in December 1977, supra, following the Board's July decision, had the effect of restricting the meaning of the word "manufacture" as used in the tariff item. The removal of the restricting words thus restored to the word "manufacture" its ordinary meaning. The Board in the decision here under appeal therefore erred in finding that the appellant was still a manufacturer of gen sets.

11 Undoubtedly, the use of the phrase "nature of the generating set" in the last sentence of the first paragraph above quoted does not fully describe the function that the Board is called upon to perform. While it must decide that the goods in issue are gen sets it also must decide whether or not the diesel engines are for use in the manufacture of gen sets no matter what their nature. While the Board did not refer to the italicized phrase and, as a consequence, to that extent inaccurately described what it had to ascertain from the evidence, in the context of the whole of its reasons, including the quoted passages, it is clear that the Board was fully aware of what it was required to do. Moreover, in my view, if that premise is accepted the Board was clearly right in its appreciation of the effect of the change in wording of tariff item 42865-1. The change did not affect the meaning of "manufacture". It simply enlarged the kinds of gen sets to which the tariff item would apply, it no longer being limited to, for example, sets mounted on a common base.

12 On the question as to whether or not the diesel engines were for use in the manufacture of gen sets as distinct from being used in the assembly thereof from component parts, it has been held by the Supreme Court of Canada that the assembly of parts may, in certain circumstances, constitute manufacture but not necessarily so[2].

13 As earlier pointed out the question the Board is called upon to decide on the issue as to whether or not the use of the engines is in the manufacture of gen sets is one of mixed law and fact. Kellock Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise[3] put that proposition in this way:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination.... [Emphasis added.]

14 With respect to the question of law, the Board had before it, as its reasons disclose, the judgments of the Supreme Court of Canada in both the Research-Cottrell case, supra, and in The Queen v. York Marble, Tile and Terrazzo Limited[4] case, the latter of which, for purposes of that appeal, adopted the definition of "manufacture" [at page 145] as "... the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery." Clearly, it considered them in drawing its conclusion with respect to the appellant's operations in this case, and, in particular, had in mind the York Marble case because it referred to the argument of the appellant here (the respondent before the Board) that no new form or new quality was brought about by Kipp Kelly Limited. Thus, it seems to me, that it properly instructed itself as to the law.

15 With respect to the finding of fact aspect of the Board's decision, the duty of an Appellate Court with respect thereto was expressed in the following manner by Thorson P. in The Dentists' Supply Company of New York v. The Deputy Minister of National Revenue (Customs and Excise)[5]:

> If the decision of the Tariff Board was a finding of fact and there was material

> before it on which it could reasonably have based its finding it is not within the competence of this Court to interfere with it, no matter what its conclusion might have been if a right of appeal de pleno from the decision had been conferred by the Customs Act. There is no right of appeal from the decision of the Tariff Board on findings of fact and it seems to me that the same is true in respect of findings of mixed law and fact. The only right of appeal conferred by section 45 of the Customs Act is an appeal upon a question that in the opinion of this Court or a judge thereof is a question of law and, even in such a case, only after leave to appeal on such question has been obtained. Thus, to the extent that the declaration of the Tariff Board in the present case was a finding of fact, this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law. But it cannot be too strongly stressed that this does not mean that there was error in the finding of fact merely because the Court might have found otherwise if a full right of appeal had been conferred. Thus, this Court has no right to substitute its own conclusion for the finding of the Tariff Board if there was material before it from which it could reasonably have found as it did.

16 Applying that test to the case at bar it was open to the Board, on the facts adduced in evidence before it, as generally described earlier herein, to find, as it did, that the operations performed by the respondent were in the manufacture of gen sets and not merely in the assembly thereof from component parts. That being so this Court should not disturb that finding.

17 Since the Board did not, in my opinion, err in law in making its declaration, I would dismiss the appeal with costs.

* * *

18 LE DAIN J.: I agree.

* * *

19 KERR D.J.: I agree.

1 See: de Smith's Judicial Review of Administrative Action, 4th ed., pp. 107-108.

2 The Deputy Minister of National Revenue for Customs and Excise v. Research-Cottrell (Canada) Limited [1968] S.C.R. 684 per Martland J. at p. 693.

3 (1956) 1 D.L.R. (2d) 497 at p. 498.

4 [1968] S.C.R. 140.

5 [1956-1960] Ex.C.R. 450 at p. 455.

TAB 15

12.19B — CAUSE OF ACTION AND ISSUE ESTOPPEL (*RES JUDICATA*)

What Is Res Judicata

Res judicata ("the matter is judged") is an equitable principle that, when its criteria are met, precludes the relitigation of a matter. The term has two subheadings — cause of action estoppel and issue estoppel. Cause of action estoppel prevents the relitigation of the same cause of action between the same parties while issue estoppel precludes the relitigation of the same issue between the same parties even if that issue arises in the context of a different cause of action.[289.11] Either form of estoppel "prevents a party from relitigating in one forum an issue already decided in another forum".[289.12] To this extent it is similar to the concept of abuse of process (relitigation) which is another manifestation of estoppel which also precludes the relitigation of matters;[289.13] however, there are more criteria that have to be met in order to establish estoppel.[289.14] The concept of abuse of process (relitigation) evolved much more recently than the concept of estoppel generally and can be considered to be one type of estoppel. Given the more liberal approach that needs to be met in establishing abuse of process (relitigation) than traditional *res judicata* estoppel practical wisdom should have the former superseding the latter where the concern is relitigation. But both concepts continue today as overlapping principles.

Res judicata rests on the idea that a litigant should be able to rely on the decision of an authoritative adjudicator being final and binding on the other party to the litigation. Like the principle of abuse of process (relitigation) the purpose of the principle "is to balance the public interest in the finality of litigation against the public interest in ensuring justice is done in a particular case."[289.15]

Although the concepts of *stare decisis* and *res judicata* can both operate to preclude the relitigation of a matter as noted by the Alberta Court of Appeal in *Enmax Energy Corp. v. TransAlta Generation Partnership*, 2015 CarswellAlta 2243, 2015 ABCA 383 (Alta. C.A.) the two concepts serve different purposes and originate from different sources.

> 39... It is trite law that *stare decisis* and *res judicata* are two separate and distinct doctrines. *Res judicata* prevents either party from relitigating an issue that has been decided previously in litigation between those parties. *Stare decisis* is a rule that lower courts are bound by the decisions of higher courts: *L'Hirondelle v. Alberta (Minister of Sustainable Resource Development)*, 2013 CarswellAlta 77, 2013 ABCA 12 (Alta. C.A.) at para 31, (2013), 542 A.R. 68 (Alta. C.A.).

Stare decisis takes as its source the need for public order and certainty in the law[289.15.1] while the various forms of *res judicata* flow from concepts of equity and the desire for finality in litigation. *Stare decisis* does not apply to make one agency decision binding on another decision-maker but *res judicata* does apply so that a party who enjoyed success in a matter before one agency will be protected from having to relitigate the matter again in another forum.[289.15.2]

> 28 It is true that the adjudicator conducted the hearing in accordance with principles of procedural fairness. In that sense, it can be said that he acted in a judicial manner. However, that does not change the fact that he was not exercising a statutory function, nor was he making a judicial decision. Rather, he was acting as a delegate of the chief of the APS in making a decision whether to discipline the grievor.[289.18]

Requirements: Decision Giving Rise To Estoppel Must Have Been Final

In *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* 2011 CarswellBC 2702, 2011 SCC 52 (S.C.C.) the Supreme Court of Canada stated that what is meant by the requirement that the decision allegedly giving rise to the estoppel be final is that all available means of review of appeal have been exhausted or elected not to be pursued.

> 51 In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. "Final" means that all available means of review of appeal have been exhausted. Where a party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer's decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks "finality" they are entitled to start all over again before a different decision-maker dealing with the same subject matter (Danyluk, at para. 57).[289.19]

Requirements: Same Parties or Privies

As noted above, in *Estenson v. Canada (Attorney General)* 2007 CarswellNat 1322, 2007 FC 538 (Fed. Ct.) the Federal Court had concluded that the Canadian Food Inspection Agency was precluded by the principle of issue estoppel from canceling its accreditation of a veterinarian who had been alleged to having falsely certified a cow for export when in an earlier proceeding against the owner of the cow initiated by the Agency and heard by Review Tribunal under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* it had been determined that there had not been an improper inspection. With respect to the requirement for estoppel that the parties or their privies be the same the Court held that the parties were the same. The person against whom the estoppel was sought to be applied was the Agency which was a party in both the proceedings before the Tribunal and its own accreditation review proceedings. The Court also found that the person seeking to enforce the estoppel in the Agency accreditation proceedings, the doctor, should be considered to be the privy of the owner in the earlier Tribunal proceedings. The Court cited the following approach to determining who is privy from the text *The Law of Evidence in Canada* by Sopinka, Lederman, and Bryant:

> It is impossible to be categorical about the degree of interest which will create privity. It has been said that "there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is a party." [*Ed.'s note* — Which sounds somewhat circular to me.]

Here the Court found that the owner and the doctor had such a close interest.

> Here, the Applicant [the vet] and Mr. Tebrinke [the owner] had an identical interest in challenging the allegation that the offending cow had been in the load which the Applicant certified and the grower exported. They had been engaged in a joint enterprise to effect the exportation of authorized cattle. The Applicant gave evidence for Mr. Tebrinke and the chairman of the Tribunal attached considerable weight to his evidence. The CFIA having had the opportunity to prove the identity of the OTM [the cow] head and having failed to do so in the Tebrinke case, should not have the opportunity to relitigate the exact same question of fact even within a different legal setting.

Estoppel Cannot Oust Statutory Duty or Right

Estoppel, even if established, cannot operate to defeat a statutory duty or right and is subject to statutory direction. An agency cannot be barred from, or avoid, performing a statutory duty by virtue of estoppel.[289.20]

In *F. Hoffmann-La Roche AG v. Canada (Commissioner of Patents)* (2003), 2003 CarswellNat 3780, 9 Admin. L.R. (4th) 106 (F.C.) the Federal Court had to consider whether estoppel could operate to preclude an agency from collecting legislatively required fees. Under the federal *Patent Act* patent holders must pay annual maintenance fees. If the required fee is not paid on time a late payment can still be made for up to one year along with an additional late fee. Beyond that date the patent automatically expires. The Commissioner of Patents had adopted a practice whereby it gave notice of a missed due date. However, in the case in point the Commissioner neglected to give the standard notice and the patent holder missed the latest date on which the fee could be paid. (It had, in fact, erroneously, paid an incorrect, and lesser, fee — partly as a result of misleading actions by the Commissioner.) Both legitimate expectations and estoppel were argued and rejected.

The Federal Court held that the patent holder could not argue the principles of legitimate expectations operated to stave off the expiry of the patent unless and until the Commissioner gave notice of the missed due date.

> ... [Section] 46(2) of the *Patent Act* clearly states that a patent will lapse if the proper fees have not been paid. The Commissioner could not suggest that the strict terms of the act would not apply where the patent holder had not been given advance warning of a patent's impending demise.

Nor could the patent holder raise some form of estoppel against the Commissioner in light of the express terms of the Act.

> A court cannot grant a remedy that contradicts the plain terms of a statute. Lord Maugham recognized this in Maritime Electric Co. v. General Dairies Ltd. 1937 CarswellNB 4, [1937] 1 D.L.R. 609 (New Brunswick P.C.). He said that "the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence" (at p. 614). He went on to observe that "there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character ... (at p. 614).
>
> Where the governing statute is less strict, courts may recognize an estoppel: *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.* 1994 CarswellOnt 1012, [1994] 1 S.C.R. 80 (S.C.C.). Similarly, if the public official has a discretion, he or she may be bound by estoppel: *Aurchem Exploration Ltd. v. Canada* [1992] F.C.J. No. 427, 1992 CarswellNat 202 (Fed. T.D.); *Saskatchewan (Minister for Environmental Assessment Act) v. Kelvington Super Swine Inc.* [1997] S.J. No. 686, 1997 CarswellSask 625 (Sask. Q.B.); *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.* [1992] S.J. No. 26, 1992 CarswellSask 281 (Sask. C.A.).
>
> However, I see no basis in this case on which to recognize an estoppel against the Commissioner. There is no leeway in the *Patent Act*. Nor does the Commissioner have any discretion.

This decision of the Federal Court was affirmed by the Court of Appeal at 2005 CarswellNat 3937, 2007 FCA 399 but the appellants had withdrawn their arguments based on estoppel and legitimate expectations and instead put forward a fairness argument arguing that the Commissioner was obligated to give notice and hold a hearing before the patent could be lost. The Court of Appeal rejected this argument.

The fact that statute can prelude the operation of estoppel was recognized by the Ontario Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.* 2012 CarswellOnt 15100, 2012 ONCA 850 (Ont. C.A.) even though the Court did not find that it did so in that particular case. *Metropolitan Toronto Condominium Corp.* dealt with the relationship between a claim under the Ontario New Home Warranties Program and a civil action for damages. Under the Warranties Program

if an administrator determines that a home defect claim is not warrantable a dissatisfied homeowner can appeal that decision to the Licence Appeal Tribunal. The statute also expressly preserves a homeowner's right to commence a civil action against the vendor. It was argued that the statutory preservation of the right to launch a civil action amounted to a statutorily authorized review or appeal of an administrator's decision. As such, it was argued, the statute operated to preclude the adjudication of a claim under the Warranties Program from creating an estoppel that would operate to preclude the relitigation of the same issues in a subsequent civil suit. The Ontario Court of Appeal rejected this argument. Thus, proceedings before an administrator were said to be able to give rise to an issue estoppel in a subsequent civil action against the vendor if the preconditions to issue estoppel were met and the court did not exercise its discretion not to apply the estoppel.

> 42 The Act authorizes only one method for reviewing a Tarion decision: an appeal to the Licence Appeal Tribunal. The Act does not preclude a civil action against the vendor on the statutory warranties. But, the Act does not expressly say, as it does in respect of appeals to the Tribunal, that a homeowner can appeal or review a Tarion decision by commencing a civil action. All that the Act expressly preserves — in s. 13(6) — is the homeowner's other rights against the vendor. The Act's silence, in my opinion, shows that a civil action is not a statutorily authorized review or appeal of a Tarion decision that would automatically preclude issue estoppel. Therefore, Newport can invoke issue estoppel if the preconditions for applying it are met, and applying it would not work an injustice.

Application of Estoppel Is Discretionary

Like abuse of process (relitigation) the application of estoppel rests in the discretion of the decision-maker.[289.21] When called upon the consider the application of estoppel a decision-maker must first determine whether the criteria for estoppel are met and then must consider the whether he or she will apply the principle in the particular case in question as a matter of discretion. Essentially, estoppel should not be applied where to do so would create an injustice. Is there something in the particular circumstances that would make it unfair to prohibit the person seeking to argue an issue in current proceedings to do so based on estoppel — i.e. was there some aspect or defect in the original proceedings that would make it unfair to allow them to create an estoppel in the current.

Material defects in the original proceedings that allegedly give rise to the estoppel might be considered a factor going to the question of whether an estoppel is created in the first place. However, the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2435, 2001 SCC 44, 201 D.L.R. (4th) 193, 2001 CarswellOnt 2434 (S.C.C.) chose to deal with defective decisions under its discretionary authority to apply estoppel rather than as a factor going to the creation of an estoppel in the first. I am going to proceed in this discussion on that basis and include cases dealing with defects in the original proceeding under this aspect of the discussion.

In *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2435, 2001 SCC 44, 201 D.L.R. (4th) 193, 2001 CarswellOnt 2434 (S.C.C.), notwithstanding that the conditions were met to establish estoppel in the case of proceedings held by an officer under the *Employment Standards Act* of Ontario, the Supreme Court of Canada held that estoppel should not have been applied to stop a party from relitigating the same question before the courts in an unjust dismissal action because the proceedings before the Employment Standards Officer had been in breach of the principles of fairness (lack of notice and opportunity to be heard). In reaching this decision the Court noted that a decision which was without jurisdiction from the outset could not give rise to issue estoppel. However, the Court stated that that was not true where the jurisdiction is lost from a breach of the principles

of fairness. In the final analysis in the case before it the Court held that the question raised by the applicant had never been properly determined such that estoppel should not be applied.[289.22]

In *Sihota v. Edmonton (City)*, 2013 CarswellAlta 154, 2013 ABCA 43 (Alta. C.A.) the Alberta Court of Appeal noted that the Supreme Court of Canada had identified seven factors in *Danyluk* that could be considered in determining whether it would be fair and just in applying estoppel:

> (a) the wording of the statute,
>
> (b) the purpose of the legislation,
>
> (c) the availability of an appeal,
>
> (d) safeguards within the administrative process,
>
> (e) the expertise of the administrative decision maker,
>
> (f) the circumstances giving rise to the prior decision,
>
> (g) any potential injustice that might result from the application or non-application of the doctrine.

In *T.E.A.M. v. Manitoba Telecom Services Inc.* 2007 CarswellMan 264, 2007 MBCA 85 (Man. C.A.), noting that no estoppel of any kind can overrule the law of the land the Manitoba Court of Appeal stated that:

> "... a consent order does not prevent a court from looking behind the order. If it is found that the proceeding itself is fundamentally flawed, as I have concluded it is here, or there is a ¨vital defect£ in the process, the defendants should not be penalized by their earlier consent. The doctrine of estoppel does not prevent parties from being removed from an action when there is no legal justification for the proceedings to be continued against them. Nor, in such circumstances, can their removal from the action be described as an abuse of process."[289.23]

In *Excelsior Medical Corp. v. Canada (Attorney General)* 2011 CarswellNat 4515, 2011 FCA 303 (Fed. C.A.) the Federal Court of Appeal has held that an agency s actions which operate contrary to a statutory scheme cannot create or extinguish rights under that scheme.

In the case in point, during the grace period for the payment of maintenance fees which were owing respecting a patent application, someone other than the patent applicant's authorized correspondent had paid the Patent Office the maintenance fees required to maintain the application. The Patent Office accepted the fees and advised the applicant that the application had been reinstated. Subsequently, the Patent Office determined that it was in error in accepting the fees because it felt that the law required that it could only deal with the applicant's authorized correspondent. It wrote to the original payor advising that the application had not been reinstated and offering to refund the fees which offer was accepted. A year later attempts were made to argue that the Patent Office was wrong to have extinguished the application. The Federal Court had held that the acceptance of the fees reinstated the application but the acceptance of the refund nullified that reinstatement.

The Federal Court of Appeal disagreed with the Federal Court as to the effects of the various Patent Office actions. The Court of Appeal held that the law required that the Patent Office could only deal with an applicant's authorized correspondent. The acceptance of fees, whether within or outside of the reinstatement period from someone other than the authorized correspondent could not create rights nor could the return of those fees extinguish those rights. "To hold otherwise would be to create a situation in which the Patent office's administrative errors create or extinguished rights independently of the statutory scheme."

In *Burchill v. Yukon Territory (Commissioner)* 2002 CarswellYukon 20, 2002 YKCA 4 (Y.T. C.A.) the Yukon Court of Appeal declined to apply estoppel against the government based on proceedings in which the government had only participated in minimally. That case involved the situation where an employee had been dismissed by his employer for intransigence and insubordination respecting the employee's job performance which involved the exercise of statutory grants of authority. A board of referees considered the propriety of the employer's actions in the context of an employment insurance claim. It found that the employer's instructions were neither lawful nor reasonable and that the employee's refusal to follow them could not be construed as misconduct within the meaning of the *Employment Insurance Act*. The employer was not present at the board's proceedings and provided only limited information leading up to the hearing. Subsequently the employee brought an application for judicial review to challenge the propriety of his dismissal. He argued that the employer was estopped by the decision of the Board of Referees from re-litigating the issue of the propriety of the employee's refusal to obey the employer's instructions. The Yukon Court of Appeal disagreed. It cited the decision of the Ontario Court of Appeal in *Minott v. O'Shanter Development Co.* (1999), 1999 CarswellOnt 1, 40 C.C.E.L. (2d) 1, 168 D.L.R. (4th) 270, 117 O.A.C. 1, 42 O.R. (3d) 321 that the degree of a party's participation in a proceeding is relevant to whether that party is subsequently estopped by the resulting decision. In *Minott* the Ontario Court of Appeal held that an employer was not estopped by the decision of the Board of Referees when the employer had declined to participate in the proceedings. The Yukon Court of Appeal came to the same conclusion saying:

> "To found a claim of issue estoppel in the face of limited participation of the employer in this benefit administration scheme is to promote greater employer participation in such hearings, potentially turning those administrative proceedings into full blown hearings on allegations of cause contrary to sensible public policy. Considering the purpose of the employment insurance scheme and the fact that the employer had no interest in the outcome of those proceedings, I would not find that the minimal involvement of the employer at the Board of Referees hearing in this case satisfied the requirement for issue estoppel that the earlier hearing engaged the same parties as are now before the courts."

In *Penner v. Niagara Regional Police Services Board*, 2013 CarswellOnt 3743, 2013 SCC 19 (S.C.C.) the Supreme Court of Canada has affirmed that even where the elements of issue estoppel have been established it remains open to a decision-maker not to apply estoppel where to do so would be unfair. The Court explained that this discretion existed to ensure that a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

The Court noted that in exercising its discretion respecting a decision arising out of an administrative agency a decision-maker must take into account the range and diversity of structures, mandates, and procedures of administrative decision makers. The Court stated that the discretion must not be exercised so as to sanction collateral attack or undermine the integrity of the administrative scheme. But the objective was to ensure that the issue estoppel "promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (*Danyluk v. Ainsworth Technologies Inc.* (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.)) *Danyluk* had set out a non-exhaustive number of factors that could be considered in determining the fairness issue but the Court noted that the issue could come down to two broad situations:

> — unfairness arising because the initial proceedings were unfair (i.e. did not provide a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issue in the proceedings, and a means to have the decision reviewed);
>
> — or even if the original proceedings were conducted fairly and properly it would be unfair to use the results of that process to preclude subsequent claims. Such unfairness might arise where there are significant differences between the purposes, processes, or stakes involved in the original and subsequent proceedings. The Court explained that one looks to the text and purposes of the legislative scheme and their effect on the parties' reasonable expectations in relation to the scope and effect of the original proceedings.

In the case in point the issue estoppel had been created by administrative disciplinary proceedings taken against police officers which the lower courts applied to block a civil action against the officers and others including their chief of police which had been

initialed by the same complainant who had initiated the disciplinary proceedings. While the Supreme Court rejected the argument that there should be a generic rule of public policy precluding the application of issue estoppel to police disciplinary hearings "based upon judicial oversight of police accountability" the majority of the court concluded that it would be unfair in the circumstances of the particular case to apply the issue estoppel.

For one thing the legislation creating the administrative process did not intend to foreclose parallel civil proceedings contemplated parallel civil proceedings — it provided that: documents generated during the complaint process were inadmissible in civil proceedings; persons carrying out duties in the complaint process could not be forced to testify in civil proceedings about the information obtained in the course of their duties; and persons engaged in the administration of the complaints process were obliged to keep information obtained during the process confidential, subject to certain exceptions.[289.24]

Also, the purpose of the disciplinary proceedings were significantly different from a civil action. The former was to decide if an employment related discipline should be imposed. The disciplinary proceedings provided no remedy or costs for the complainant unlike a civil proceeding where a wronged party may obtain compensation. The Court noted that a complainant might think it unlikely that a proceeding in which he or she had no financial stake could preclude a claim for significant damages in his or her civil action. Furthermore, if the outcome of employment based disciplinary action were to operate to foreclose subsequent damage claims a complainant might be encouraged to mount a full-scale case to ensure the recovery of damages in subsequent proceedings which would "tend to defeat the expeditious operation of the disciplinary hearing". This would also lead to the persons being disciplined facing two prosecutors — the counsel leading the disciplinary proceedings and the counsel for the complainant. It might also lead to complainants not coming forward with disciplinary complaints in order to avoid prejudicing their civil actions.

The Court also noted two other factors which would have encouraged a reasonable belief in the parties that the disciplinary proceedings would not give rise to an estoppel. The civil action had been filed before the original disciplinary decision was released and there was a 2001 Ontario Superior Court of Justice decision that held that the acquittal of an officer at a disciplinary hearing did not give rise to issue estoppel in relation to the same issue in a subsequent civil action.

Lastly, the Court also noted that in the disciplinary proceedings the Chief of Police had the responsibility to investigate and determined whether a disciplinary hearing was required, and to appoint the investigator, the prosecutor and the hearing officer. While this was not unfair in terms of the disciplinary proceedings, if the result of those disciplinary proceedings were applied to the civil action which also included the Chief of Police the result would be to permit the Chief of Police to become the judge of his own case. "Applying issue estoppel here is a serious affront to basic principles of fairness."

The 2010 decision in *D'Almeida v. Barron* 2010 CarswellOnt 6299, 2010 ONCA 564 (Ont. C.A.) of the Ontario Court of Appeal illustrates the exercise involved in determining where a civil suit should be allowed to continue notwithstanding that the issues therein were subject to issue estoppel arising out of earlier police disciplinary proceedings. In considering, but ultimately rejecting, whether to exercise its discretion the Ontario Court of Appeal took a number of factors into account—both pro and contra. The individual in the case was attempting to sue police officers for damages arising out of his arrest and had to ask the Court to allow the suit to proceed notwithstanding that the issues involved were subject to issue estoppel arising out of earlier administrative police disciplinary

proceedings (which ultimately cleared the officers) that had been initiated by a complaint by the person now bringing the tort suit respecting that same earlier arrest.

The Court of Appeal held that, where there are factors which argue for and against the exercise of discretion it is not a matter simply of toting up the number for against the number against. Rather, a qualitative assessment of the various considerations was to be carried out and it was possible that the significance of one factor could outweigh a collection of other factors going the other way.

> 54 Having set out the competing considerations for and against applying issue estoppel, I return to the ultimate question: would applying issue estoppel be unfair or unjust? The answer to this question requires a qualitative assessment of the relevant considerations, not a mathematical calculation. That four considerations favour applying issue estoppel and only two favour not applying it does not resolve the question. The court must examine the importance and strength of each consideration. There may be a case where a single consideration is so important that it will control the result.

In the case in question, two considerations were said to favour exercising discretion to allow the suit to continue notwithstanding the issue estoppel.

> 1. The disciplinary proceedings and the tort suit served different purposes. The disciplinary proceedings were to determine if the officers were guilty of misconduct and had no direct consequences for the complainant.
>
> 2. Similarly the complainant had no financial interest in the outcome of the disciplinary proceedings. Notwithstanding, had the disciplinary proceedings gone against the police officers there would have been an indirect benefit to the complainant in that the officers would be estopped from contesting those findings in a subsequent tort suit brought against them by the complainant.

Four considerations were said to argue against allowing the suit to continue.

> 3. The decision-maker in the administrative proceedings had significant expertise respecting the particular type of determination made (i.e. the propriety of the actions of the police officers).
>
> 4. The administrative proceedings in question had significant career ramifications for the officers and thus were not quick and inexpensive but thorough where the complainant had the opportunity to be represented by counsel and with the police services and the police officers actually being represented by counsel, with extensive and detailed examination of many witnesses heard over several days and with complete oral submissions. And while the disciplinary proceedings applied the criminal standard of proof, as opposed to the civil standard applicable in the tort action under consideration, the evidence before the disciplinary proceedings was so clear that the same result would have occurred there even if the civil standard of proof was applied.
>
> 5. The complainant had participated fully in the disciplinary proceedings as a party.
>
> 6. The administrative proceedings were subject to a right of appeal which had been fully exercised. The results had been appealed, and thereafter the appeal had been subject to a judicial review. Thus, the results had been fully judicially reviewed.

Overall, the Court of Appeal concluded against exercising its discretion to allow the tort suit to continue notwithstanding the issue estoppel. The Court concluded that in the particulars of the case it "would not be unfair or unjust. The cumulative strength of the considerations in favour of applying issue estoppel outweigh the strength of those against

applying it."

Similarly, in *Meeches v. Meeches*, 2013 CarswellNat 2239, 2013 FCA 177 (Fed. C.A.) the Federal Court of Appeal determined that it would be unfair to apply *estoppel* against an individual based on an earlier proceeding during which the individual had not had a fair opportunity to address the issue against which the estoppel was claimed. In the case in point an application had been brought for an interim order staying a decision of an Indian election committee which found some breaches of the relevant election statute and recommended the holding of new elections. The Federal Court judge hearing the interim application dismissed it on the grounds (raised by the judge himself) that there was no right of appeal from what he perceived as a mere recommendation. The respondent to that application was the sitting chief. (The main application to which that decision was interim was ultimately abandoned.) The Federal Court of Appeal held that on a judge on a second proceeding dealing with the same election was correct in not applying estoppel to preclude the sitting chief from challenging the issue of whether the election committee's decision was a mere recommendation or a binding decision. At the time of the interim proceeding the sitting chief had had little time to secure legal counsel and to organize an appropriate response and the interim matter had proceeded with benefit of argument from his counsel. Also the fact that the issue was raised for the first time at the interim matter hearing by the judge himself also left little time for the sitting chief to properly address the issue. Lastly the Federal Court of Appeal felt that the original interim matter judge was proceeding on the basis of an incomplete record and limited merits on the merits of the underlying application. Thus, the Federal Court of Appeal concluded that the second proceeding judge properly exercised his discretion not to apply an *estoppel* arising from the earlier interim proceeding.

12.19C — PROMISSORY ESTOPPEL

Promissory or equitable estoppel is yet another form of estoppel. While agencies may be called upon to determine the existence of promissory estoppel to the degree that it binds the agencies themselves the concept has likely been displaced by the concept of legitimate expectations. Both concepts involve entities being bound by the promises or assertions which they make. (Legitimate expectations is discussed in detail later in chapter 40.) Having said that, where the facts are such to establish a promissory estoppel agencies agencies are bound by the equitable principle. (*Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, 1994 CarswellOnt 1012, [1994] 1 S.C.R. 80, 110 D.L.R. (4th) 449 (S.C.C.).)

While courts sometimes express the elements necessary to establish a promissory estoppel in slightly different terms the essence of the test remains constant. In *Immeubles Jacques Robitaille inc. c. Québec (Ville)*, 2014 CarswellQue 3559, 2014 SCC 34 (S.C.C.) the Supreme Court of Canada held that the following elements must be proven in order to establish a promissory estoppel against a public authority:

> 1. there must be proof of a clear and unambiguous promise made to a person by a public authority;
>
> 2. the promise must have been made in order to induce the citizen to perform certain acts;
>
> 3. the person must have relied on the promise and acted on it by changing his or her conduct.

In *Irving Tissue Co. v. C.E.P., Local 786* 2010 CarswellNB 52, 2010 NBCA 9 (N.B. C.A.) the New Brunswick Court of Appeal outlined the requirements respecting the application of

TAB 16

ADMINISTRATIVE LAW

BY
THE LATE

SIR WILLIAM WADE
QC, LLD, LittD (Hon), FBA

An Honorary Bencher of Lincoln's Inn, Formerly Master of Gonville and Caius College, Cambridge, Rouse Ball Professor of English Law in the University of Cambridge and Professor of English Law in the University of Oxford

AND

CHRISTOPHER FORSYTH
BSC, LLB (Natal), LLB, PhD (CANTAB)

An Academic Bencher of the Inner Temple, Quondam Director of the Centre for Public Law, Professor of Public Law and Private International Law, University of Cambridge Extraordinary Professor of Law, University of Stellenbosch, Fellow of Robinson College Member of 4–5 Gray's Inn Square

Eleventh Edition

BY

CHRISTOPHER FORSYTH

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
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Eighth edition 2000
Ninth edition 2004
Tenth edition 2009

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014936310

ISBN 978–0–19–968370–3

Printed in Italy by
L.E.G.O. S.p.A.—Lavis TN

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But these decisions were strongly motivated by the court's desire to contrive some binding legal basis for the informal advice often given to enquirers by planning authorities and their officers; but to this, as will be shown, there are serious legal objections.[226] The dissenting view of Russell LJ that a planning authority, as 'the guardian of the planning system', is 'not a free agent to waive statutory requirements', and that the law should not be made to conform to 'a thoroughly bad administrative practice',[227] is correct in principle.[228]

NO POWER TO DISPENSE

Where something more than mere procedure or formality is in question, a public authority cannot exercise a dispensing power by waiving compliance with the law. For this would amount to an unauthorised power of legislation. There is therefore no power for a local authority to waive compliance with its binding byelaws;[229] nor is any such power possessed by the minister with whose consent the byelaws are made.[230] Still less is there any power to grant dispensations from the ordinary law, e.g. as to obstruction of the highway.[231]

RES JUDICATA

PRINCIPLES AND DISTINCTIONS

One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'. It is the latter which presents most difficulty, since an issue 'directly upon the point' has to be distinguished from one which 'came collaterally in question' or was 'incidentally cognisable'.[232] In any case, 'there must be a lis or issue and there must be a decision'.[233]

Like other forms of estoppel already discussed, res judicata plays a restricted role in administrative law, since it must yield to two fundamental principles of public law: that jurisdiction cannot be exceeded; and that statutory powers and duties cannot be fettered.[234] Within those limits, however, it can extend to a wide variety of statutory tribunals and authorities which have power to give binding decisions, such as employment tribunals[235] and commons commissioners.[236] It can extend likewise to the decisions of

[226] Below, p. 340. [227] In the *Wells* case (above) at 1015.

[228] And in the ascendency following the *Reprotech* case (above), discussed below at p. 283.

[229] *Yabbicom* v. *King* [1899] 1 QB 444; *Bean (William) & Sons* v. *Flaxton Rural District Council* [1929] 1 KB 450; below, p. 737. [230] *Bean (William) & Sons* v. *Flaxton Rural District Council* (above).

[231] *Redbridge LBC* v. *Jacques* [1970] 1 WLR 1604; *Cambridgeshire CC* v. *Rust* [1972] 2 QB 426.

[232] These phrases were used in *The Duchess of Kingston's Case* (1776) 20 St Tr 355, 538 n., in which the rules were laid down. See Spencer Bower and Turner, *Res Judicata*.

[233] *Vernon* v. *Inland Revenue Commissioners* [1956] 1 WLR 1169 at 1178, holding that the Attorney-General was not estopped from disputing the purposes of a charity by having been party to an order of the court which did not put that question in issue. [234] Below, p. 295.

[235] *McLoughlin* v. *Gordons (Stockport) Ltd* [1978] ICR 561; *Munir* v. *Jang Publications Ltd* [1989] ICR 1; *O'Laoire* v. *Jackel International Ltd (No 2)* [1991] ICR 718.

[236] *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch 297.

inspectors in planning appeals, so as to prevent an inspector from ruling that houses were used as hostels when another inspector three years earlier had ruled that they were used as hotels and no change of use had occurred meanwhile.[237]

Res judicata is sometimes confused with the principle of finality of statutory decisions and acts, and thus with the general theory of judicial control. If a public authority has statutory power to determine some question, for example the compensation payable to an employee for loss of office,[238] its decision once made is normally final and irrevocable. This is not because the authority and the employee are estopped from disputing it, but because, as explained elsewhere,[239] the authority has power to decide only once and thereafter is without jurisdiction in the case. Conversely, where a statutory authority determines some matter within its jurisdiction, its determination is binding not because of any estoppel but because it is a valid exercise of statutory power. The numerous cases which hold that a decision within jurisdiction is unchallengeable[240] have therefore no necessary connection with res judicata. Res judicata does nothing to make the initial decision binding: it is only because the decision is for some other reason binding that it may operate as res judicata in later proceedings raising the same issue between the same parties.

How easily these questions may appear to overlap may be seen in a case where a schoolteacher, who had enlisted for war service, claimed additional pay from the local authority which had undertaken to make up his service pay to the level of his teacher's pay. The dispute was referred to the National Arbitration Tribunal, which ruled against him, and he then brought proceedings in the High Court. The questions were whether there was a 'trade dispute' within the Tribunal's statutory jurisdiction, and whether it had jurisdiction over private (as opposed to national) service agreements. These being answered in the affirmative, the Tribunal's award was held conclusive[241]—from which it followed, the judge said, that it was res judicata.[242] But in fact the case seems to belong to the common class where a specific matter is allotted by statute to a specific tribunal so that the tribunal's award, within its jurisdiction, is conclusive.[243] Where the question in issue is one of jurisdiction, no estoppel can prevent the court from determining it.[244] Once it is determined in favour of the tribunal, no estoppel is needed to bind the parties conclusively. If in the case of the teacher there had been an 'issue estoppel'—if, for example, the tribunal had determined that he belonged to a particular category, and he disputed this in later proceedings against the local authority—a true res judicata might have been pleaded. So where an industrial tribunal found that an employee had been fairly dismissed, he was not allowed to litigate substantially the same issue in a High Court action for breach of contract.[245]

ADMINISTRATIVE CASES

Res judicata in an administrative context is illustrated by a decision of the House of Lords about the making up of Sludge Lane, Wakefield. Adjoining landowners disputed their

[237] *Thrasyvoulou* v. *Secretary of State for the Environment* [1990] 2 AC 273. See similarly *Hammond* v. *Secretary of State for the Environment* (1997) 74 P & CR 134. But a certificate of appropriate alternative development creates no estoppel by res judicata or otherwise: *Porter* v. *Secretary of State for Transport* [1996] 3 All ER 693.

[238] As in *Livingstone* v. *Westminster Corporation* [1904] 2 KB 109.

[239] Above, p. 191.

[240] See above, p. 27.

[241] *Re Birkenhead Cpn* [1952] Ch 359.

[242] Ibid. at 379.

[243] e.g. *IRC* v. *Pearlberg* [1953] 1 WLR 331; *Healey* v. *Minister of Health* [1955] 1 QB 221; *R* v. *Paddington etc. Rent Tribunal ex p Perry* [1956] 1 QB 229; *Davies* v. *Price* [1958] 1 WLR 434.

[244] See above, p. 197.

[245] *Green* v. *Hampshire CC* [1979] ICR 861.

liability to contribute to the costs incurred by the Corporation on the ground that Sludge Lane was a public rather than a private road, and so chargeable to the ratepayers generally rather than to the frontagers. A local Act empowered two justices to determine the objection, and they determined it in favour of the frontagers. Three years later the Corporation undertook further works and again attempted to charge the frontagers, who were mostly the same persons as before. The justices refused to reconsider the matter, holding it to be res judicata; and after being reversed in the King's Bench Division and upheld in the Court of Appeal, their decision was upheld in the House of Lords.[246] The House of Lords was prepared to treat the original decision as a judgment in rem,[247] binding on everyone. Lord Davey said that, alternatively, it would bind all who were given notice and an opportunity to object. Such an estoppel would, on ordinary principles, bind their successors in title also.[248]

The House of Lords distinguished *R* v. *Hutchings*,[249] a superficially similar case where the justices had held that the disputed road was a public highway and had dismissed the local board's application for the enforcement of its levy on the frontager. Five years later the same board made another levy on the same frontager which a magistrate upheld. The Court of Appeal held that this was correct and that there was no res judicata. The reason was that the Public Health Act 1875, unlike the local Act in Wakefield, gave the justices no power to determine finally whether the street was public or private. Their only power was to decide whether the levy was properly assessed or not. If its validity was disputed on the ground that it was ultra vires, the magistrate had indeed to determine that issue before proceeding further; but it was only a matter 'incidentally cognisable'. It was thus a point of 'jurisdictional fact' upon which jurisdiction depended, and upon which no estoppel could operate so as to make a wrong decision unchallengeable.[250] It illustrates the 'constitutional principle that a tribunal of limited jurisdiction cannot be permitted conclusively to determine the limits of its own jurisdiction'.[251]

The reasoning of the last-mentioned case has played an important part in a series of later decisions about assessments for rates and taxes. In these it has been repeatedly held that matters decided for the purposes of one year's assessment or of one rating list do not amount to res judicata for the purposes of later assessments or lists. A medical society successfully established before the Lands Tribunal in 1951 that it was entitled to exemption from rates under the Scientific Societies Act 1843. In 1956 a new valuation list had to be made and the valuation officer again attempted to assess the society, and on his appeal to the Lands Tribunal the society pleaded res judicata. Although it was admitted that there had been no relevant change of circumstances, the House of Lords disallowed this plea and ruled that the question must again be decided on its merits.[252] It was held that decisions relating to a different list were irrelevant, since the local valuation court had jurisdiction to determine cases for the purpose of one list only at any one time. The same point has been settled, after some difference of opinion, in a line of income tax cases. Thus where a trust in Ceylon had been held to be a charity, and so exempt from income tax, by the statutory board of review, this was held to be conclusive only in the relevant

[246] *Wakefield Cpn* v. *Cooke* [1904] AC 31. See similarly *Armstrong* v. *Whitfield* (1973) 71 LGR 282 (determination as to public right of way conclusive in later proceedings).

[247] For this see also *A-G* v. *Honeywill* (1972) 71 LGR 81; *Armstrong* v. *Whitfield* (above); *Emms* v. *R* [1979] 2 SCR 1148 (judgment invalidating regulation held binding upon all affected by it).

[248] See Halsbury's *Laws of England*, 4th edn, xvi. 1041.

[249] (1881) 6 QBD 300.

[250] For this see below, p. 209.

[251] *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch 297 at 312 (Millett J), so explaining *R* v. *Hutchings*.

[252] *Society of Medical Officers of Health* v. *Hope* [1960] AC 551.

year of assessment, and to be open to challenge by the Commissioner of Income Tax in any subsequent year.[253] The Privy Council emphasised that the important consideration was the limited nature of the question that was within the tribunal's jurisdiction: each year's assessment was a different operation and there was no 'eadem quaestio' of the kind required for res judicata.

THE SEARCH FOR A PRINCIPLE

The above-mentioned decisions on rates and taxes have carried the doctrine of *R* v. *Hutchings*,[254] which they profess to follow, far beyond its apparent boundaries. That case merely illustrates the familiar principle that where jurisdictional questions are raised before a tribunal of limited jurisdiction, the tribunal must necessarily determine them for its own purposes but its determination may always be reviewed in the High Court.[255] It follows that the tribunal's determination cannot be conclusive, whether as res judicata or otherwise. But it is plain that the question whether a taxpayer or ratepayer is entitled to exemption, if raised before a revenue tribunal, is not 'collateral' or 'jurisdictional' in any such sense: it falls squarely within the range of questions which it is the tribunal's business to decide conclusively. The tax and rate cases observe no such distinction, and it is generally accepted that they are anomalous.[256] It should likewise be admitted that no help is to be derived from trying to distinguish judicial from administrative functions[257] (that favourite fallacy):[258] all that res judicata requires is some power to adjudicate. Nor does there appear to be merit in the argument that there is no *lis* because the taxing or rating officer is a neutral party rather than an opponent.[259] Law based on such sophistries must lack a firm foundation.

Yet a firm foundation exists, and can be traced through a series of judicial opinions. The principle is simply that an assessing officer has a statutory public duty to make a correct assessment on the taxpayer or ratepayer on each occasion, and that no estoppel can avail to prevent him doing so. Just as an electricity company cannot be estopped from charging the full price of electricity, if it has a statutory duty,[260] so an assessing officer 'cannot be estopped from carrying out his duties under the statute'.[261] A county court, similarly, must determine a statutory standard rent on the correct facts, and no estoppel or res judicata from earlier proceedings can discharge the court from this duty.[262] This doctrine fits easily into the framework of public law. It carries altogether more conviction than the formalistic distinctions discussed above, which fail to take account of the special character of public power and duty. Its force is all the more obvious if it is remembered

[253] *Caffoor* v. *Commissioner of Income Tax* [1961] AC 584, following *Broken Hill Proprietary Company Ltd* v. *Broken Hill Municipal Council* [1926] AC 94 and *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362; not following *Hoystead* v. *Commissioner of Taxation* [1926] AC 155. [254] Above.

[255] Below, p. 210.

[256] *Caffoor* (as above) at 599; *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch 297 at 311.

[257] *Caffoor* (as above); and see [1965] *PL* 237 at 241 (G. Ganz). [258] See below, p. 416.

[259] The House of Lords lent countenance to this in *Society of Medical Officers of Health* v. *Hope* [1960] AC 551. Cf. *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362.

[260] See *Maritime Electric Company* v. *General Dairies Ltd* [1937] AC 610; above, p. 197.

[261] *Society of Medical Officers of Health* v. *Hope* [1960] AC 551 at 568 (Lord Keith), citing the *Maritime Electric Company* case (above) and the opinion of Lord Parker of Waddington in *Inland Revenue Commissioners* v. *Brooke* [1915] AC 478 at 491. See also *Bradshaw* v. *McMullan* [1920] 2 IR (HL) 412 at 425; *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362 at 382 (Lord Hanworth MR). For a similar principle of public policy in matrimonial law see *Hudson* v. *Hudson* [1948] P 292.

[262] *Griffiths* v. *Davies* [1943] KB 618; *R* v. *Pugh* [1951] 2 KB 623; above, p. 198.

that res judicata, like other forms of estoppel, is essentially a rule requiring a party to accept some determination of fact or law which is wrong.[263] For if the determination is right, no substantive question arises. There are self-evident objections to requiring public authorities to act on wrong assumptions. Public powers and duties, as has been seen elsewhere,[264] cannot be fettered in such ways. There is no inconsistency in giving conclusive force to a tax tribunal's decision on an assessment for the year in question, since that is given the force of law by statute, not by mere estoppel.

The same principle ought to apply in all situations where powers have to be exercised in the public interest. Suppose that certain disciplinary charges are made against a schoolteacher whose removal can be required by the education authority only on educational grounds, that no educational grounds are shown before the authority's disciplinary committee, and that the complaint is dismissed. What is the position if it is later discovered that there were in fact good educational grounds on which the teacher ought to have been removed? The answer should be that the education authority always has the power to require removal when such grounds in fact exist; that this is a power which it must exercise in the public interest; that its powers cannot be fettered by any estoppel, by res judicata or otherwise; and that it is therefore free to act on the fresh evidence. The additional dimension of the public interest is what makes the difference.

Where, on the other hand, an immigrant's right to an entry certificate was established in his favour by an adjudicator, but the Home Office later discovered evidence suggesting that he might be an illegal entrant, the court refused to admit that evidence in later proceedings and held that the adjudicator's decision came very close to rendering the immigrant's status res judicata.[265] Thus they treated his status as a matter more of private right than of public interest. The doctrine of res judicata is not entirely rigid and exceptions are sometimes made when the court is unwilling to compel a party to remain bound by a wrong decision.[266]

JURISDICTIONAL AND OTHER LIMITS

No question of res judicata can derogate from the rules that a determination which is ultra vires may always be challenged in the High Court and that no tribunal can give itself jurisdiction which it does not possess. There can therefore be no such thing as jurisdiction by estoppel. But since so many kinds of error, including now mere error of law,[267] are held to go to jurisdiction, the scope of res judicata in administrative law will be restricted unless the courts decide not to press the jurisdictional logic to the limit.

A large class of administrative cases must also be ruled out because they involve public policy. In licensing cases of all kinds it is usually inherent in the system of control that applications may be made at any time and may be renewed. Thus planning permission may be sought repeatedly over many years and each application must be considered on its merits.[268] As will be seen, the discretionary power of a public authority cannot normally be fettered, even by its own decisions.[269] Res judicata rests on the theory of an unchanging

[263] This was the reason for the old saying 'estoppels are odious': e.g. *Baxendale* v. *Bennett* (1878) 3 QBD 525 at 529. An instance is *Priestman* v. *Thomas* (1884) LR 9 PD 210, where the estoppel obliged the parties to accept a forged will.

[264] Above, p. 196.

[265] *R* v. *Home Secretary ex p Momin Ali* [1984] 1 WLR 663, no doubt assisted by the fact that the fresh evidence was weak.

[266] See *Arnold* v. *National Westminster Bank plc* [1991] 2 AC 93.

[267] See below, p. 219.

[268] As in *Westminster Bank Ltd* v. *Beverley BC* [1971] AC 551.

[269] Below, p. 271.

TAB 17

All England Law Reports/1961/Volume 2 /Southend-On-Sea Corporation v Hodgson (Wickford) Ltd - [1961] 2 All ER 46

Southend-On-Sea Corporation v Hodgson (Wickford) Ltd

QUEEN'S BENCH DIVISION

LORD PARKER CJ, WINN AND WIDGERY JJ

14, 15 FEBRUARY 1961

Estoppel - Statutory discretion - Hindering exercise of discretion - Statment by officer of local planning authority that land had existing user right - Purchase of land on faith of statement - Subsequent enforcement notice served by authority calling on purchaser to cease such user - Whether authority estopped from proving that land had not been used for the period required to establish existing user right - Town and Country Planning Act, 1947 (10 & 11 Geo 6 c 51), s 23 n1).

Town and Country Planning - Enforcement notice - Appeal against notice - Estoppel - Previous statement by officer of local planning authority that land had existing user right and that planning permission for this use was not needed - Purchase of land on faith of this statement - Notice requiring cesser of use - Town and Country Planning Act, 1947 (10 & 11 Geo 6 c 51), s 23(1).

A builder who was considering purchasing certain premises for use as a builder's yard wrote to the borough engineer and surveyor (an officer of the local planning authority) inquiring whether the premises "can still be used for a builder's yard". On 12 February 1959, the builder received a reply from the borough engineer and surveyor's office that "the land ... has an existing user right as a builder's yard, and no planning permission is therefore necessary". Relying on this reply the builder purchased the premises and used them as a builder's yard. Subsequently, the local planning authority informed the builder that it had decided that the premises did not have an existing user right as a builder's yard, and so could not be used as such without planning permission. On appeal by the builder against an enforcement notice, served by the local planning authority under s 23(1) of the Town and Country Planning Act, 1947[a], calling on the builder to cease his user of the premises as a builder's yard, the builder contended that the local planning authority were estopped, by reason of the letter of 12 February 1959, from showing that the premises had not been used as a builder's yard through the period necessary to give an existing user right.

a The relevant part of s 23(1) is set out at p 49, letter *e*, post, in the judgment of Lord Parker CJ

Held - (i) estoppel could not be raised to hinder the exercise of a statutory discretion conferred on a public authority.

Maritime Electric Co Ltd v General Dairies Ltd ([1937] 1 All ER 748) applied.

(ii) even if it were assumed in the present case that the letter of the borough engineer contained a representation of pure fact (viz., that the land had been used as a builder's yard long enough to attract and existing user right), yet, if the local planning authority were estopped from proving facts that would show that the enforcement notice was valid, it would be hindered in the exercise of its discretion under s 23 of the Town and Country Planning Act, 1947, and, accordingly, no estoppel was raised by the letter.

Appeal allowed.

Notes

As to the doctrine that estoppel cannot prevent performance of a statutory duty, see 15 *Halsbury's Laws* (3rd Edn) 176, para 345, and 226, para 427.

For the Town and Country Planning Act, 1947, s 23, see 25 *Halsbury's Statutes* (2nd Edn) 524.

Cases referred to in judgment

Maritime Electric Co Ltd v General Dairies Ltd [1937] 1 All ER 748, [1937] AC 610, 106 LJPC 81, 156 LT 444, *Digest* Supp.

Case Stated

> Southend-on-Sea Corporation, the local planning authority, appealed by Case Stated from a decision of the justices for the County Borough of Southend-on-Sea, sitting as a magistrates' court on 13 June 1960. The magistrates had refused to hear evidence which the appellants proposed to call on an appeal to the magistrates' court by the respondents under s 23(4) of the Town and Country Planning Act, 1947, against an enforcement notice dated 19 April 1960, which had been served on them by the appellants, and had quashed the enforcement notice. The evidence which the appellants had proposed to call was that the respondents' land, to which the enforcement notice related, had been used formerly as a private garden and had first been used as a builder's yard less than four years immediately preceding the service of the notice. The facts are stated in the judgment of Lord Parker CJ

N C Bridge for the appellants.

H H V Forbes for the respondents.

15 February 1961. The following judgment was delivered.

LORD PARKER CJ.

The respondents were minded to buy premises at 37, Eastwood Road North, Leigh-on-Sea, and there establish a builder's yard. Prior to purchasing the premises they wrote to the borough engineer and surveyor in these terms:

> "We have been looking for a builder's yard for some time, and we now have the opportunity to purchase one, at 37, Eastwood Road North, which we understand has been a builder's yard for about twenty years, until the death of the owner. Although we hope there will be no objection to our continuing this type of business, we would be very pleased if you could let us know if this can still be used for a builder's yard. We are enclosing a rough site plan for your information."

Six days later, on 12 February 1959, they received a reply, headed: "County Borough of Southend-on-Sea", from the Borough Engineer and Surveyor's Office, Southend-on-Sea, in these terms:

> "Dear Sirs, Proposed builder's yard, 37, Eastwood Road North Leigh-on-Sea. In reply to your letter dated Feb. 6, the land you have shown on the plan accompanying your letter has an existing user right as a builder's yard, and no planning permission is therefore necessary."

Thereupon as the justice find, the respondents purchased the land, moved a quantity of builder's equipment and materials on to the land and used the same as a builder's yard. The justices further

find that the respondents would not have bought the land if as a consequence of the letter they had not thought that no further planning permission was required. Nevertheless, on 17 July 1959, the town clerk wrote on behalf of the local planning authority to the respondents, a letter the relevant passage of which is in these terms:

> "I am also given to understand that you have had correspondence with the borough engineer in which it was suggested that the land had an existing use as a builder's yard. However, the Southend-on-Sea Corporation has received many complaints about the use of this land, as a result of which a considerable amount of evidence has been presented to the corporation showing that the land has not been used as a builders yard and has no existing use as such. I am writing, therefore, to inform you that the corporation has decided that the land cannot be used as a builder's yard without planning permission and, furthermore, that such use does not appear to them to be in keeping with the surrounding development."

In due course, on 20 April 1960, the appellants served on the respondents an enforcement notice dated 19 April calling on the respondents to cease that user of the land. The respondents then, as they were entitled to do under s 23(4) of the Act, appealed to the justices by way of complaint and, the justices having

heard the complaint, found that planning permission was not required and accordingly, quashed the notice.

I confess that I have strained throughout to support the decision of the justices in this case which clearly sounds common sense, particularly when these respondents have only acted as they have done as the result of the letter which I have read from the borough engineer. It is said, nevertheless, that the action taken by the local planning authority here is justified in law and that no estoppel can be raised against them based on the letter written by the borough engineer.

The broad submission made by counsel on behalf of the appellants takes this form: estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public. It is further said that the discretion of the local planning authority to serve an enforcement notice under s 23 in respect of development in fact carried out without permission is a statutory discretion of a public character. It is, I think perfectly clear that that proposition is sound, at any rate to this extent, that estoppel cannot operate to prevent or hinder the performance of a positive statutory duty. That, indeed, is admitted by counsel on behalf of the respondents, but he maintains that it is limited to that and that it does not extend to an estoppel which might prevent or hinder the exercise of a statutory discretion. For my part, I can see no logical distinction between the two. In *Maritime Electric Co Ltd v General Dairies, Ltd*, the appellants, who were a public utility company, were under the relevant statute[b] to be under this duty:

b The Public Utilties Act of New Brunswick (c 127 of the Revised Statutes, 1927), s 16

"No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand, collect, or receive any rates, tolls, or charges not specified in such schedules."

Over a considerable period sums less than the statutory charges were obtained from the respondents on representations that only so much electricity had been consumed. In fact the meter that was read only recorded one-tenth of the charge, and by mistake in rendering their accounts the appellants had failed to multiply the amount shown on the meter by ten. An estoppel was sought to be raised against them, and Lord Maugham said this ([1937] 1 All ER at p 753; [1937] AC at p 620):

"In such a case--and their Lordships do not propose to express any opinion as to statutes which are not within this category--where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which, in certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law."

As I have said, I can see no logical distinction between a case, such as that, of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases[c] to

c See, eg, *Ayr Harbour Trustees v Oswald* (1883), 8 App Cas 623, 634), and 9 *Halsbury's Laws* (3rd Edn) 65, para 132, text and note (f)

which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion.

Having said that, it seems to me that this matter comes down to a very narrow point on the construction of the letters to which I have referred. Based on that principle, it is conceded that in so far as the letter from the borough engineer was saying that no permission was necessary, that could not be raised as an estoppel. What is said, however, is that that letter contains a representation of a fact which can operate as an estoppel against these appellants just as it could between private parties, namely, the representation that the land has an existing user right as a builder's yard. It is said that that is a pure representation of fact which does not prevent or hinder the exercise of the discretion which the local planning authority has under s 23 in regard to enforcing breaches of planning. For my part, I am by no means certain that that letter read as a whole can be looked on as a pure representation of fact, but assuming that it can be read in that sense, the question arises whether it does not even so limit or hinder the free exercise by the planning authority of their discretion under s 23.

Section 23 of the Town and Country Planning Act, 1947, so far as it is material, by sub-s (1) provides:

> "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf ... the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section",

that is, an enforcement notice.

It seems to me, therefore, that if the appellants are not allowed in this case to give evidence what the true position was in regard to existing user they must be prevented from exercising their free discretion under the section. It is true that it can be said, as in this case, that they have exercised their discretion. They have said that it appears to them that the development of the land has been carried out without permission, and therefore to that extent the exercise of the discretion has not been hampered; but it seems to me quite idle to say that a local authority has in fact been able to exercise its discretion and issue an enforcement notice if by reason of estoppel it is prevented from proving and showing that it is a valid enforcement notice in that amongst other things planning permission was required. I have reluctantly come to the conclusion, accordingly,that the argument for the appellants is right, and that this appeal should succeed.

I would add only this, that apparently a point was taken before the justices that the two letters of 6 February and 12 February which I have read, were respectively an application under s 17 of the Act to determine whether planning permission was necessary, and a determination by the local planning authority that no permission was necessary. Before this court, however, that point, though not actually abandoned, has not been argued, and, for my part I am quite satisfied that on the reading of those letters it cannot be said either that there was a proper valid application under s 17 or a proper

determination thereunder.

WINN J.

I agree.

WIDGERY J.

I also agree.

Appeal allowed: order of the justices quashing the notice quashed, case remitted to the justices to hear the evidence which the appellants were prevented from calling and to hear such further evidence by the respondents as they wish to tender.

Solicitors: Sharpe, Pritchard & Co agents for Town clerk, Southend-on-Sea (for the appellants); Drysdale, Lamb & Jackson (for the respondents).

Henry Summerfield Esq Barrister.

TAB 18

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140520

Docket: A-144-13

Citation: 2014 FCA 130

2014 FCA 130 (CanLII)

CORAM: **NOËL J.A.**
MAINVILLE J.A.
WEBB J.A.

BETWEEN:

GRAEME MALCOLM on his own behalf and on behalf of all commercial halibut licence holders in British Columbia

Appellant

and

THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA and B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.

Respondents

and

B.C. SEAFOOD ALLIANCE

Intervener

Heard at Vancouver, British Columbia, on February 13, 2014.

Judgment delivered at Ottawa, Ontario, on May 20, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
WEBB J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of Rennie J. of the Federal Court (Federal Court Judge), dated April 11, 2013 and cited as 2013 FC 363, 430 F.T.R. 238, which dismissed the appellant's judicial review application seeking to set aside a decision of the Minister of Fisheries

and Oceans (Minister) made on February 17, 2012 reducing by 3% (from 88% to 85%) the allocation of the Total Allowable Catch (TAC) for Pacific halibut to the commercial fishery sector, and increasing accordingly the allocation of that TAC (from 12% to 15%) to the recreational fishery sector.

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[2] The appellant represents Pacific halibut commercial fishers. He essentially submits that

(a) by instituting in the early 1990's an Individual Transferable Quota (ITQ) system in the commercial fishery for Pacific halibut, and

(b) by providing assurances that the reallocation of quotas resulting from the TAC for Pacific halibut would be made under a market-based mechanism,

the Minister was bound to reallocate 3% of the TAC for Pacific halibut to the recreational fishery sector through the use of a market-based mechanism. By deciding otherwise, the Minister would have breached the doctrines of promissory estoppel and legitimate expectations, and would have acted unreasonably.

[3] The Minister has a wide discretion to reallocate portions of a TAC between various sectors of a fishery. In this case, after lengthy and in-depth consultations, the Minister reallocated 3% of the TAC for Pacific halibut from the commercial fishery sector to the recreational fishery sector, essentially with the view that this would encourage jobs and economic growth in British Columbia. In exercising discretion to reallocate part of a TAC from one fishery sector to another, the Minister may take into account social and economic considerations. Moreover, the Minister is under no legal duty to use a market-based mechanism or to provide financial compensation to

the detrimentally affected sector. I would consequently dismiss this appeal. My reasons for doing so are more fully set out below.

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Background and context

[4] Pacific halibut migrate across the international boundary between Canada and the United States. In 1923, Canada and the United States established the International Pacific Halibut Commission (Commission) pursuant to the *Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean and Bering Sea* (Convention). Under the Convention, Canada and the United States are obliged to manage their Pacific halibut fisheries within the TAC set by the Commission for each country.

[5] The Minister allocates the Canadian portion of the TAC for Pacific halibut by providing first priority for Aboriginal food, and social and ceremonial purposes. The Minister then allocates the remainder of the TAC between the other participants in the Pacific halibut fishery, principally divided between the commercial fishery sector and the recreational fishery sector.

[6] The commercial fishery for Pacific halibut was historically organized as a derby in which licence holders could catch as much halibut as they could until the season was closed once the TAC was reached. In 1979, in an attempt to control and reduce the size of the Canadian halibut commercial fleet, the Minister created a limited licensing system under which licences conveyed rights to a limited number of people or vessels. This policy eventually resulted in limiting the commercial fishery for Pacific halibut to some 435 licence holders.

[7] In 1982, Dr. Peter Pearce was commissioned by the federal government to review and report on the Pacific fisheries, including the halibut fishery. Dr. Pearce concluded that the Pacific fisheries were at a crisis point and that fundamental policy changes were required to correct the situation. He notably recommended that the limited-licensing system in the commercial fishery for Pacific halibut be replaced by an ITQ system.

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[8] The basic principle behind an ITQ system is conceptually simple. It involves the creation of a competitive economic market for access to the fishery. This is accomplished not only by limiting access to the fishery, but also by allowing fishers to buy and sell their right of access. The strategy involves allocating to fishers the privilege of landing a fixed percentage of the TAC. Under an ITQ system, only fishers who possess quota shares are permitted to harvest fish from the fishery. The quota shares are initially assigned by government, but once allocated they can be sold or leased. Therefore, fishers not holding an ITQ may bargain with fishers who hold an ITQ in order to gain entry into the fishery. The ITQ system has many advantages, but it also has many drawbacks. A review of the ITQ system and of its advantages and disadvantages may be found in Neal D. Black, "Balancing the Advantages of Individual Transferable Quotas Against their Redistributive Effects: The case of *Alliance Against IFQs v. Brown*", (1996-1997) 9 Geo. Int'l Envtl. L. Rev. 727.

[9] As a result of the report from Dr. Pearce, the Department of Fisheries and Oceans (DFO) attempted to develop an ITQ system for the Pacific halibut commercial fishery as early as 1983, but met with limited success. After extensive consultations with industry stakeholders, the then Minister decided in 1990 to introduce an ITQ system to the commercial fishery for Pacific

halibut on the basis of a two-year trial program. Starting in 1991, each commercial licence holder for Pacific halibut was allocated, by way of a licence condition, a specific quota of the commercial TAC for that year. The quota allocation was based on a formula that accounted for the historical catch averages and vessel length. At the end of the 1992 fishing season, all 435 halibut licence holders were given the opportunity to vote on the continuation of the program, and they responded positively.

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[10] It is useful to note that the commercial Pacific halibut licence holders did not pay for the individual quotas allocated to their licences in 1991. Moreover, the ITQ system introduced into this commercial fishery at that time provided commercial value to the benefit of these licence holders.

[11] As for the recreational fishery for Pacific halibut, it was historically small, and it operated through an individual licensing scheme. However, spurred by the decline of the recreational fishery for Pacific salmon, the amount of halibut caught by the recreational sector had increased substantially by the mid-1990's, causing conservation concerns. As a result, in 1999, the then Minister committed to establishing an equitable and sustainable framework for allocating the TAC for Pacific halibut between the commercial and recreational sectors. Extensive consultations were carried out with stakeholders for this purpose.

[12] In 2000, the DFO retained economist Dr. Edwin Blewett to facilitate discussions between the commercial and recreational Pacific halibut fishery sectors. These discussions revealed deep discrepancies between the views of the sectors; the recreational sector seeking 20% of the TAC

for Pacific halibut, and the commercial sector proposing only 5%. In 2001, the DFO retained Stephen Kelleher, Q.C. to provide advice on an initial allocation of the Pacific halibut TAC between the commercial and recreational sectors. Mr. Kelleher recommended a 9% allocation of the TAC to the recreational sector.

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[13] In 2003, the then Minister announced a new policy framework that contained various policy objectives (2003 Framework). First, there would be a 12% ceiling for the recreational sector's portion of the Pacific halibut TAC. Second, the 12% ceiling would remain in place until both the commercial and recreational sectors developed an acceptable mechanism to allow for adjustment through acquisition of additional halibut quotas from the commercial sector. In addition, the DFO would seek to avoid any in-season closure of the recreational fishery for Pacific halibut.

[14] The commercial sector received no compensation for the 12% of the TAC allocated to the recreational sector under the 2003 Framework, and no market-based mechanism was implemented to effect that allocation.

[15] Since 2003, in order to keep the recreational sector within 12% of the TAC, the DFO has imposed restrictive management measures on the Pacific halibut recreational fishery, including early closures of the fishery in many years. Nevertheless, the recreational sector's catch has consistently exceeded the 12% ceiling, causing serious concerns with respect to conservation and to Canada's international obligations under the Convention.

[16] Moreover, there has been little progress achieved with respect to the second policy objective of the 2003 Framework dealing with the development of a mechanism acceptable to both sectors so as to allow for adjustments to the 12% ceiling through acquisition of additional halibut quotas from the commercial sector. In 2007, the DFO retained Mr. Hugh Gordon to try to assist the recreational and commercial sectors to reach a consensus on an acceptable market-based mechanism. That process resulted in a consensus recommendation from both sectors that the DFO provide initial funding of $25 million to facilitate the transfer of the Pacific halibut through a market mechanism, which initial funding would be "paid-back" by the recreational sector through increased licence fees or a stamp. However, the DFO did not agree with using the public purse, and it did not believe it had the authority to levy fees on the recreational sector for that purpose.

[17] In 2010, the DFO retained another facilitator, Mr. Roger Stanyer, to evaluate options for reallocating the TAC between the sectors. However, by the end of that process, the stakeholders had clearly reached an impasse, and any further meetings between them were deemed useless. As a result, representatives of both the commercial sector and the recreational sector undertook extensive letter-writing campaigns in anticipation of a change to the 2003 Framework. The commercial sector supported the continuation of the 2003 Framework, while the recreational sector called for its modification.

[18] On February 15, 2011, the Minister announced that (a) the 2003 Framework allocating 12% of the TAC to the recreational sector would continue for 2011; (b) for the 2011 season, the DFO would create a pilot experimental market-based mechanism that would allow participants in

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the recreational sector to voluntarily acquire some of the Pacific halibut quota allocated to the commercial sector; and (c) Randy Kamp, the Parliamentary Secretary to the Minister, would be appointed to evaluate the available options prior to the start of the 2012 season so as to allow for effective conservation, for economic prosperity through predictable access for all users, and for an effective mechanism for transfers between sectors.

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[19] Mr. Kamp held extensive meetings with stakeholders. No final document was produced by Mr. Kamp, but drafts were circulated to the Minister proposing various options, including an option to adjust the TAC allocation percentage to the recreational sector from 12% to 15% without compensation or a market adjustment mechanism. As noted in the draft of January 10, 2012 from Mr. Kamp, "[i]f the adjustment is ma[d]e without compensation we can expect legal action from the commercial interests": Appeal Book (AB) at pp. 633-634.

[20] Following the process carried out by Mr. Kamp, the Deputy Minister of the DFO proposed various options to the Minister. On February 17, 2012, the Minister announced an immediate 3% change to the TAC allocation for the Pacific halibut fishery. The Minister allocated 85% of the TAC to the commercial sector (down from 88%) and 15% to the recreational sector (up from 12%). No compensation or market-based mechanism was attached to this reallocation. The Minister also continued the 2011 pilot experimental market-based mechanism for the voluntary acquisition of quotas by the recreational sector. In making this decision, the Minister stated the following: "Our government is making good on a commitment to provide greater long-term certainty in the Pacific halibut fishery for First Nations, commercial

and recreational harvesters, and, most importantly encouraging jobs and economic growth in British Columbia": AB at p. 517 .

[21] It is this decision that the appellant challenged in the Federal Court.

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The Federal Court Judge's reasons

[22] The Federal Court Judge concluded that the principles of judicial review expressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) and in *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 (*Maple Lodge Farms*) were not mutually exclusive: reasons at para. 51. Applying by analogy the reasoning of the Chief Justice of Canada in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (*Catalyst Paper*), the Federal Court Judge concluded that reasonableness is a flexible standard to be applied contextually and that it is informed by the prior jurisprudence. Since the jurisprudence had applied a standard of review based on *Maple Lodge Farms* to prior similar decisions of the Minister, the Federal Court Judge concluded that he should follow this approach.

[23] The Federal Court Judge found that "[t]here is no evidence that the decision was made in bad faith or pursuant to an irrelevant purpose": reasons at para. 62. He further concluded that the Minister was facing a policy decision involving the allocation of a fishery resource between competing economic and social interests, and that the Minister chose to make the reallocation with economic growth and jobs in mind: reasons at para. 61.

[24] The Federal Court Judge also concluded, relying on *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (CA) (*Carpenter Fishing*) at para. 39, that "there is nothing preventing the Minister from favoring one group of fishermen over another": reasons at para. 63. In addition, he concluded, relying on *Canada (Attorney General) v. Arsenault*, 2009 FCA 300, 395 N.R. 223 (leave to appeal to SCC refused: [2009] S.C.C.A. No. 543 (QL)) (*Arsenault*), that the Minister was not bound by the 2003 Framework since he could make changes to fisheries policy at any time: reasons at para. 64. Finally, the Federal Court Judge noted that there was a long standing dispute between the commercial and recreational sectors, and that the decision to reallocate part of the TAC from one sector to another was a policy decision that properly belonged to the Minister: reasons at paras. 74-75. He therefore ultimately found the Minister's decision to be reasonable.

[25] The Federal Court Judge also rejected the appellant's legitimate expectations submissions. He concluded that the Minister had previously committed to a market based mechanism for effecting quota reallocations between the commercial and recreational sectors: reasons at para. 78. However, he also concluded that the doctrine of legitimate expectations can only pertain to the process that the Minister would follow in reaching a decision, and not to the outcome of that decision: reasons at para. 77. Since no dissatisfaction had been expressed with respect to the extensive consultations leading up to the Minister's decision to reallocate the TAC without compensation, he concluded that the doctrine of legitimate expectations had no application: reasons at paras. 79 to 81.

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[26] With respect to the appellant's submissions concerning promissory estoppel, the Federal Court Judge concluded that there was no basis on which this doctrine could be invoked. While the Federal Court Judge recognized that commercial fishers relied on the Minister's assurance of a market-based quota transfer mechanism, he also concluded that "promissory estoppel cannot prevent a minister from exercising a broad statutory mandate to act in the public interest": reasons at para. 85. In the Federal Court Judge's view, "the Minister has discretion to change course on policy": reasons at para. 87.

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The issues in appeal

[27] The issues raised in this appeal may be regrouped under the following questions:

(a) What is the applicable standard of review?

(b) Does the doctrine of promissory estoppel apply in the circumstances?

(c) If not, does the doctrine of legitimate expectations apply in the circumstances?

(d) If not, was the Minister's decision nevertheless unreasonable?

Standard of Review

[28] In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he or she has not, to assess the decision under review in light of the correct standard. This means, in effect, that an appellate court's focus is on the administrative decision: *Canada (Attorney General) v. Johnstone et al.*, 2014 FCA 110 at paras. 36 to 38. The

application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness: *ibid*.

[29] The Federal Court Judge did not discuss the standard under which he reviewed the application of the doctrines of promissory estoppel and of legitimate expectations. However, it is apparent from his reasons that he used a standard of correctness. The application of these doctrines is akin or analogous to a failure to observe a principle of natural justice, procedural fairness or another procedure that the Minister was required by law to observe, and consequently the Federal Court Judge properly applied a standard of correctness to these matters: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

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[30] With respect to the substance of the Minister's decision, all parties agree that the applicable standard of review is that of reasonableness, but they disagree as to what that standard requires in the context of this case. The appellant submits that the reasonableness standard set out in *Dunsmuir* applies without qualification, while the respondents submit that the test set out in *Maple Lodge Farms* governs the matter.

[31] Reasonableness is a flexible standard to be applied contextually and it is informed by the prior jurisprudence. In *Catalyst Paper*, the Supreme Court of Canada had to determine what the standard of reasonableness required in the context of the judicial review of municipal bylaws. McLachlin C.J. answered that question as follows at para. 18 of *Catalyst Paper*:

> [18] The answer lies in *Dunsmuir's* recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12,

> [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past (*Dunsmuir*, at paras. 54 and 57). To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

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[32] The limited individual quota system put in place in the early 1990's as a result of the new ITQ system introduced at that time was challenged in the Federal courts, leading to the decision of our Court in *Carpenter Fishing*. In upholding that system as a valid policy decision of the Minister, and relying on *Maple Lodge Farms*, Décary J.A. noted in that case that the imposition of an individual quota system is a discretionary ministerial decision in the nature of a policy or legislative action that may only be disturbed on judicial review if it can be established that the decision was made in bad faith, did not conform with the principles of natural justice, or if reliance was placed upon considerations that are irrelevant or extraneous to the legislative purpose: *Carpenter Fishing* at paras. 28 and 37.

[33] That approach to the judicial review of fisheries management decisions had been previously adopted by the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (*Comeau's Sea Foods*) at para. 36. It has also been affirmed by our Court post-*Dunsmuir*: *Mainville v. Canada (Attorney General)*, 2009 FCA 196, 398 N.R. 249 at para. 5; and *Arsenault* at paras. 38 to 42.

[34] The decision of the Minister in this case is discretionary and in the nature of a policy action. As a ministerial policy decision made under the *Fisheries Act*, it is amenable to judicial review under a standard of reasonableness discussed in *Dunsmuir*. The issue here is what does the standard of reasonableness require in these circumstances?

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[35] A discretionary policy decision that is made in bad faith or for considerations that are irrelevant or extraneous to the legislative purpose is unreasonable by that very fact. Such a decision can also be unreasonable if it is found to be irrational, incomprehensible or otherwise the result of an abuse of discretion. The ultimate question in judicially reviewing the Minister's decision in this case is to determine whether the decision falls within a range of reasonable outcomes having regard for both the context in which the decision was made and the fact that the decision itself involves policy matters in which a reviewing court should not interfere by substituting its own opinion to that of the Minister's. It is with these considerations in mind that the reasonableness of the Minister's decision should be determined.

Promissory estoppel

[36] The appellant submits that (a) by instituting an ITQ system in the commercial fishery for Pacific halibut in the early 1990's, and (b) by providing assurances that the 2003 Framework would be followed with regard to a market-based quota transfer system between the commercial and recreational sectors of that fishery, the Minister cannot now renege on these commitments.

[37] The appellant does not dispute that the Minister may reallocate part of the TAC from the commercial sector to the recreational sector. Rather, he submits that, in light of prior

representations, the Minister was bound to carry out such a reallocation through a market-based mechanism and is now estopped from reallocating the TAC without using such a mechanism.

[38] Though the doctrine of promissory estoppel may be available against a public authority, including a minister, its application in public law is narrow. As noted by Binnie J. in his concurring opinion in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (*Mount Sinai*) at para. 47, public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.

[39] This principle has been expressed in various ways. In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 220, Rand J. expressed it as follows: "there can be no estoppel in the face of an express provision of a statute". In *Canada (Minister of Employment & Immigration) v. Lidder*, [1992] 2 F.C. 621 at p. 625, Marceau J.A. stated the principle as follows: "[t]he doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty". In *St. Anthony Seafoods Limited Partnership v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2004 NLCA 59, 245 D.L.R. (4^{th}) 597 at paras. 81-82, Mercer J.A. noted that the overriding public interest expressed in legislation precluded the application of the doctrine of promissory estoppel to impede a provincial minister from exercising his discretion so as to respond to current socio-economic concerns in a different manner that that expressed in representations of his predecessor.

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[40] The *Fisheries Act*, R.S.C. 1985, c. F-14 grants the Minister wide and unfettered discretion to manage the Canadian fisheries taking into account the public interest. As noted by Major J. in *Comeau's Sea Foods* at pp. 25-26, Canada's fisheries are a "common property resource" belonging to all the people of Canada, and it is the Minister's duty under the *Fisheries Act* to manage, conserve and develop the fisheries on behalf of Canadians in the public interest.

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[41] In determining an appropriate management system in a given fishery, the Minister may well exercise his discretion so as to decide to implement an ITQ system with market-based mechanisms for quota transfers from one fishery sector to the other. However, the Minister is not forever bound by such a discretionary decision.

[42] Rather, the Minister may modify the approach followed previously if, in the Minister's opinion, public interest considerations reasonably justify such a change of policy. As noted by this Court in *Arsenault* at para. 43 in the context of modifications to a management plan for a fishery, "[t]he Minister was not bound by his policy and he could, at any time, make changes thereto".

[43] In reallocating the TAC from one fishery sector to another, the Minister may determine (and often has) that the public interest requires that the fishers affected by the reallocation be compensated through a market-based mechanism or through direct government subsidies. However, the Minister may also determine that the public interest does not require such compensation mechanisms. It is therefore for the Minister to determine what weight, if any, is to be given, in the public interest, to providing compensation in the form of market-based

mechanisms or direct subsidies. As aptly noted by my colleague Pelletier J.A. at paragraph 57 of his concurring reasons in *Arsenault*:

> […] Consequently, if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. As a result, the decision to offer compensation for lost quota is not one which is based on a statute or a regulation. In fact, the crabbers allege in their action that their right to compensation is a matter of contract. The exercise of the minister's discretion to issue fishing licences with reduced quota under section 7 of the Act did not result in a public legal duty to pay compensation for the lost quota. There being no public legal duty, the crabbers are not entitled to an order of *mandamus*.

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[44] Another example of this principle may be found in *Kimoto v. Canada (Attorney General)*, 2011 FCA 291, 426 N.R. 69 (*Kimoto*). In that case, a group of commercial salmon trollers on the West coast of Vancouver Island had their TAC curtailed by the Minister by about 50% to satisfy an international treaty commitment made by Canada, in return for which the government of the United States provided compensation of $30 million for a fishery mitigation program to reduce efforts in Canada's commercial salmon troll fishery.

[45] The affected fishers challenged the decision of the Minister to allocate the funds in a manner that was not directly beneficial to them. In *Kimoto*, Layden-Stevenson J.A. dealt with that claim by noting that the concerned fishers had no proprietary right in the fish or the fishery, and no right to compensation for the reduction in the TAC and of their individual quotas that flowed from the treaty commitment. She further noted that the Minister's decision as to how to allocate the compensation was one based on public interest considerations involving the balancing of the preoccupations of a multiplicity of stakeholders. She consequently refused to interfere with the Minister's decision.

[46] In conclusion, in light of the wide discretion provided to the Minister under the *Fisheries Act*, and taking into account the principle that the Minister is not bound by the policy decisions of his predecessors, I agree with the Federal Court Judge that the doctrine of promissory estoppel has no application in this case.

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Legitimate expectations

[47] The appellant acknowledges that judicial review on the basis of the doctrine of legitimate expectations is limited to procedural relief. However, the appellant submits that the right to a market-based mechanism for the reallocation of the Pacific halibut TAC does constitute a procedural relief.

[48] The doctrine of legitimate expectations is an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there would otherwise be no such opportunity: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at p. 1204. The use of the doctrine of legitimate expectations to seek substantive relief was considered and rejected by the Supreme Court of Canada in *Mount Sinai*, and that approach has been recently reiterated in *Agraira v. Canada (Public Service and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*) at para. 97.

[49] When applicable, the doctrine can create a right to make representations or to be consulted, but it does not fetter the decision following the representations or consultations: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at pp. 557-558. Further, as

noted by David J. Mullen, *Administrative Law*, 4th ed. (Toronto: Irwin Law, 2001) at p. 184, the courts have taken a broad view of what constitutes a "substantive" as opposed to a "procedural" claim.

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[50] I agree with the Federal Court Judge and the respondents in this appeal that the outcome that the appellant seeks in this case – the application of a market-based mechanism – is not a procedural relief. Rather, the appellant is seeking to overturn the Minister's decision on a question of substance, namely the refusal to provide compensation for the reallocation of 3% of the TAC through a market-based mechanism or direct subsidies. Since Canadian jurisprudence does not recognize that the doctrine of legitimate expectations provides substantive relief, and since no dissatisfaction has been expressed with regard to the long and in-depth consultation processes leading to the Minister's decision in this case, the appellant's submissions on the issue of legitimate expectations fail.

Reasonableness of the decision

[51] The appellant does not challenge the decision to reallocate 3% of the TAC to the recreational sector, but rather the decision not to use a market-based mechanism to carry out that reallocation. The appellant essentially submits that the Minister abused his discretion in deciding to reallocate 3% of the TAC without using a market-based mechanism, a decision that constitutes a reversal of a long-standing ministerial policy with respect to the use of such a mechanism. In support of this submission, the appellant points out that the Minister did not follow the recommendations of his officials in discarding market-based mechanisms, and failed to properly articulate the reasons for that decision.

[52] As I have already noted, the Minister has broad authority and discretion under the *Fisheries Act* to manage the fisheries in the public interest. As found by our Court in *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 at p. 106, and confirmed by the British Columbia Court of Appeal in *R. v. Huovinen*, 2000 BCCA 427, 188 D.L.R. (4th) 28 at para. 24, and by the Supreme Court of Canada in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569 at paras. 39 to 41, the Minister may, among other factors, take into account social and economic factors in managing and allocating a fishery resource.

[53] As further found by our Court in *Arsenault* at para. 43, and as further discussed above, the Minister is not bound by the policy decisions of his predecessors, and he may make new decisions and change existing policies so as to respond, notably, to developing social and economic considerations. Nor is the Minister bound to provide compensation to the affected fishers when reallocating the TAC or reducing a quota: *Arsenault* at para. 57, *Kimoto*.

[54] With respect to a market-based mechanism, the record in this case shows that (a) the 2003 Framework required both the commercial and the recreational sectors to develop an acceptable mechanism to allow for adjustment through acquisition of additional halibut quotas from the commercial sector; (b) both sectors failed to agree to such a mechanism notwithstanding numerous efforts by the DFO to allow them to reach a consensus; (c) the use of public funds to compensate the commercial sector for the reallocation or to foster a market-based mechanism was not deemed appropriate by the DFO; (d) in the current legislative context, the DFO questioned the feasibility of a levy or fee mechanism to collect funds to support a market-

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based mechanism involving quota transfers; and (e) the pilot experimental market-based mechanism to reallocate quotas introduced by the Minister in 2011 did not meet with any substantial success.

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[55] In light of these facts, of the long series of consultations carried out over many years to develop a market-based mechanism, and of the failures of the numerous attempts to reach an acceptable consensus on such a mechanism, it was not unreasonable for the Minister to decide as he did. The appellant does not question the need for the reallocation, and since a viable market-based mechanism could not be agreed to, the Minister could act in the public interest to ensure that the reallocation actually occurred.

[56] It is moreover readily apparent from his decision that the Minister's primary consideration was to encourage jobs and economic growth in British Columbia. This was an appropriate consideration that the Minister was entitled to take into account. That consideration is substantiated by the fact the recreational sector provides an important contribution to the economy of British Columbia, a matter that is not disputed.

[57] The appellant also submits that the Minister's decision was largely the result of political lobbying by the recreational sector and of electoral calculations on the part of the Minister. However, the record shows that both the commercial and the recreational sector engaged in extensive letter writing campaigns once it became apparent that the 2003 Framework was being reconsidered by the Minister: Federal Court Judge's reasons at para. 20. Moreover, the Federal Court Judge rightfully concluded, at paragraph 62 of his reasons, that there is no evidence

whatsoever in the record that the Minister's decision was made in bad faith or pursuant to irrelevant considerations.

[58] The appellant further submits that the Minister did not follow the recommendations of the officials of the DFO in reaching the decision, and that this emphasizes the unreasonableness of that decision. Officials of the DFO did present the Minister with various options prior to the decision, including the option that the Minister finally approved. While DFO officials favoured another option, this does not mean that the Minister's decision is necessarily unreasonable. The final decision properly belonged to the Minister, and in my view, the very fact the option that was finally approved had been tabled by officials of the DFO as a possible alternative tends to show that the approved option was a possible reasonable outcome of the decision making process.

[59] Finally, the appellant submits that the Minister did not clearly articulate the reasons for which he did not favour a market-based mechanism to reallocate 3% of the TAC to the recreational sector. Taking into account the discretionary and policy nature of the ministerial decision at issue in this case, the Minister would be required at the very most to provide limited reasons. As noted by Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 54, "[w]hen there is no duty to give reasons (…) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review." See also *Agraira* at paras. 57-58.

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[60] In the absence of a Parliamentary appropriation of funds to provide compensation or to assist in the establishment of a market-based mechanism, and without any clear legislative authority to impose fees or taxes on the recreational sector for these purposes, and in the absence of any agreement between the recreational and commercial Pacific halibut fishery sectors for the voluntary implementation of a market-based mechanism, the Minister was left with a very limited margin to maneuver if he was to effectively ensure the reallocation of 3% of the TAC to the recreational sector.

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[61] The Minister's decision to proceed with the 3% reallocation of the TAC without applying a market-based mechanism or another form of compensation was not irrational or incomprehensible when considering the record as a whole. Moreover, that decision was not an abuse of the Minister's discretion, and it was not made in bad faith or on the basis of considerations that are irrelevant or extraneous to the purposes of the *Fisheries Act*. The Minister's decision fell within a range of reasonable outcomes having regard for both the context in which the decision was made and the discretionary and policy nature of the decision.

Conclusion

[62] For the reasons set out above, I would dismiss this appeal. I would award costs in this appeal to both respondents. There should be no order for costs with respect to the intervener.

"Robert M. Mainville"

J.A.

"I agree,
Marc Noël J.A."

"I agree,
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-144-13

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE RENNIE DATED APRIL 11, 2013 NO. T-577-12)

STYLE OF CAUSE:	GRAEME MALCOLM on his own behalf and on behalf of all commercial halibut licence holders in British Columbia v. THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA and B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C. and B.C. SEAFOOD ALLIANCE (Intervener)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 13, 2014
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	(NOËL, WEBB JJ.A.)
DATED:	MAY 20, 2014

APPEARANCES:

Joseph J. Arvay, Q.C. Sean Hern Alison M. Latimer	FOR THE APPELLANT
Tim Timberg Fiona Mendoza	FOR THE RESPONDENT (THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA
Christopher Harvey, Q.C.	FOR THE RESPONDENT (B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.)
Catherine Boies Parker	FOR THE INTERVENER

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SOLICITORS OF RECORD:

Farris, Vaughan, Wills & Murphy LLP Vancouver, British Columbia	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT (THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA)
MacKenzie Fujisawa LLP Vancouver, British Columbia	FOR THE RESPONDENT (B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.)
Farris, Vaughan, Wills & Murphy LLP Vancouver, British Columbia	FOR THE INTERVENER

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TAB 19

ST. ANN'S ISLAND SHOOTING AND FISHING CLUB LIMITED.. } APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1949 * Nov. 7

1950 * Feb. 21

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Indian Lands, Lease of—Direction of Governor in Council mandatory—Failing authorization by Order in Council lease void—The Indian Act, R.S.C. 1906, c. 81, ss. 51, 64.

Section 51 of the *Indian Act,* R.S.C. 1906, c. 81, provides that all Indian lands which are reserves or portions of reserves surrendered to His Majesty, shall be deemed to be held for the same purposes as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of Part I of the Act.

Held: That the language of s. 51 is mandatory, and in the absence of direction by the Governor in Council, a lease of Indian lands is invalid.

In the case at bar the original lease, having been approved by Order in Council, was a valid one but such approval terminated with the said lease. As to the subsequent leases, they lacked authorization by Order in Council and consequently were void.

APPEAL from a decision of the Exchequer Court, Cameron J. (1), whereby an action brought by the appellant for a declaration of right to a renewal of a lease of surrendered Indian lands, was refused.

The appellant in 1880 secured from the Council of the Chippewa and Pottawatomie Indians of Walpole Island a lease of part of their reserve, St. Ann's Island, for shooting and fishing for a term of five years and renewable for a like term but reserving to the said Indians their right to shoot and fish the leased area. The appellant having raised the question as to whether the lease was a valid one under the *Indian Act,* a formal surrender of the leased lands was made by the Indians to the Crown and an Order in Council was passed approving the surrender and confirming a lease from the Superintendent General of Indian Affairs to the appellant for a term of five years renewable for a like term. From 1884 to 1925 several further leases were entered into between the same

* PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) [1949] 2 D.L.R. 17.

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parties. Some contained no provision for renewal, some varied the terms of the original lease as to the amount of land, and the terms of payment. The 1925 lease excluded the Indians from shooting or fishing on the leased property and reserved that right to the appellant alone. It also provided for a term of 20 years with the right of renewal for further successive terms of ten years at rentals to be fixed by arbitration. In 1944 the appellant gave notice to the Superintendent General of Indian Affairs of its intention to renew the lease but he refused to grant such renewal or to admit that the lessee was entitled thereto. The matter was subsequently under the provisions of s. 37 of the *Exchequer Court Act*, referred to that Court for adjudication.

A. S. Pattillo and *J. A. Macintosh, K.C.*, for the appellant.

Lee A. Kelley, K.C., and *W. R. Jackett, K.C.*, for the respondent.

KERWIN J.:—I would dismiss this appeal. It is unnecessary to consider that part of the reasons for judgment of the trial judge (1) dealing with the argument that the Crown was estopped from denying the validity of the tenancy of the appellant since counsel for the appellant stated that he did not now advance any such claim. As to the other points, I agree with the trial judge.

During the argument a question was asked as to whether a contention could be advanced that the surrender "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent of Indian Affairs may consider best for our advantage", was really a surrender upon condition, and that if the condition were not fulfilled the land would revert. It was suggested in answer thereto that this would not assist the appellant and this was made quite clear by Mr. Jacket when he pointed to ss. 2 (*i*) and (*k*), 19, 48 and 49 of the *Indian Act*, c. 81, R.S.C. 1906. If by some means the lands again became part of the reserve, then s. 49 would apply and, except as in Part I otherwise provided, no

(1) [1949] 2 D.L.R. 17.

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release or surrender of a reserve or a portion thereof shall be valid or binding unless the release or surrender complies with the specified conditions.

The determination of the case really depends upon s. 51 of the Act. These lands were Indian lands which had been surrendered and, therefore, in the wording of the section "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this part." Mr. Jacket pointed out that counsel for the appellant wanted s. 51 to be read as if the words "subject to the conditions of surrender and the provisions of this part" preceded "all Indian lands, etc. * * * ", thus inserting those words, which now appear at the end, at the very commencement, and without taking into consideration the fact that the two parts of the section are separated by a semi-colon. Reference was also made to s. 64 but the collocation of the word "deed" with "lease or agreement" shows that a surrender could not be included under the word "deed".

The trial judge answered the question in the negative and dismissed the claim with no costs to either the claimant or the respondent but there is no reason why costs in this Court should not go against the unsuccessful appellant.

The judgment of Taschereau and Locke JJ. was delivered by:—

TASCHEREAU J.:—By Petition of Right filed in December, 1945, the suppliant-appellant claimed that it was entitled to a renewal of a lease of certain premises, from the Superintendent General of Indian Affairs, dated May 19, 1925. The first document to which we have been referred is a resolution dated March 18, 1880, adopted by the Council of the Chippewa and Pottawatomie Indians of Walpole Island, purporting to authorize an original lease to the St. Ann's Shooting and Fishing Club, of St. Ann's Island. Pursuant to this resolution, the Superintendent General of Indian Affairs executed the lease on May 30, 1881, "for the purpose of shooting over the

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Taschereau J.

same and angling and trawling in the waters thereof" for a period of five years, renewable on its expiration for a like term.

Following the execution of this lease, the officers of the Club raised certain questions as to the validity of the lease, and more particularly as to whether there had been a surrender of the lands as required by the *Indian Act* of 1880, an acceptance thereof by the Governor General in Council, and finally, an Order in Council authorizing the lease. A further meeting of the Indians was therefore held in February, 1882, and a formal surrender was executed in due form, and on the 24th of February of the same year, the Indian Superintendent at Sarnia wrote to the Club that for the purpose of the lease, a formal surrender had been given, and that the defect in the preliminary proceedings had been remedied. In April, 1882, Order in Council No. 529 was passed purporting to accept the surrender, and on the 18th of April, the Department again advised the Club that the surrender had been accepted, and that the lease had been confirmed by the said Order in Council.

In 1884, 1892, 1894, 1906 and 1915, new leases were entered into between the same parties, but only those of 1894, 1906 and 1915 contained provisions for renewal. In all these leases, except the first one, trustees signed the agreements with the Superintendent General, on behalf of the St. Ann's Island Shooting and Fishing Club.

In May, 1925, the Superintendent General of Indian Affairs signed a new lease with Geoffrey T. Clarkson and Walter Gow, acting as trustees for the St. Ann's Island Shooting and Fishing Club Limited, and it provided that the lessees should be entitled on the expiration of the term granted, to renewals for further successive periods of ten years at rentals to be fixed by arbitration.

The lessees have been in possession of the lands in question since 1881, and have expended substantial amounts for the permanent improvement of their facilities as a hunting and fishing club, including the erection of a club house and other buildings and the opening up of ditches and canals. On September 4, 1945, Geoffrey T. Clarkson and Walter Gow assigned their interest in the lease to the appellant.

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Some correspondence was then exchanged between the Department of Indian Affairs and the Club, as to the renewal of the lease, but as the parties could not agree, it was therefore decided that the question should be referred to the Exchequer Court of Canada for adjudication. Pursuant to the dispositions of the general rules and orders of the Court, the appellant filed a statement of claim on December 17, 1945, and asked for a declaration that the Club was entitled to a renewal of the lease dated May 19, 1925, for a further term of ten years, and subject to the stipulations and provisions contained in the lease of May 19, 1925, save as to rental. The claimant also asked that the annual rent to be paid during the term of the renewal of the lease, from October 1, 1944, to September 30, 1955, be determined by the judgment, instead of by arbitration.

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Mr. Justice Cameron, before whom the matter came, reached the conclusion that as the lease of 1925 was never authorized by Order in Council, it was, as well as the provisions for renewal, wholly void.

These lands in question were formerly part of a "Reserve" for the use or benefit of the Chippewa and Pottawatomie Indians of Walpole Island, and there is no doubt that they could not be originally leased in May, 1881, to the predecessors of the appellant, unless they had been *surrendered* to the Crown. The effect of a surrender is to make a reserve or part of a reserve, "Indian Lands", defined in section 2 of the *Indian Act,* para. (*k*) as "any reserve or portion of a reserve which has been surrendered to the Crown".

The necessary surrender was made as a result of the meeting held by the Indians in February, 1882, and which was accepted by Order in Council No. 529 in April of the same year. This Order in Council reads as follows:—

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act* 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the

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benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".

The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

It followed that St. Ann's Island became "Indian Land", and in view of s. 51 of the *Indian Act,* could be leased or sold only with the approval of the Governor General in Council. This s. 51 reads as follows:—

> All Indian lands which are reserved or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

It is argued on behalf of the appellant that the effect of P.C. 529 is not only to accept the surrender of the lands to the Crown, and to confirm the original lease of May 1881, but also to authorize the Superintendent General of Indian Affairs, to enter into further agreements with the appellant, as he did.

I am unable to agree with this contention. When the Indians surrendered the lands to the end that said described territory may be leased to the applicants, * * * "for such terms and conditions as the Superintendent General of Indian Affairs may consider best for our advantage * * *", the lease with the appellant had then been signed, and the terms of the surrender indicate that its contents were known to all. The object of the surrender was to legalize what was rightly thought to be illegal, and to ratify what had been done. The same may be said of the Order in Council. But neither the authorization to the Superintendent in the surrender, nor P.C. 529 can be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly fifty years later, and in which can be found different conditions. When this lease came to an end, P.C. 529 which had authorized it, had served its particular purpose and a new one was therefore needed, in view of the imperative terms of s. 51, to vest in the Superintendent the necessary authority to lease these lands anew.

In view of the declaration of counsel for the appellant that he does not rely on the point raised in the court

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below, that the respondent is estopped from denying the validity of the tenancy of the claimant, it is unnecessary to deal with it.

The appeal should be dismissed with costs.

The judgment of Rand and Estey JJ. was delivered by

RAND J.:—The question in this appeal is whether what purports to be a lease executed by the Superintendent General of Indian Affairs to the predecessor trustees of the appellant became binding on the Dominion Government. It was made in 1925 for the term of twenty years with an option for "renewal leases * * * for successive periods of ten years" and was the last of a succession between the same parties dating from 1881. It covers certain lands and waters within an Indain reservation, and was given primarily for fishing and hunting purposes, although not so expressly restricted.

The matter originated in a resolution passed on March 18, 1880, by the Indian Band Council authorizing the letting of what was known as St. Ann's Island to trustees for the St. Ann's Island Shooting and Fishing Club on terms approved by the Council, which was followed by a document signed by the Superintendent General dated May 30, 1881. The term was for five years from May 1, 1881, renewable for a like period; and it was provided that the lands and any buildings erected on them would at the "end, expiration, or other determination" of the lease or renewal be yielded up without any allowance being made for improvements.

Under the *Indian Act* of 1880, a surrender of the Indian interest was required before an effective lease could be made. On February 6, 1882, as a result of enquiries made by the lessees, at a meeting of the Band, an instrument was signed on its behalf which, after referring to the resolution of March 18, 1880, formally surrendered the lands to Her Majesty "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage." Then following a

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recital that an executed lease had been read and explained, it declared approval of its terms and the confirmation of its execution by the Superintendent General.

The surrender was accepted by a minute of the Privy Council approved by the Governor General on April 3, 1882 (P.C. 529) as follows:—

> On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act*, 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".
>
> The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

The first lease was superseded by another executed in 1884, which in turn was followed by others in 1892, 1894, 1906, 1915 and finally by that now in question. In those of 1884 and 1892 there was no provision for renewal, but an option to renew for ten years was contained in the instruments of 1894, 1906 and 1915.

Section 51, R.S.C. 1906, c. 81 (the *Indian Act*) provided:—

> All Indian lands which are reserved or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

Cameron J., before whom the Reference made by the Minister under s. 37 of the *Exchequer Court Act*, came, construed the surrender to be absolute but held that s. 51 required for the validity of the lease of 1925 that it should have been directed by the Governor in Council, and, as admittedly no other Order in Council than No. P.C. 529 of April 3, 1882 had been made, found it void.

The contention of the appellant is that the surrender was on the condition that the lands should thereafter be subject to a right of leasing by the trustees, on terms satisfactory to the Superintendent General, which, if not perpetual, would continue so long as the Superintendent General determined; that by acceptance of the surrender

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the condition became fixed and without more or by virtue of s. 64 of the Act, the Superintendent General became competent thereafter to deal with the lands in relation to the Club as he might consider for the benefit of the Band.

I find myself unable to agree that there was a total and definitive surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees "for such term and on such conditions" as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable commitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity, or in the judgment of the Superintendent General, to the Club. To the Council, the Superintendent General stood for the government of which he was the representative. Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell into possession.

That there can be a partial surrender of the "personal and usufructuary rights" which the Indians enjoy is confirmed by the *St. Catherine's Milling Company Limited* v. *The Queen* (1), in which there was retained the privilege of hunting and fishing; and I see no distinction in principle, certainly in view of the nature of the interest held by the Indians and the object of the legislation, between a surrender of a portion of rights for all time and a surrender of all rights for a limited time.

But I agree that s. 51 requires a direction by the Governor in Council to a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

But the circumstances here negative any delegation of authority. The Order in Council approved a lease for a

(1) (1888) 14 App. Cas. 46.

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definite period on certain stipulations; by its terms, it would come to an end, even with renewal, within ten years; and the efficacy of the Order was exhausted by that instrument.

It was argued that the Crown is estopped from challenging the lease, but there can be no estoppel in the face of an express provision of a statute; *Gooderham & Worts Limited* v. *C.B.C.* (1), and *a fortiori* where the legislation is designed to protect the interests of persons who are the special concern of Parliament. What must appear —and the original trustees were well aware of it—is that the lease was made under the direction of the Governor in Council, and the facts before us show that there was no such direction.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Anglin, Osler & Cassels.*

Solicitor for the respondent: *F. P. Varcoe.*

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TAB 20

Indexed as:

Canada (Minister of Employment and Immigration) v. Lidder (C.A.)

The Minister of Employment and Immigration (Appellant)
v.
Mohinder Singh Lidder (Respondent)

[1992] 2 F.C. 621

[1992] F.C.J. No. 212

Court File No. A-1125-87

Federal Court of Canada - Court of Appeal

Marceau, Desjardins and Décary JJ.

Heard: Ottawa, January 15, 1992.
Judgment: Ottawa, March 10, 1992.

Immigration -- Appeal under Immigration Act, s. 84 from Immigration Appeal Board's decision allowing respondent's appeal under Act, s. 79(2) -- Respondent sponsoring nephew's application for landing -- Application refused by Minister as nephew 18 years old when filed -- Date of application for landing, not date assistance undertaking filed, relevant -- Whether estoppel, doctrine of legitimate expectations applicable -- Requirement as to age mandatory and absent of discretionary power -- Board without jurisdiction to hear sponsor's appeal.

Estoppel -- Application for sponsored landing refused by Minister as applicant 18 years old when received -- Whether doctrine of estoppel applicable -- Estoppel by representation defined, recognized as principle of law and equity -- Estoppel cannot interfere with proper administration of law -- Requirement as to age mandatory and absent of discretionary power -- Only properly filed application can be sponsored -- Immigration Appeal Board without jurisdiction to hear sponsor's appeal.

This was an appeal pursuant to section 84 of the Immigration Act from a decision of the Immigration Appeal Board allowing the respondent's appeal under subsection 79(2) of the Act. As Canadian citizen, the respondent submitted an undertaking of assistance (family class) in October

1982 to sponsor his orphaned nephew who was seventeen years old at the time. After having filed that undertaking, the respondent was told by a representative of the Minister of Employment and Immigration Canada that he had nothing else to do. Moreover, he was not told that he had to obtain a certificate that the provincial child welfare authority did not object to the respondent taking care of his orphaned nephew. He later realized that such certificate could no longer be obtained since his nephew had turned eighteen. By letter dated October 8, 1985, the respondent was informed that his nephew's application had been refused because the latter was not a member of the family class as defined by paragraph 4(1)(e) of the Immigration Regulations, 1978, due to the fact that he was eighteen years of age when his application was received and that a no objection certificate had not been obtained. The Immigration Appeal Board allowed the appeal from the Minister's decision pursuant to paragraph 77(3)(b) of the Act, applying the doctrine of estoppel in holding that the Minister was prevented from refusing the nephew's application on the grounds that it was filed after he had reached the age of eighteen. The issue upon this appeal was whether the doctrine of estoppel or that of legitimate expectations could be invoked to prevent the Minister from refusing the nephew's application for landing.

Held, the appeal should be allowed.

Per Desjardins J.A.: Subsection 77(1) of the Immigration Act makes it clear that sponsorship cannot exist without an application for landing. It is not the date of the sponsorship application but that of the application for landing which is relevant in determining whether a person is a member of the family class. There are different types of estoppel, the branch of estoppel at issue herein being estoppel by representation. This type of estoppel, originally viewed as a principle of equity, is now recognized as a principle of both law and equity. The representations had been made to the sponsor, not to the nephew. But more importantly, the doctrine of estoppel cannot interfere with the proper administration of the law. The requirement as to age is mandatory and absent of any discretionary power.

As to whether the doctrine of legitimate expectations could apply to this case, it is true that the second letter sent to the nephew could be construed as an offer by the Minister to process the nephew's application, notwithstanding his age. However, the doctrine of legitimate expectations is procedural only and does not create substantive rights. The Minister could not be deemed to have acted in contravention of his statutory duty. The application for landing not being made by a member of the family class, the Immigration Appeal Board was without jurisdiction to hear the sponsor's appeal.

Per Marceau J.A.: Even if the finding of the Board, that there had been representation or conduct amounting to a representation intended to induce a course of conduct, were to be accepted, the reasoning of the Board was legally unsound. The doctrine of estoppel could not be invoked to preclude the exercise of a statutory duty or to confer a statutorily defined status on a person who does not fall within the statutory definition. The related doctrine of "reasonable or legitimate expectation", which suffers from the same limitation restricting the doctrine of estoppel, was also

inapplicable. A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can it place itself in conflict with its duty and forego the requirements of the law.

Nothing could turn on the date that the undertaking of assistance was filed since it has been held that the effective date of a sponsored application has to be the date that the application itself was filed. The wording of the legislation makes it clear that only a properly filed application can be sponsored.

Statutes and Regulations Judicially Considered

Immigration Act, R.S.C., 1985, c. I-2, ss. 77(1),(3) (as am. by R.S.C., 1985 (2nd Supp.), c. 10, s. 6; idem (4th Supp.), c. 28, s. 33), 83 (as am. idem, s. 19).
Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 79(2) (as am. by S.C. 1986, c. 13, s. 6), 84.
Immigration Regulations, 1978, SOR/78-172, ss. 4(1)(e) (as am. by SOR/84-140, s. 1), 6(1)(c) (as am. by SOR/85-225, s. 4; SOR/91-157, s. 1).

Cases Judicially Considered

Applied:
Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525; (1991), 83 D.L.R. (4th) 297; [1991] 6 W.W.R. 1; 58 B.C.L.R. (2d) 1; 127 N.R. 161;
O'Grady v. Whyte, [1983] 1 F.C. 719; (1982), 138 D.L.R. (3d) 167; 42 N.R. 608 (C.A.).

Considered:
Bendahmane v. Canada (Minister of Employment and Immigration), [1989] 3 F.C. 16; (1989), 61 D.L.R. (4th) 313; 26 F.T.R. 122 (note); 8 Imm. L.R. (2d) 20; 95 N.R. 385 (C.A.).

Referred to:
Granger v. Canada Employment and Immigration Commission, [1986] 3 F.C. 70; (1986), 29 D.L.R. (4th) 501; 69 N.R. 212 (C.A.); affd [1989] 1 S.C.R. 141; (1989), 91 N.R. 63;
Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; (1990), 75 D.L.R. (4th) 385; [1991] 2 W.W.R. 145; 2 M.P.L.R. (2d) 217; 69 Man. R. (2d) 134; 46 Admin. L.R. 161; 116 N.R. 46.

Authors Cited

Halsbury's Laws of England, 4th ed., vol. 16, London: Butterworths, 1976.

Counsel:

Donald A. MacIntosh, for appellant. Robin G. LeFevre, for respondent.

Solicitors:

Deputy Attorney General of Canada, for appellant. Lette, McTaggart, Blais, Martin, Ottawa, for respondent.

The following are the reasons for judgment rendered in English by

1 **MARCEAU J.**:-- This case cannot but stir up some sympathy. As explained by Madam Justice Desjardins, the nephew's application for landing was rejected on the ground that, at the moment of filing, he was a few months too old to meet the family class definition; and it seems that the sole reason for the duly sponsored would-be immigrant's late filing was that, of the two application forms sent him by officials of the Canadian High Commission in New Delhi, only the second had reached him and that was 10 days after his eighteenth birthday. The result is no doubt harsh and regrettable, but I think, like my colleague, that it was inevitable and the Immigration Appeal Board erred in trying to avoid it.

2 The Board attempted to rely on the doctrine of estoppel. On the evidence submitted to it, the Board found that the respondent, the sponsoring uncle, "[a]cting upon the immigration officer's representation to the effect that there was nothing else for him to do omitted, to his detriment, to take the necessary steps to ensure that the application was filed in time"[1]. From that finding, the Board concluded that the Minister was estopped from refusing the application for the sole reason that it was filed after the nephew had reached the age of eighteen years.

3 Even if we accept the finding of the Board that there was representation here or conduct amounting to a representation intended to induce a course of conduct -- a finding with which I would have difficulty agreeing -- it is clear to me, as it is to my colleague, that the reasoning of the Board was legally unsound. The doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty -- here, the duty of the officer to deal with the application as it was presented -- or to confer a statutorily defined status on a person who clearly does not fall within the statutory definition. Indeed, common sense would dictate that one cannot fail to apply the law due to the misstatement, the negligence or the simple misrepresentation of a government worker.

4 It was suggested in the course of the argument that, if the doctrine of estoppel could not apply, maybe the related doctrine of "reasonable or legitimate expectation" could. The suggestion was to no avail because this doctrine suffers from the same limitation that restricts the doctrine of estoppel. A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can it place itself in conflict with its duty and forego the requirements of the law. As was repeated by Sopinka J. recently in writing the judgment of the Supreme Court in Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at pages 557-558:

> There is no support in Canadian or English cases for the position that the

> doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.

5 I thought for a moment that a successful approach could be based on the date of filing of the uncle's undertaking of assistance, October 25, 1982, since the nephew was then only seventeen and, therefore, still met the family class definition. It was an approach that appeared, at first, logically attractive in that the undertaking of assistance is a pre-condition to the actual application and is also a significant indication of intent. I soon realized, however, that this door was closed. The Court has already decided that the effective date of a sponsored application has to be the date of filing of the application itself (O'Grady v. Whyte, [1983] 1 F.C. 719 (C.A.)), a conclusion which was, in retrospect, inevitable. The wording of the legislation makes it clear in many provisions, notably subsection 77(1) of the Act [Immigration Act, R.S.C., 1985, c. I-2] and paragraph 4(1)(e)[2], of the Regulations [Immigration Regulations, 1978, SOR/78-172 (as am. by SOR/84-140, s. 1)] that only a properly filed application can be sponsored. Thus, only a duly filed application can give legal meaning and existence to an undertaking of assistance.

6 So, in the end, I agree with Madam Justice Desjardins and would dispose of the appeal as she suggests.

> DÉCARY J.:-- I concur.

* * *

7 DESJARDINS J.:-- This appeal, brought pursuant to section 84 of the Immigration Act, 1976[3] (the "Act"), pertains to a decision of the Immigration Appeal Board (the "Board") dated July 15, 1987, in which the Board allowed the respondent's appeal under subsection 79(2) [as am. by S.C. 1986, c. 13, s. 6] of the Act[4].

8 The respondent, a Canadian citizen, promised his dying sister that he would take care of her children upon her death, which occurred in 1982. He submitted an undertaking of assistance (family class) on October 25, 1982 to sponsor his now orphaned nephew who was living in India[5]. The respondent had been financially supporting his nephew since the time of his mother's death. At the time of the respondent's submission of the undertaking of assistance, his nephew was seventeen years old.

9 Once the respondent had filed his undertaking of assistance, a representative of the Minister of Employment and Immigration Canada (the "Minister") told him "Your part is finished. It's up to the Delhi office, they have to contact the other party"[6]. The representative also told the respondent that the Minister would be sending all the documents to New Delhi and that the New Delhi office would be in touch with his nephew.

10 The Minister sent a first letter dated November 17, 1982 to the respondent's nephew. This letter was apparently never received by the nephew. It had been improperly addressed in that it did not state the name of the nephew's father. No fault by the government authorities is however alleged. It would appear that the incomplete address was taken from the sponsorship application filed by the respondent himself[8]. A second letter dated July 15, 1983, this time properly addressed, was received by the nephew. The letter instructed him to complete an enclosed application for permanent residence (the "application") and to forward certain documents. By the time the nephew received this second letter, he was already eighteen years old.

11 On or about July 28, 1983, the respondent's nephew submitted his application to the Canadian High Commission in New Delhi[9]. He was interviewed by an immigration officer on November 24, 1983. His birth certificate was not received by the Minister until July 9, 1984, and the process of documentation verification was not completed until February 21, 1985. On March 11, 1985, the Minister inquired into whether a no objection certificate had been filed by the respondent in order to show that the child welfare authority of the relevant province had no objection to the respondent taking care of his orphaned nephew. The respondent had never been told by the Minister that he needed to obtain such a certificate. The Minister was informed that a no objection certificate could no longer be obtained since the respondent's nephew had turned eighteen.

12 By letter dated October 8, 1985, the respondent was informed that his nephew's application had been refused[10]. The grounds for the refusal were that the nephew was not a member of the family class as defined by paragraph 4(1) (e) of the Immigration Regulations, 1978[11] (the "Regulations") due to the fact that he was eighteen years of age when his application was received and due to the fact that, contrary to paragraph 6(1)(c) [as am. by SOR/85-225, s. 4; SOR/91-157, s. 1] of the Regulations, a no objection certificate had not been obtained from the relevant provincial child welfare authorities. The very same day, the respondent appealed the Minister's decision to the Immigration Appeal Board.

13 The Board applied the doctrine of estoppel and thereby held that the Minister was prevented from refusing the nephew's application on the grounds that it was filed after he had reached the age of eighteen[12]. The Board furthermore allowed the appeal in equity pursuant to paragraph 77(3)(b) of the Act[13].

14 At issue, in the instant case, is whether the doctrine of estoppel or, perhaps, the doctrine of legitimate expectations may be invoked to prevent the Minister from refusing the nephew's application for landing notwithstanding the fact that the nephew was eighteen years of age at the time of the submission of his application.

15 According to the appellant, the doctrine of estoppel cannot be applied in order to preclude the exercise of a statutory duty nor to confer a statutorily defined status on a person who does not fall within a statutory definition. Since the immigration officer, in the instant case, was under a statutory duty pursuant to section 77 of the Act to make an initial determination as to whether the nephew

was a member of the family class, and since the nephew was clearly not a member of the family class, as defined by paragraph 4(1)(e) of the Regulations, the immigration officer had no other alternative but to refuse the nephew's application for landing. The doctrine of estoppel cannot be applied to preclude the valid exercise of the immigration officer's statutory duty. Hence, the appellant contends that since the nephew was not a member of the family class, the Board was without jurisdiction to hear the respondent's appeal.

16 In the alternative, the appellant submits that if the doctrine of estoppel may be invoked to preclude the refusal of an application for landing, it is not applicable given the facts of the instant case. There was no evidence of any representation or promise made to the respondent's nephew with respect to the family class, nor was there any evidence of reliance on the part of the nephew as a result of the statements made by the immigration officer to the respondent. The essential conditions for the application of the doctrine of estoppel are therefore not met in the case at bar.

17 The respondent argues that the doctrine of estoppel is applicable. That doctrine may be invoked in order to preclude public authorities from relying upon technicalities contained in legislation when they have breached a statutory duty. The Minister had a duty to advise the respondent that he had experienced difficulties in communicating with his nephew. Since he breached his duty towards the respondent, he was precluded from relying upon technicalities contained in the Regulations in order to determine that the nephew was not a member of the family class. The respondent finally contends that the decision of the Board on the basis of estoppel was in furtherance of its jurisdiction to render a decision on the basis of compassionate and humanitarian grounds.

18 Subsection 77(1) of the Act makes it clear that sponsorship cannot exist without an application for landing. The date of the application for landing is the relevant date for determining whether a person is a member of the family class and not the date of the sponsorship application[14].

19 The doctrine of estoppel is defined as[15]:

> ... a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability.

20 There are four types of estoppel: estoppel by matter of record, estoppel by deed, estoppel by representation and promissory estoppel[16]. The branch of estoppel that is at issue, in the instant case, is estoppel by representation.

21 Although estoppel by representation was originally viewed as a principle of equity, it is now recognized as equally a principle of law and equity[17]. Estoppel by representation has been defined in the following terms[18]:

> Where a person has by words or conduct made to another a clear and

> unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. [Emphasis added.]

22 According to the above definition, in order for the doctrine of estoppel by representation to apply, there must be the following elements:

--

> a representation of fact made with the intention that it be acted upon or that a reasonable person would assume that it was intended to be acted upon;

--

> that the representee acted upon the representation;

--

> that the representee altered his position in reliance upon the representation and thereby suffered a prejudice.

23 The representations, in the case at bar, were made to the sponsor that he need not worry, and not to the nephew. It is difficult, in the absence of any evidence, to assume that the sponsor would have done something to alert his nephew. But, more importantly, the doctrine of estoppel cannot interfere with the proper administration of the law[19].

24 Subsection 77(1) of the Immigration Act provides the grounds upon which sponsored applications for landing may be refused:

> 77. (1) Where a person has sponsored an application for landing made by a member of the family class, an immigration officer or a visa officer, as the case may be, may refuse to approve the application on the grounds that
>
> (a) the person who sponsored the application does not meet the requirements of the regulations respecting persons who sponsor applications for landing, or
> (b) the member of the family class does not meet the requirements of this Act or the regulations.

> and the person who sponsored the application shall be informed of the reasons for the refusal. [Emphasis added.]

25 The definition of a "nephew" is provided in the family class definition described in paragraph 4(1)(e) of the Immigration Regulations, 1978 in the following terms:

> 4. (1) ... every Canadian citizen and every permanent resident may, if he is residing in Canada and is at least eighteen years of age, sponsor an application for landing made
>
> ...
>
> (e) by any brother, sister, nephew, niece, grandson or granddaughter of his who is an orphan, under eighteen years of age and unmarried; [Emphasis added.]

26 The requirement as to age is certainly mandatory and absent of any discretionary power.

27 I have considered whether the doctrine of legitimate expectations may apply to this case on the basis that, at the time the second letter was sent to the nephew, the Delhi office already knew that the nephew had attained his eighteen years of age, as this was evident from the undertaking of assistance, and still pursued the matter, raising therefore some "expectations" that the application could proceed. In Bendahmane v. Canada (Minister of Employment and Immigration)[20], Hugessen J.A., expressing a majority view, was able to find that the Minister's letter, there in question, did not conflict with his statutory authority. In the case at bar, however, the difficulty with the idea that the authorities' letter could be construed as an offer by the Minister to process the nephew's application, notwithstanding his age, stems from the provisions of the Regulations themselves. The doctrine of legitimate expectations is procedural only and does not create substantive rights[21]. The Minister cannot be deemed to have acted in contravention of his statutory duty.

28 The application for landing not being made by a member of the family class, the Immigration Appeal Board was without jurisdiction to hear the sponsor's appeal.

29 I would allow the appeal, I would set aside the decision of the Immigration Appeal Board dated July 15, 1987, and I would confirm the refusal of the Minister dated October 8, 1985.

30 I would, pursuant to section 84 of the Immigration Act, declare that all costs of, and incident to this appeal are to be paid by Her Majesty on a solicitor and client basis.

> DÉCARY J.:-- I concur.

1 (1987), 3 Imm. L.R. (2d) 284 (I.A.B.), at p. 287.

2 These provisions read as follows:

> 77. (1) Where a person has sponsored an application for landing made by a member of the family class, an immigration officer or a visa officer, as the case may be, may refuse to approve the application on the grounds that
>
> (a) the person who sponsored the application does not meet the requirements of the regulations respecting persons who sponsor applications for landing, or
>
> (b) the member of the family class does not meet the requirements of this Act or the regulations,
>
> and the person who sponsored the application shall be informed of the reasons for the refusal.
>
> 4. (1) Subject to subsections (2) and (3), every Canadian citizen and every permanent resident may, if he is residing in Canada and is at least eighteen years of age, sponsor an application for landing made
>
> ...
>
> (e) by any brother, sister, nephew, niece, grandson or granddaughter of his who is an orphan, under eighteen years of age and unmarried;

3 S.C. 1976-77, c. 52 (now section 83 of the Immigration Act, R.S.C., 1985, c. I-2 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 19]).

4 S.C. 1976-77, c. 52 (now subsection 77(3) of the Immigration Act, R.S.C., 1985, c. I-2 [as am. by R.S.C., 1985 (2nd Supp.), c. 10, s. 6; idem (4th Supp.), c. 28, s. 33]):

> 77. ...

> (3) A Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection (1) may appeal to the Appeal Division on either or both of the following grounds:
>
> > (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
> >
> > (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

5 A.B., at p. 12.

6 A.B., at p. 47.

7 Ibid.

8 A.B., at p. 56.

9 A.B., at p. 4.

10 A.B., at p. 25.

11 SOR/78-172, as am. by SOR/84-140, s. 1.

12 A.B., at pp. 207-208.

13 A.B., at p. 208.

14 O'Grady v. Whyte, [1983] 1 F.C. 719 (C.A.).

15 Halsbury's Laws of England, 4th ed., vol. 16 (London: Butterworths, 1976), at p. 1008.

16 Ibid., at p. 1008.

17 Ibid., at p. 1068.

18 Ibid., at p. 1010.

19 Granger v. Canada Employment and Immigration Commission, [1986] 3 F.C. 70 (C.A.); affd [1989] 1 S.C.R. 141.

20 [1989] 3 F.C. 16 (C.A.).

21 Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170 at p. 1204; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at pp. 557-558.

TAB 21

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The Doctrine of Res Judicata in Canada, Fourth Edition
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June 2015

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Library and Archives Canada Cataloguing in Publication

Lange, Donald J.
The doctrine of res judicata in Canada / Donald J. Lange—4th ed.

Includes bibliographical references and index.
ISBN 978-0-433-48350-2

1. Res judicata—Canada. 2. Estoppel—Canada. 3. Process—Canada
I. Title.

KE8514.L36 2010 347.71'077 C2004-906835-0
KF8992.L36 2010

Published by LexisNexis Canada, a member of the LexisNexis Group
LexisNexis Canada Inc.
123 Commerce Valley Dr. E., Suite 700, Markham, Ontario L3T 7W8

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Printed and bound in Canada.

Over its history in this country, the meaning of *res judicata* has been very much associated with the term "abuse of process." Hence, *res judicata* "is one of the weapons in the common law arsenal to prevent abuse of the process."[25] In 2003 in *Toronto (City) v. Canadian Union of Public Employees, Local 79*,[26] the Supreme Court of Canada gave definitive recognition to the term "abuse of process by relitigation," a term coined in the process of writing this book. This doctrine now joins the doctrines of issue estoppel and cause of action estoppel as one of the essential estoppel doctrines in the common law of Canada. With the influence of the rule in *Henderson* on issue estoppel and cause of action estoppel, the courts of Canada now have six essential estoppel doctrines to apply.[27]

It is generally agreed that the doctrines are easier to state than to apply.[28] In *Toronto*, Arbour J. observed:

> The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice.[29]

2. A CORNERSTONE OF THE JUSTICE SYSTEM

The doctrine of *res judicata* is a cornerstone of the justice system in Canada. The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause.[30] These policy

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Withler v. Canada (Attorney General), [2002] B.C.J. No. 1395 (S.C.) at par. 25; *Phillips Estate v. Noble* (1997), 75 A.C.W.S. (3d) 939 (N.B.Q.B.) at 6; *Baird v. Lawson* (1996), 22 C.C.E.L. (2d) 101 (Sask. Q.B.) at 106; *Chan v. Royal LePage Commercial Real Estate Services* (1990), 20 A.C.W.S. (3d) 117 (B.C.S.C.) at 7; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.) at 688.

24 *Walji v. Quraishi*, [2007] A.J. No. 1165 (Q.B.) at par. 57.

25 *Hendry v. Strike* (1999), 29 C.P.C. (4th) 18 (Ont. Gen. Div.) at 21, *per* Haines J.

26 *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64, *per* Arbour J. for the majority, *per* LeBel J. for the minority concurring.

27 See the section on the six essential doctrines in this chapter, below.

28 *R. v. Holmes* (1972), 25 C.R.N.S. 154 (Ont. Co. Ct.) at 161; *Re Tong*, [2008] B.C.J. No. 1174 (S.C.) at par. 43.

29 *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64 at par. 15, *per* Arbour J. for the majority, *per* LeBel J. for the minority concurring. In *R. v. Mahalingan*, [2008] S.C.J. No. 64 at par. 113, Charron J., for the minority dissenting, stated:

> Identifying the elements of issue estoppel is deceptively simple, but applying the concept can prove rather complex, as evidenced by the considerable body of jurisprudence it has generated: see Lange for a useful discussion of the relevant jurisprudence.

30 These two sentences were quoted or paraphrased, in whole or in part, in *Loewen v. Manitoba Teachers' Society*, [2015] M.J. No. 21 (C.A.) at par. 28; *Glenko Enterprises Ltd. v. Keller*, [2008] M.J. No. 65 (C.A.) at par. 31; *Lienaux v. 2301072 Nova Scotia Ltd.*, [2005] N.S.J. No. 247 (C.A.) at par. 15; leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 399; *Furlong v. Avalon Bookkeeping Services Ltd.*, [2004] N.J. No. 276 (C.A.) at par. 1; *Ramnarace v. Home*

CHAPTER 2

ISSUE ESTOPPEL

1. THE KEY PRINCIPLES[1]

The key principles governing the doctrine of issue estoppel as decided by the courts of Canada are:

- The same question test governs.
- The question to be decided in the second proceeding must be the same question that has been decided in the first proceeding.
- The question decided in the first proceeding, governing the same question test in the second proceeding, must be fundamental to the decision in the first proceeding, not collateral to the decision.
- The question decided in the first proceeding, governing the same question test in the second proceeding, includes all subject matter encompassing the question whether decided expressly or by necessary logical consequence.
- If the question has been decided in the first proceeding, the same question cannot be relitigated in a second proceeding based on a separate and distinct cause of action.
- The same parties, and their privies, cannot relitigate the same question in a second proceeding.
- The decision in the first proceeding must be a final decision on the question.
- The decision in the first proceeding must be a judicial decision on the question.
- The decision-making forum in the first proceeding must have the jurisdiction to decide the question.

---

[1] The key principles were quoted in *R. v. Martin*, [2008] O.J. No. 1596 (S.C.J.) at par. 10; *Bence v. Okanagan-Similkameen (Regional District)*, [2002] B.C.J. No. 2627 (S.C.) at par. 28; *Burgess v. Canada (Royal Canadian Mounted Police)*, [2001] B.C.J. No. 2411 (Prov. Ct.) at par. 16; paraphrased, in part, in *Lynch v. Segal*, [2007] O.J. No. 4983 (S.C.J.) at par. 57; *Walji v. Quraishi*, [2007] A.J. No. 1165 (Q.B.) at par. 54.

TAB 22

Case Name:

R. v. Martin

Between
Her Majesty the Queen, Applicant, and
Etienne Martin, Respondent

[2008] O.J. No. 1596

Court File No. CRIM(J)P1517/07

Ontario Superior Court of Justice

T.P. O'Connor J.

Heard: February 25-26, 2008.
Judgment: March 5, 2008.

(45 paras.)

Criminal law -- Preliminary inquiry -- Evidence -- Successful Crown application for a production order in the context of a criminal trial where the accused faced charges of second degree murder, conspiracy to commit robbery and robbery -- The Crown was not estopped from bringing the motion due to the preliminary inquiry judge's dismissal of a prior motion for a production order -- The Crown had no right of appeal from the decision, and it would be inequitable to prevent it from relitigating the issue -- Although the documents might draw the protection of litigation privilege, the Crown had met its low burden and established the crime fraud or criminal purpose exception.

Criminal law -- Evidence -- Privilege -- Privileged relationships -- Solicitor and client -- Successful Crown application for a production order in the context of a criminal trial where the accused faced charges of second degree murder, conspiracy to commit robbery and robbery -- The Crown was not estopped from bringing the motion due to the preliminary inquiry judge's dismissal of a prior motion for a production order -- The Crown had no right of appeal from the decision, and it would be inequitable to prevent it from relitigating the issue -- Although the documents might draw the protection of litigation privilege, the Crown had met its low burden and established the crime fraud or criminal purpose exception.

Crown application for a production order in the context of a criminal trial where the accused faced

charges of second degree murder, conspiracy to commit robbery and robbery. The Crown argued that the doctrine of fraud crime exception defeated both of the privileges relied upon by the defence. While awaiting their respective trials, a certain Lionel Brown, who had previously implicated the accused in a statement to police, was housed in the cell block as the accused. At that time, Brown prepared statements in favour of the defence. The Crown's application for production of the statements was denied by the defence on the grounds of solicitor/client privilege and/or litigation privilege. At the preliminary inquiry, Brown implicated the accused in the murder and claimed his written statements were coerced by the accused and his friends in the correctional institution. The Crown now argued the manner in which the statements were obtained constituted a criminal offence. The defence argued the Crown was stopped from bringing the motion, as the same application had been brought before the preliminary inquiry judge, who dismissed it.

HELD: Crown's application for a production order granted. The Crown was not estopped from bringing the motion before the court. The jurisprudence showed that res judicata did not apply to search instruments. An application for a production order was akin to an application for a search warrant. It was an investigative tool used in the criminal investigation process. The Crown had no right of appeal from the decision, and it would be inequitable to prevent it from re-litigating the issue. All three communications failed to qualify for protection under the solicitor-client privilege rules. At their highest, the statements and transcript of the interview might qualify as work product and draw the protection of the litigation privilege rule. They were communications between a solicitor, through his client, and a third party and between a solicitor through an agent (the investigator), and a third party, both for the purpose of gathering evidence to be used in litigation, i.e. the defence of a murder charge. However, there was a clear exception in the law to the use of that privilege, in the form of the so-called crime fraud or criminal purpose exception. The Crown had met its low burden to make out a prima facie case that the communications were the product of criminal conduct.

Counsel:

Brian McGuire, for the Applicant.

Mr. Richard Litkowski, Mr. Donald McLeod and Ms. Seble McKonnen, for the Respondent.

REASONS FOR RULING

1 [1] **T.P. O'CONNOR J.**:-- On July 17, 2005, Lamar Philip was stabbed to death in the stairwell of an apartment building in Mississauga during an alleged drug transaction. On August 2, 2005, Lionel Brown was arrested and charged with murder. He gave a statement to police implicating Etienne Martin in the killing. Mr. Martin was arrested on August 3, 2005, and charged

with second degree murder, conspiracy to commit robbery and robbery. Mr. Brown later pleaded guilty to manslaughter and was sentenced to six years in the penitentiary.

2 [2] While awaiting their respective trials, Brown and Martin were housed in the same cell block at Maplehurst Correctional Centre. In January 2006, Martin advised his counsel that Brown wished to assist Martin with his defence. He said Brown prepared a written statement containing what he intended to say if subpoenaed at Martin's trial. Martin's counsel reviewed it and indicated it was too vague and required specificity if it was to be of any assistance at trial. Martin obtained a revised version, signed by Brown, which his counsel found to be very helpful to his defence. Counsel then arranged for a private investigator to attend on Brown to ascertain that the statement was obtained voluntarily. The investigator recorded his interview with Brown. The interview has been transcribed. Martin's counsel satisfied himself that the statements were given voluntarily.

3 [3] Before Martin's preliminary inquiry, the Crown requested copies of Brown's statements and the transcript of the investigator's interview. The Defence declined to disclose them, claiming solicitor/client privilege and/or litigation privilege.

4 [4] At the preliminary inquiry, Brown gave evidence in accordance with his initial statement to the police implicating Martin in the murder. He said that the statements given to Martin and the investigator were coerced out of him by threats and actual violence from Martin and his friends at Maplehurst.

5 [5] The Crown says the manner in which the statements were obtained constituted a criminal offence, specifically an attempt to obstruct justice. A Crown application for a production order, brought before Martin's preliminary inquiry, was dismissed. The Crown seeks the same relief of this court, arguing that the doctrine of fraud crime exception defeats both of the privileges relied upon by the Defence. The Defence seeks dismissal of the application or in the alternative an exemption from any production order.

Background

6 [6] By way of brief background to the murder, the Crown alleges the two men conspired to lure the deceased, a drug dealer, to the building by offering to buy crack cocaine from him. However, their real intention was to rob him of the drugs, his money and other valuables. Martin armed himself with a knife with the intention of using it to "poke" Philip if he resisted. Martin wore a red bandanna over his face. Philip resisted and during a scuffle he pulled down the bandanna. Mr. Martin stabbed him once in the chest. Philip died a short time later.

Issue Estoppel

7 [7] The Respondent argues that the Crown is estopped from bringing this production order application at this time. It brought the same application before Clements J., the preliminary inquiry judge, who after careful analysis of the issues, dismissed it. Thus, says the Respondent, the matter is

res judicata and cannot be re-litigated.

8 [8] The Crown submits that issue estoppel does not apply in the circumstances of this application. The issue is properly before this trial court for three reasons: (1) evidentiary rulings at preliminary hearings are not final determinations of legal issues (R. v. Duhamel, [1984] 2 S.C.R. 555); (2) a production order is a search tool, akin to a search warrant, where one is not precluded from going before another judicial officer if unsuccessful the first time (R. v. Colbourne (2001), 157 C.C.C. (3d) 273 (Ont. C.A.), and R. v. Duchcherer, 2006 BCCA 171); and (3) there is only a limited right of appeal from an unsuccessful application for a search warrant/production order (R. v. Church of Scientology of Toronto (1987), 31 C.C.C. (3d) 449 (S.C.C.)).

9 [10] The Respondent argues that the doctrine of res judicata applies to this matter. The Crown, who lost the previous application, is trying to take another "kick at the can" by relitigating the same issue that has already been decided. The Respondent submits that while Clements J. ultimately presided over Mr. Marlin's preliminary hearing, he dealt with the request for a production order and exemption pursuant to his status under s. 487.012, before commencing the preliminary hearing. He therefore was not making an evidentiary ruling on a voir dire at a preliminary inquiry in his capacity as a preliminary inquiry judge.

10 [11] Relying on the principles set out by Donald J. Lange in The Doctrine of Res Judicata in Canada. 2nd ed. (LexisNexis Butterworths, 2004), the Respondent submits that all the prerequisites for the doctrine of issue estoppel apply in this case:

* the question to be decided in the second proceeding is the same question that has been decided in the first proceeding;
* the question decided in the first proceeding is fundamental to the decision in the first proceeding, not collateral to the decision;
* the question decided in the first proceeding includes all subject matter encompassing the question whether decided expressly or by necessary logical consequence;
* the decision in the first Proceeding is a final decision on the question;
* the decision in the first Proceeding is a judicial decision; and
* the decision-making forum in the first proceeding held jurisdiction to decide the question.

11 [12] The Respondent submits that because the Crown has not taken steps to appeal or judicially review the judgment of Clements J., the decision is final. The Crown cannot now seek to relitigate the same issue through a new motion. However, the Crown still has a right of appeal - after the trial if there is an acquittal. The Respondent submits that the Crown is launching a collateral attack on a ruling that has already been made.

12 [13] The Respondent also notes that issue estoppel applies to a second motion in the same proceeding dealing with the same issue, relying on Lange's chapter on "Dispositions Without a

Trial". He argues that parties in the first motion must bring forward all subject matter germane to the motion, and all subject matter that could have been brought forward on the first motion by exercise of reasonable diligence. Mr. Brown was available to give evidence before Clements J., but did not do so. The Crown was put on notice that this was an issue. The Respondent argues that it was incumbent upon the Crown to put all material before the court, and it cannot now file new evidence on a new motion. The rule in Leier v. Shumiatcher (1962), 37 W.W.R. 605 (Sask. C.A.) applies. Where the first motion is based on inadequate material, issue estoppel will apply to a second motion based on more complete material.

13 [14] The Respondent submits that fundamental fairness is more cogent in a criminal proceeding, and the Crown, in these circumstances, should not have the right to relitigate an issue previously decided.

Analysis

Ruling at a Voir Dire

14 [9] If Clements J.'s ruling is characterized as a legal ruling at a preliminary inquiry, then issue estoppel does not apply. Duhamel dealt with the issue of whether the Crown is estopped from relitigating the admissibility of a statement, ruled as inadmissible by a judge in a previous criminal proceeding. Although Lamer J. observed that it is desirable to avoid relitigation of issues, he held that this doctrine should not extend to findings made at a voir dire held at a preliminary inquiry. There is no appeal, and error is generally subject to limited review. In these circumstances, the remedy is to relitigate the legal issue at trial.

Search Instruments

15 [15] The criminal law context is different than the civil context in that a subsequent application for a search instrument may be made if the first application fails. Again, in Duchcherer, in which a justice of the peace rejected an RCMP officer's application for a search warrant, the officer then applied to a judge, on essentially the same information. The judge authorized the warrant. The judge knew of the previous rejection. Thackray J.A. concluded that the judge hearing the second application was exercising his discretion in a hearing de novo, and was not acting in an appellate capacity in review of the first refusal. Successive applications are proper, even if the information supporting the applications has not changed, because errors of law made within jurisdiction do not give rise to jurisdictional review. Successive applications afford an opportunity to seek an independent exercise of discretion.

16 [16] In Colbourne, the police sought a search warrant for a blood sample taken from the accused at a hospital. The first search warrant application failed. On the second application, the police officer failed to disclose the unsuccessful first application. In the circumstances of that case, where the information presented on the application was substantially different from the first, Doherty J.A. observed that disclosure of a prior refusal based on entirely different information

would not have precluded the issuing of a warrant by the second justice of the peace (para. 41). Res judicata was not even raised as an issue in that case.

17 [17] These cases demonstrate that res judicata does not apply to search instruments. Nothing prevents a police officer, or the Crown, from applying to a second judicial officer should the first application fail, so long as there is disclosure of the first failed application.

Right of Appeal Where There is No Jurisdictional Error

18 [18] There is only a limited right of appeal from search instrument applications. The purpose of search warrants or production orders is to gather evidence in the criminal context. In the context of search warrants, the right of review is restricted to jurisdictional error (Church of Scientology of Toronto, supra).

19 [19] In R. v. Dunphy, [2006] O.J. No. 850 (Sup. Ct. J.) at para. 37, the court observed that s. 487.012 is a relatively new section. It is a sub-section added to the search warrant sections of the Code. The wording of the operable portions of the section closely parallels the wording of the operative sections respecting search warrants. Both sections, for example, require that the issuing justice be satisfied by information on oath, that there are reasonable grounds to believe that an offence has been or is suspected to have been committed, and "... will afford evidence with respect to the commission of an offence ..." (s. 487(1)(b)) or "... will afford evidence respecting the commission of an offence ..." (s. 487.012(3)(b)). Glitherto J. applied the standard developed in relation to search warrants to the new provision. Given the similarities between search warrants and productions orders it is reasonable to assume that the same limited right of review applies.

20 [20] Nor is there a right of appeal from an interlocutory order of a judge made in the application of principles determining privilege (Canada v. Scales, 2008 NBCA 10 at para. 4). See also paragraph. 36 of Duchcherer, citing Paris J. in R. v. Bilert (1989), 28 C.P.R. (3d) 65 (B.C.S.C.), who observed that an error made by a provincial court judge at a preliminary inquiry on a question of fact or the admissibility of evidence does not deprive him of jurisdiction and render his decision amenable to correction by prerogative writ.

21 [21] Clements J. made no jurisdictional error in his judgment.

Does issue estoppel apply?

22 [22] The issue before the court is whether the elements of issue estoppel have been met: (a) the same question, and not collateral to the first decision; (b) the same parties; (c) a final decision; (d) a judicial decision; and (e) jurisdiction to decide the question. The main element in dispute between the parties is the finality of the decision.

23 [23] The Supreme Court in Duhamel makes it clear that issue estoppel does not apply to findings in voir dires held at preliminary inquiries. There is no appeal to these findings, and error is

generally subject to limited review. In the application before Clements J., the Crown applied for a production order pursuant to s. 487.012 of the Code, and the Defence applied for an exemption under s. 487.015. Under s. 487.012, a justice or judge may order a person, other than the person under investigation for an offence referred to in para. 3(a), to produce documents or copies of them. I agree with the Respondent that Clements J. was acting not as a preliminary inquiry judge in determining this application, but under the authority given to him by the Code. It cannot be said, therefore, that issue estoppel does not apply because the nature of Clements J.'s refusal was a legal ruling at a preliminary inquiry.

24 [24] The rationale in Duhamel, however, may apply if there is no appeal or a limited right of review from Clements J.'s refusal to grant the production order.

25 [25] As discussed above, an application for a production order is akin to an application for a search warrant. Like a search warrant, a production order is an investigative tool used in the criminal investigation process. The British Columbia Court of Appeal has held that successive applications for search warrants are proper, with disclosure of the first application, because there is no process for reviewing an error in law made within jurisdiction (Duchcherer). The remedy is a hearing de novo of the application. As in the case of search warrants, the right of review of a production order is limited to jurisdictional error. In these circumstances, issue estoppel cannot apply to bar the Crown's application. Thus, as the Crown points out, it has no effective right of appeal from the decision of Clements J. and it would be inequitable to prevent it from relitigating the issue.

26 [26] I find the Crown is not estopped from bringing this motion before this Court.

Solicitor-Client Privilege or Litigation Privilege?

27 [27] The Crown argues that solicitor-client privilege is distinctly different from litigation privilege, also sometimes referred to as work-product privilege.

28 [28] I agree.

29 [29] In Blank v. Canada (Minister of Justice), [2006] S.C.J. No. 39 (S.C.C.), the court defined the two concepts and clarified the difference between them. At paragraph 33, Fish J., for the majority, stated "... the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences." In defining those differences the court adopted the position of Sharpe J.A. in his 1984 Special Lectures of the Law Society of Upper Canada article Claiming Privilege in the Discovery Process at pages 164-165:

> ... There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third

> parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process.
>
> Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client). (emphasis added)

30 [30] In the case at bar the communications between Martin, the accused, and a third party, Brown, in the circumstances that Martin describes, cannot be characterized as solicitor-client communications. Martin says Brown approached him and voluntarily provided a version of the murder that exculpated Martin. His counsel suggested to Martin that he ask Brown to be more specific in the statement. Brown provided a second version, this one signed by him. Counsel then had his investigator interview Brown to take a statement and to determine that the written statement had been made freely and voluntarily. The interview was audio taped and transcribed.

31 [31] The obtaining and taking of the three statements were not confidential conversations between a client and his solicitor. They included a Crown witness. The purpose of the statements was to gather evidence for use at Martin's trial. The Respondent agrees that the first statement would not qualify for any privilege. In any event, it no longer exists. It may have been subsumed in the second statement. He argues that because Martin's counsel had some involvement in the second and third (audio taped) statements they qualify for protection under one or other of the solicitor-client or litigation privilege.

32 [32] I find that all three communications fail to qualify for protection under solicitor-client privilege rules. Only the telephone conversations between Martin and his counsel during the creation and gathering of them could be argued are solicitor-client communications. However, the Crown is not seeking access to them. Thus, at their highest, the statements and transcript of the interview may qualify as work product and draw the protection of the litigation privilege rule. They were communications between a solicitor, through his client, and a third party and between a solicitor through an agent (the investigator), and a third party, both for the purpose of gathering evidence to be used in litigation, i.e. the defence of a murder charge.

The Fraud Crime Exception

33 [33] However, even if the statements appear to qualify for the litigation privilege protection, there is a clear exception in law to the use of that privilege. The so-called crime fraud or criminal purpose exception was defined by Dickson J. in Solosky v. The Queen (1979), 50 C.C.C. (2d) 495 (S.C.C.), who said at page 507:

> ... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwilling dupe or knowing participant ...

34 [34] And in Descoteaux et. al v. Mierzwiiiski and Attorney General of Quebec et al. (1982), 70 C.C.C. (2d) 385 (S.C.C.), Lamer J. said at page 398:

> Communications made in order to facilitate the commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith.

35 [35] In the case at bar, Brown's evidence at Martin's preliminary inquiry was that he was coerced by threats and an assault by Martin and his friends to get him to recant his statement to the police.

36 [36] On this application, the parties disagree as to the standard of proof required of the party seeking disclosure of material through the crime fraud exception. The Respondent argues that the preferred line of cases holds that the appropriate standard is the balance of probabilities.

37 [37] In R. v. Serfaty, [2004] O.J. No. 1952 (Sup. Ct. J.), Molloy J. relied on several cases to conclude at paragraph 23 that "[a]lthough I am not aware of any other authority directly on point, the general case law on the standard of proof to be applied on a voir dire supports the conclusion that the appropriate standard here is the balance of probabilities." See R. v. Evans, [1993] 3 S.C.R. 653, and R. v. Arp, [1998] 3 S.C.R. 339. In the English case of Buttes Gas and Oil Co. v. Hammer (No. 3), [1980] 3 All E.R. 475 at 486, Lord Denning held that to set aside the privilege "there must be strong evidence of fraud such that the court can say 'This is such an obvious fraud that he should not be allowed to shelter behind the cloak of privilege,'" See also R. v. Shirose (1999), 133 C.C.C.

(3d) 257 (S.C.C.), wherein Binnie J. for the Supreme Court of Canada, after a lengthy analysis of the issue, stated at paragraph 62, "In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a 'dupe or conspirator'".

38 [38] However, these cases and others relied upon by the Respondent deal with application of the crime fraud exception to the solicitor-client privilege, not to the litigation privilege. As noted above, there are distinct differences between the two protections.

39 [39] Several cases review the standard of proof when the applicant is seeking an exception to the litigation privilege protection, as in the case at bar.

40 [40] In Blank, at paragraph 45, the court stated that "... [E]ven where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed ...". A 'prima facie showing of actionable misconduct' is a significantly lower standard than proof on a balance of probabilities.

41 [41] In R. v. Swearengen, [2003] O.J. No. 4489 (Sup. C.J.), Pierce J., in a case with very similar facts to the one at bar, found the "... burden of proof in establishing that the criminal purpose exception applies to documents seized from a lawyer's office falls on the claimant. In this instance, it is the Crown. The standard is a prima facie case: that is, evidence that goes beyond allegation, but is not as cogent as proof on a balance of probabilities. See R. v. Hilborn, [1990] B.C.J. No. 1141 (Sup. C.J.)." Again, the standard is found to be a prima facie case only.

42 [42] In Swearengen, the two complainants in a sexual assault case testified at the preliminary inquiry about communications they made to the lawyer for the accused at the accused's request. The court found that the Crown had made out a prima facie case that the communications were for a criminal purpose. It ordered the lawyer's notes of the conversations released to the Crown.

43 [43] I find that the standard of proof in the circumstances of this case is as set out in Blank, Swearengen, Hilborn and other cases.

44 [44] The Respondent argues that Brown's credibility is highly suspect due to his lengthy criminal record and his desire at the time to make a deal with the Crown. However, his credibility is a matter for the consideration of the trier of fact, the jury, in this trial. I find that the Crown has met its low burden. It has made out a prima facie case that the communications were the product of criminal conduct, that is, they were induced by Martin and others for the purpose of obstructing justice. That the police have not laid a charge of attempting to obstruct justice against Martin is not fatal to the issue of whether a case has been made to the required standard. They may have strategic reasons for failing to do so. The laying of a charge may have bolstered the Crown's argument somewhat. But failure to do so does not reduce its proof below the prima facie case standard.

Result

45 [45] The Crown's application for a production order is granted. The Respondent's applications for dismissal of the Crown's application or in the alternative for an exemption from the production order are dismissed. The documents to be produced to the Crown include a statement signed by Lionel Brown given at the request of Etienne Martin while both were inmates at Maplehurst Correctional Centre and an audio recording and transcript of same made during an interview of Lionel Brown by Thomas A. Klatt and Kim Carr at Maplehurst on February 8, 2006.

T.P. O'CONNOR J.

TAB 23

In the Court of Appeal of Alberta

Citation: Alberta (Minister of Finance) v. Bang, 2007 ABCA 344

Date: 20071107
Docket: 0503-0278-AC
Registry: Edmonton

2007 ABCA 344 (CanLII)

Between:

Her Majesty the Queen In Right of Alberta as Represented by the Minister of Finance, Alberta Human Resources and Employment

Respondent
(Plaintiff)

- and -

Lisa Bang

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.W. Perras
Dated the 29th day of March, 2005
Filed the 17th day of June, 2005
(Docket: 0203-18607)

Memorandum of Judgment

The Court:

[1] This is an appeal from summary judgment in favor of the plaintiff Her Majesty. The claim is for return of monthly government payments said to have been procured through misrepresentation (concealing the defendant's marriage).

[2] The statement of claim does not plead the underlying facts, and is conclusory. That is doubtless because the affidavit in support of summary judgment for the plaintiff exhibits a 2001 decision of a statutory Citizen's Appeal Panel. It dismissed an appeal by the defendant and upheld a decision to order a repayment of the past payments. The affidavit does not really swear to any other facts (apart from that decision) which would support a judgment. So the present suit is somewhat in the nature of a suit on a judgment.

[3] Neither party suggested to the Court of Appeal that the underlying facts should be tried. After two hearings on the subject, the last four days long, that is not surprising. Economics would also loom. Instead, each side claimed issue estoppel in its favor. The plaintiff says that the obligation to repay is ***res judicata*** because of the 2001 panel decision ordering repayment. The defendant says that the obligation to repay is nonexistent because of ***res judicata*** stemming from an earlier 1998 panel decision on an earlier appeal. The defendant now argues that the two decisions were about the same subject.

[4] Neither the 1998 nor the 2001 decision was appealed further. Neither was the subject of any judicial review proceedings, and the time for that has long since expired.

[5] The actual formal decisions at the end of the panels' reasons are not at all the same. But each decision recites facts (and indeed the 2001 one is very long). It appears that the time period covered by the two decisions largely overlaps. Furthermore, each decision is about allegedly concealing the defendant's relationship to the same man. The 1998 decision was all about whether they were living together, presumably as a common-law couple. She never told the Department that she was, and told them that she was single. There is no mention of marriage in that 1998 decision. The 1998 decision accepted both of their statements that they were living apart. All the information came from Edmonton. The 1998 decision allowed her appeal from closure of her file. So apparently she then resumed getting monthly payments.

[6] The 2001 decision was about whether the defendant was married. The Department had recently got anonymous information that years before, she had gone through a marriage ceremony with the same man. The 2001 panel held a hearing of several days, with different witnesses, and information about immigration sponsors in Winnipeg, and a wedding ceremony for the couple which the sponsors had attended, backed up with a wedding invitation, gifts, etc.

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[7] This time, the man in question asserted that the ceremony or reception was a sham, or social, was never reported to Vital Statistics, and was devoid of documents. There was a great deal of other indirect information. The defendant's counsel objected to that evidence about the ceremony (or whatever it was), saying that that information could have been got before, with due diligence.

[8] The 2001 panel held there was a marital relation, and ordered repayment of the past monthly payments.

[9] The defendant's statement of defence to the present suit simply denies any debt or overpayment. It does not plead anything else, not even the issue estoppel argued before us.

[10] Her affidavit opposing summary judgment denies overpayment, or that she lived with or was supported by the man in question. It says nothing about marriage. It complains of the weighing of evidence by the 2001 panel. It does not mention the 1998 panel decision.

[11] The chambers judge gave written reasons finding that issue estoppel was created by the 2001 decision, and he expressly exercised a discretion to apply that issue estoppel. He held that the 2001 decision was made within jurisdiction and without breach of natural justice. He held that the 1998 decision was on a different topic.

[12] On appeal, counsel for the defendant appellant first argued that the 2001 decision relied on the wrong section in the ***Social Development Act***. There is no merit to that point. She also argued time's expiry (limitations), but they were neither pled nor supported by any evidence, and it is too late to raise that on appeal. She raised public policy, and asked for a stay, but the same remarks apply. She argued that the rules of natural justice were not observed by the 2001 panel, but that seemed to be a combination of the s. 16 vs. s. 17 argument plus an attempt to reweigh the evidence heard in 2001. It is not supported by anything in either affidavit, and so there is no evidence of it. There is no merit to that argument either.

[13] It is clear that there is no proper triable issue raised by most of the arguments by the defendant's counsel, and so most would not bar the summary judgment given.

[14] Only one issue raises any complications. Counsel for the defendant also argued that the 1998 decision created issue estoppel (which as noted was not pleaded). However, she also argued that the 2001 decision therefore could not validly contradict the 1998 decision. The 1998 decision is not in the sworn evidence, but is in the agreement as to contents, and no one objected to our looking at it. It would have been much better to plead it.

[15] Counsel for the respondent plaintiff concedes that one appeal panel has no general power to rehear and vary the decision of an earlier appeal panel on the same topic. However, he submits that there is an exception where there is new relevant evidence not discoverable earlier by due diligence. He does not produce authority directly on point, but that proposition is certainly arguable.

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[16] In the light of the foregoing, the one remaining topic is whether the 2001 decision creates issue estoppel, or whether the Court of Queen's Bench should have had an operative doubt as to its validity. That doubt can arise on this record (if at all) only from the 1998 decision. Is there contradiction between the two decisions? Did the 1998 decision bar reopening the matter in 2001? Was there enough new evidence? Should it have been found earlier by due diligence?

[17] Our Court is thus left in an awkward situation, given the sparsity of legal authority cited to us. We could do a good deal more legal research on our own, and possibly surprise counsel with the authorities which we found. The research is not that simple. The role of ***res judicata*** between administrative tribunals is not well settled. And much of administrative law has changed radically in the last 20 years and is still in flux, especially in the areas of jurisdiction, nullity, and what is the standard of review on questions of jurisdiction.

[18] Of course we are well aware of the more recent case law prohibiting collateral attack upon administrative tribunals' orders; some authority on that was cited. If the supposed conflict between the 1998 and 2001 decisions produced error in the 2001 decision, that is irrelevant. The 2001 decision was neither appealed nor quashed, and it is too late to do either. So the defendant needs to go further and show nullity of the 2001 decision, in order to win the suit in debt.

[19] Because the law was not fully argued before us, we cannot (on the few authorities presented) be sure which facts must be known or decided to rule on these issues. Nor whether they are contested here. Therefore, our power under R. 159(6) to decide ourselves any questions of law raised by the summary judgment motion is not a practical solution here. It would be still less practical vaguely to tell the Court of Queen's Bench to decide such a legal issue, on this record.

[20] So the position of the defendant is very thin and narrow. We could dismiss the appeal on a number of procedural grounds. It would be unjust, and contrary to well-settled authority, to allow the defendant to amend her pleadings to raise new issues, or to force or permit the plaintiff to prove the underlying facts of the alleged debt.

[21] However, in view of the fairly large amounts involved, the peculiar facts, the narrow pleadings on both sides, and somewhat unsettled law, we will act under R. 159(3), (4), (6.1) and direct trial in Queen's Bench of two related issues, which we now state.

1. The defendant affirms, and the plaintiff denies that the March 21, 2001 decision of the Citizen's Appeal Tribunal is now a nullity because the September 2, 1998 decision of another appeal panel was contrary and on the same topic.

2. The plaintiff affirms, and the defendant denies, that the 2001 panel had before it additional significant evidence supporting the 2001 decision which

> the 1998 panel did not have, which evidence the Department would not have obtained before the 1998 decision by the exercise of due diligence.

[22] The first issue is one of both law and fact, and new legal research will be necessary. The second issue is one of fact. The second issue is ancillary to the first, not freestanding. If the law is not as argued before us, the second may prove to be academic.

[23] If the answer to issue #1 is yes, now a nullity, then the entire action must be dismissed. If the answer to the first issue is no, not now a nullity, then the action must be allowed and the judgment prayed for will be entered in favor of the plaintiff. When we say a nullity, we mean that. Voidability will not suffice. Neither will other grounds of attack which might have succeeded had there been timely judicial review proceedings (which did not occur).

[24] There will be no trial of whether the defendant and the man in question were in fact married or living together, nor of quantum.

[25] Any dispute as to the procedure, timing, or conduct of these issues will be settled on notice by a Master. However, neither party can move to raise other issues, by amendment of pleadings or otherwise.

[26] Each party will bear its own costs on appeal, and costs of the summary judgment motion.

Appeal heard on November 1, 2007

Memorandum filed at Edmonton, Alberta
this 7th day of November, 2007

Côté J.A.

Authorized to sign for: Paperny J.A.

Greckol J.

2007 ABCA 344 (CanLII)

Appearances:

G.K. Epp
for the Respondent (Plaintiff)

K.S.V. Linton
for the Appellant (Defendant)

2007 ABCA 344 (CanLII)

TAB 24

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.

Held: The appeal should be allowed.

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

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.

Arrêt : Le pourvoi est accueilli.

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.

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado*

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.

Jurisprudence

Arrêt examiné : *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248; **arrêt critiqué en partie :** *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **arrêts mentionnés :** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell c. La Reine* (1894), 22 R.C.S. 553; *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; *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103; *Bell c. Miller* (1862), 9 Gr. 385; *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *McIntosh c. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay c. Lafleur*, [1965] R.C.S. 12; *Thoday c. Thoday*,

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

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1).
Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. *idem*, s. 9(2)], 67(1) [am. *idem*, s. 10(1)], (2) [rep. & sub. *idem*, s. 10(2)], (3) [ad. *idem*], (5) [*idem*], (7) [*idem*], 68(1) [am. *idem*, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).
Employment Standards Improvement Act, 1996, S.O. 1996, c. 23, s. 19(1).
O. Reg. 626/00, s. 1(1).

Authors Cited

American Law Institute. *Restatement of the Law, Second: Judgments 2d*, vol. 2. St. Paul, Minn.: American Law Institute Publishers, 1982.
Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*, vol. 2. Toronto: Canvasback, 1998 (loose-leaf updated 2001, release 2).
Handley, K. R. "Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214.
Holmested, George Smith, and Garry D. Watson. *Ontario Civil Procedure*, vol. 3 Supp. Toronto: Carswell, 1984 (loose-leaf updated 2000, release 3).

[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.

Lois et règlements cités

Loi de 1996 sur l'amélioration des normes d'emploi, L.O. 1996, ch. 23, art. 19(1).
Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14, art. 1 « salaire », 2(2), 6, 65(1)a), b), c) [abr. & rempl. 1991, ch. 16 (suppl.), art. 9(1)], (7) [aj. *idem*, art. 9(2)], 67(1) [mod. *idem*, art. 10(1)], (2) [abr. & rempl. *idem*, art. 10(2)], (3) [aj. *idem*], (5) [*idem*], (7) [*idem*], 68(1) [mod. *idem*, art. 11(1); mod. 1991, ch. 5, art. 16; mod. 1993, ch. 27, ann.], (3) [abr. & rempl. 1991, ch. 16 (suppl.), art. 11(2)], (7).
Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 23(1).
Règl. de l'Ont. 626/00, art. 1(1).

Doctrine citée

American Law Institute. *Restatement of the Law, Second : Judgments 2d*, vol. 2. St. Paul, Minn. : American Law Institute Publishers, 1982.
Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*, vol. 2. Toronto : Canvasback, 1998 (loose-leaf updated 2001, release 2).
Handley, K. R. « Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214.
Holmested, George Smith, and Garry D. Watson. *Ontario Civil Procedure*, vol. 3 Supp. Toronto : Carswell, 1984 (loose-leaf updated 2000, release 3).

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.

Spencer Bower, George, and Sir Alexander Kingcome Turner. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley. London, U.K.: Butterworths, 1996.

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

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.

Spencer Bower, George, and Sir Alexander Kingcome Turner. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley. London, U.K. : Butterworths, 1996.

Watson, Garry D. « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

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.

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.

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.

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.

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.

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.

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

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.

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.

22 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.

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

23 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 adjudica-

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

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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.

(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*

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.

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.

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) *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 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 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.

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

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

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

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

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

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it

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.

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

[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.

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 :

[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. . .

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

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.

TAB 25

Indexed as:

Kaloti v. Canada (Minister of Citizenship and Immigration)

Between
Yaspal Singh Kaloti, appellant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 365

[2000] A.C.F. no 365

[2000] 3 F.C. 390

[2000] 3 C.F. 390

186 D.L.R. (4th) 120

285 N.R. 184

4 Imm. L.R. (3d) 1

95 A.C.W.S. (3d) 1117

Court File No. A-526-98

Federal Court of Appeal
Toronto, Ontario

Décary, Sexton and Evans JJ.

Heard: March 3, 2000.
Judgment: March 13, 2000.

(15 paras.)

Counsel:

Stephen W. Green, for the appellant. Kevin Lunney, for the respondent.

The judgment of the Court was delivered by

1 **DÉCARY J.**:-- In August 1990, the appellant filed an undertaking of assistance to sponsor the application for permanent residence of his fiancée whom he subsequently married in India in February 1993. In May 1993, a visa officer refused his application pursuant to subsection 4(3) of the Immigration Regulations ("the Regulations") on the ground that the marriage was not bona fide but was entered into by the spouse primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with the appellant. The visa officer determined that the appellant's spouse was therefore not a member of the family class.

2 The appellant appealed to the Appeal Division of the Immigration and Refugee Board (hereinafter "the Appeal Division") pursuant to paragraph 77(3)(a) of the Immigration Act. The Appeal Division confirmed the decision of the visa officer and dismissed the appeal for lack of jurisdiction on February 20, 1995 because the appellant's spouse was a person described in subsection 4(3) of the Immigration Regulations and therefore not a member of the family class.

3 In 1995, the appellant made a new application to sponsor his spouse for permanent residence and paid a new fee for processing. The appellant's spouse was interviewed on October 17, 1995 in India and the appellant was interviewed on January 22, 1996. Following the interviews, the visa officer refused the application for permanent residence on the same grounds as are outlined above. The appellant filed a new notice of appeal to the Appeal Division.

4 The respondent then made a motion to dismiss the appeal for lack of jurisdiction on the basis of res judicata. The motion was granted by the Appeal Division. The appellant applied to the Federal Court, Trial Division for leave and for judicial review. Mr. Justice Dubé dismissed the application for judicial review[1] but certified the following question of general importance[2]:

> "May an applicant re-apply for admission to Canada of his spouse as a member of the family class under s. 4(3) of the Immigration Regulations on the ground of a change of circumstances where a previous application by him has been denied on the ground that she entered into the marriage primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with her spouse?"

5 Relying on the decision of this Court in O'Brien v. Canada (Attorney General)[3], Dubé J. expressed himself as follows[4]:

> [12] Consequently, I must find that, generally, res judicata has an application in public law. Otherwise applicants could re-apply "ad infinitum" and "ad nauseam"

> with the same application, an abuse of the process of administrative tribunals. However, that would not prevent an applicant from launching a second application based on change of circumstances provided, of course, that the change of circumstances was relevant to the matter to be decided.
>
> [13] Again, in the instant matter, the plain meaning of s. 4(3) of the Immigration Regulations is clearly centered on the intention of a spouse at the time of the marriage, a situation that cannot be affected by a subsequent change of intentions on her part. Therefore, the applicant's spouse was properly adjudged not to be a member of the family class and the matter became res judicata. It does not follow that she may not seek admission to Canada under some other provisions of the Immigration Act.

6 The respondent, who had relied in both instances below on the doctrine of res judicata, refined his strategy in his submissions before us. He submitted that the proceeding undertaken by the appellant before the Appeal Division was an abuse of process, of a kind "which the doctrine of res judicata seeks to prevent". According to counsel, resort to the doctrine of res judicata was "not ultimately necessary, as every statutory tribunal has an implied or ancillary jurisdiction to prevent an abuse of its own process".

7 The question as certified by the Motions Judge goes beyond the circumstances of this case. As phrased, it would invite an opinion as to the right of an applicant to even re-apply to a visa officer, an issue which does not arise here.

8 Also, the certified question speaks in terms of "a change of circumstances". These terms are inappropriate. The only "circumstance" in proceedings under subsection 4(3) of the Regulations is the intent of the sponsored spouse at the time of the marriage. That intention is fixed in time and cannot be changed. What the learned Judge must have meant, rather, was whether a new application could be made based on relevant and permissible new evidence pertaining to a spouse's intent at the time of marriage. However, in this case, as counsel for the appellant has conceded, for all practical purposes the second application was not based on any new evidence.

9 We are left with a rather simple question: does the Appeal Division have the authority to summarily dismiss an appeal when the appellant seeks to re-litigate, on essentially the same evidence, an issue which the Appeal Division has already decided?

10 The answer has to be in the affirmative. Rearguing a case in appeal for the sake of reargument offends public interest. It is well recognized that superior courts have the inherent jurisdiction to prevent an abuse of their process[5] and there is some suggestion that administrative tribunals do too[6].

11 Whether that suggestion with respect to administrative tribunals is well-founded need not be further explored here because by the very terms of its enabling statute, the Appeal Division is a

"court of record" which has, "as regards [...] matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record" (subsections 69.4(1) and (3) of the Immigration Act). Clearly, therefore, the Appeal Division has jurisdiction to control its process and to prevent its abuse. It may entertain, as it did in this case, preliminary motions to summarily dispose of an appeal which is but an abusive attempt to re-litigate what had been litigated in a previous appeal. A full hearing on the merits of the appeal is not necessary.

12 In the case at bar, counsel for the appellant expressed the view that it was open to an unsuccessful applicant to file a new sponsorship application and pay the scheduled fees in order to require the Appeal Board time and time again as the case may be, to go through a full hearing. The process, in other words, is there to be abused. That, of course, cannot be.

13 While the issue of abuse of process was not squarely raised with the Appeal Division and the Motions Judge, it is implicit in their reasons for judgment that they were both of the view that there was, in the instant case, an abuse of process. The Appeal Division used the expression "appeal by attrition" to describe what was really happening and the Motions Judge did use the very words "abuse of process". In the circumstances, it would serve no useful purpose to send the matter back for express consideration of the abuse of process argument. Nonetheless, one should remain aware of the distinction to be made between "res judicata" and "abuse of process" which has been recently described as follows by Auld L.J. in Bradford & Bingley Building Society v. Seddon[7]:

> In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances" [...] The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter [...]

14 I agree therefore with counsel for the respondent that it is not necessary in this case to resort to the doctrine of res judicata. The decision of the Appeal Division to summarily dismiss the appeal was open to it in the exercise of its jurisdiction to prevent an abuse of its process.

15 The appeal should be dismissed with costs.

DÉCARY J.
SEXTON J.:-- I agree.
EVANS J.:-- I agree.

1 The impugned decision is reported at (1998), 153 F.T.R. 289, 49 Imm.L.R. (2d) 187 (F.C.T.D.).

2 Supra, note 1 at 292.

3 (1993), 153 N.R. 313 (F.C.A).

4 Supra, note 1 at 292.

5 See R. v. Jewitt, [1985] 2 S.C.R. 128 at 131, Dickson, C.J.; Levi Strauss & Co. et al. v. Roadrunner Apparel Inc. (1997), 221 N.R. 93 at 97, (1997), 76 C.P.R. (3d) 129 at 134 (F.C.A.), Létourneau J.A.

6 Sawatsky v. Norris (1992), 10 O.R. (3d) 67 at 77 (Gen. Div.), Misener J. See, also, Nisshin Kisen Kaisha Ltd. v. CN, [1981] 1 F.C. 293 at 301 (F.C.T.D.), Addy J., aff'd [1982] 1 F.C. 530 (C.A.) without discussing this point.

7 [1999] 1 W.L.R. 1482 at 1490 (C.A.).

TAB 26

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the *Bankruptcy and Insolvency Act*], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

Authors Cited

Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1991.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

Lois et règlements cités

Employment Standards Act, R.S.O. 1970, ch. 147, art. 13(2).
Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

Doctrine citée

Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville, Qué.: Yvon Blais, 1990.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 27

Federal Court of Appeal | Cour d'appel fédérale

Date: 20161021

Dockets: A-534-15
A-535-15
A-536-15

Citation: 2016 FCA 257

CORAM: **TRUDEL J.A.**
STRATAS J.A.
SCOTT J.A.

Docket: A-534-15

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

BRI-CHEM SUPPLY LTD.

Respondent

Docket: A-535-15

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

EVER GREEN ECOLOGICAL SERVICES INC.

Respondent

Docket: A-536-15

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

SOUTHERN PACIFIC RESOURCE CORP.

Respondent

Heard at Ottawa, Ontario, on October 19, 2016.

Judgment delivered at Ottawa, Ontario, on October 21, 2016.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. SCOTT J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20161021

Dockets: A-534-15
A-535-15
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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] In three decisions dated October 16, 2015, the Canadian International Trade Tribunal upheld the ability of importers to correct certain customs declarations in order to obtain more favourable tariff treatment: *Bri-Chem Supply Ltd.* (file AP-2014-017); *Ever Green Ecological Services Inc.* (file AP-2014-027) and *Southern Pacific Resource Corp.* (file AP-2014-028). In the course of doing this, the Tribunal rejected the submissions of the agency that administers the tariff regime, the Canada Border Services Agency or CBSA.

[2] The Tribunal's decisions turned upon the Canadian International Trade Tribunal's interpretation of the *Customs Act*, R.S.C. 1985 (2d. Supp.), c. 1, particularly sections 32.2 and 74. On this, the Tribunal adopted the interpretations and reasoning in its earlier decision in *Frito-Lay Canada Inc.* (file AP-2010-002). In the course of its reasons, the Tribunal found that the

CBSA committed an abuse of process by failing to apply its earlier decision in *Frito-Lay* when administering the Act and by relitigating *Frito-Lay* before the Tribunal.

[3] The Tribunal's reasons for decision are set out in *Bri-Chem*; it adopted these reasons in *Ever Green* and *Southern Pacific*.

[4] The Attorney General of Canada appeals all three decisions and the appeals have been consolidated. The Attorney General also challenges the Tribunal's finding that the CBSA committed an abuse of process. These are the Court's reasons in the consolidated appeals. A copy of these reasons shall be placed in each court file.

[5] I conclude that the Tribunal's decisions, including its ruling on abuse of process, are reasonable. I do not fully agree with the principles the Tribunal applied in making the abuse of process ruling. Nevertheless, the ruling is sustainable on this record. Therefore, I would dismiss the appeals with costs.

B. The basic facts

[6] In these three cases, goods qualifying under the *North American Free Trade Agreement* (NAFTA) were imported into Canada from the United States duty-free using the Most Favoured Nation (MFN) tariff treatment. The importers declared certain tariff classifications for the goods.

[7] Later, as a result of CBSA audits, the importers discovered that the tariff classifications they had chosen for the goods were incorrect. After discovering their error, they filed a correction to the tariff classifications. They went further and notified CBSA of a change to the

tariff treatment: the goods went from a duty-free tariff classification with MFN tariff treatment to a duty-free classification with NAFTA treatment. If the tariff treatment did not change from MFN to NAFTA, the goods would have been subject to duty.

[8] In doing this, the importers relied upon section 32.2 of the *Customs Act*. In particular, subsection 32.2(2) provides that "an importer…of goods…shall, within ninety days after the importer…has reason to believe that…the declaration of tariff classification…is incorrect,…make a correction to the declaration". The importers did just that: within ninety days, they corrected the tariff classifications on the declarations. They also changed the tariff treatment from MFN to NAFTA.

[9] The CBSA objected to what the importers had done. The matter fell before the Tribunal. Before the Tribunal, the CBSA focused on the importers' choice of MFN tariff treatment and told the Tribunal that MFN treatment is "not an incorrect tariff treatment"; after all, the goods could indeed be subject to MFN treatment. Thus, the choice of MFN treatment could not be changed.

[10] In its reasons for decision in *Bri-Chem*, the Tribunal saw nothing wrong with what the importers had done (at para. 18):

> Importantly, Bri-Chem did not correct the "origin" of the goods; they were always stated as being of U.S. origin. When Bri-Chem corrected the tariff classification, the accompanying choice of the UST/NAFTA tariff treatment that was always available to its goods of U.S. origin simply maintained the status quo ante of the previously claimed zero rate of duty and was, therefore, revenue-neutral.

Further, in the Tribunal's view, the CBSA was following a wrong methodology: the CBSA was focusing on "a purported 'correction' to *tariff treatment*, whereas the proper analytical starting

point is that the only 'correction' that took place was to *tariff classification*" (at para. 17) [emphasis in original].

[11] The CBSA also took the position that importers are not entitled to claim the benefits of NAFTA more than one year after importation. The CBSA argued that the one-year limitation for applications for refunds under section 74 of the *Customs Act* applied to non-revenue corrections under section 32.2 of the Act. The Tribunal rejected this as follows (at paras. 22-23):

> Further, the CBSA's position continues to be predicated on a misunderstanding of the two regimes of the Act (section 32.2 for Corrections and section 74 for Refunds). What Parliament intended through section 32.2 was to ensure that erroneous declarations of origin, tariff classification and/or value for duty be corrected and that any duties owed be paid, *but only when duties are owing*.
>
> Meanwhile, subsection 74(1) applies to "…a person *who paid* duties on any imported goods…" which is clearly not the case here. Section 74 does not allow the CBSA to operate schemes which would ensnare importers into duties on goods that are legitimately entitled to enter Canada duty-free; that is tantamount to taxation in the absence of legislation.…[emphasis in original]

[12] The Tribunal stressed that its earlier decision in *Frito-Lay* decided all of these issues. It adopted all of its conclusions and reasoning in *Frito-Lay*.

[13] The Tribunal expressed concern that the CBSA had relitigated *Frito-Lay* without justification. Indeed, the CBSA had "knowingly frustrated importers from the applicability of Frito-Lay in either similar or even identical situations of fact" (at para. 24) and had "embark[ed] on what appears to have been a policy of outright disregard for Frito-Lay" (at para. 25). In support of its comments, the Tribunal stressed the need for its decisions to be respected in order to further stability and predictability (at para. 37):

> …respectful and responsible application of Tribunal precedent is important for stability and predictability in the importing community. Importers should not be subjected to costs and unfair litigation of cases for matters that have already been dealt with through proper legal authority.

[14] The Attorney General appeals to this Court from the Tribunal's decisions.

C. Standard of review

[15] In this Court, the parties submit that we are to review the Canadian International Trade Tribunal's decisions on the basis of reasonableness. I agree. The Tribunal is entitled to a margin of appreciation because it has "particular familiarity" with the *Customs Act* provisions it interpreted and the provisions are "closely connected to its function": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54; see also *C.B. Powell Limited v. Canada (Border Services Agency)*, 2011 FCA 137, 418 N.R. 33 at paras. 19-22.

[16] The Supreme Court of Canada recently adopted reasonableness as the standard of review of Tribunal interpretations of the *Customs Tariff*, S.C. 1997, c. 36. It noted that the Tribunal "has specific expertise in interpreting 'the very complex customs tariff and the international and national rules for its interpretation'" and the questions of legislative interpretation involved in the case were "of 'a very technical nature' which the [Tribunal] will often be better equipped than a reviewing court to answer": *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 17, citing *Star Choice Television Network Inc. v. Canada (Customs and Revenue Agency)*, 2004 FCA 153 at para. 7 and *Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 N.R. 381 at para. 5.

[17] The words of the Supreme Court in *Igloo* apply equally here. The *Customs Tariff* at issue in *Igloo* and the *Customs Act* at issue here are different statutes. But they are related. Further the particular issues of statutory interpretation concerning the provisions at issue here are similar to those in *Igloo* in nature and technical complexity.

D. Reviewing the Tribunal's decision for reasonableness

[18] In these consolidated appeals, we need not delve into any of the subtleties in the law governing the meaning of "reasonableness" and how much deference the Tribunal is owed: even if the standard of review were correctness, I would agree with the Canadian International Trade Tribunal's interpretation of the relevant provisions substantially for the reasons it gave.

[19] As mentioned above, the Tribunal adopted its earlier decision in *Frito-Lay* in the three decisions now under appeal. The outcome of the Tribunal in *Frito-Lay* is reasonable; indeed, I agree with that outcome and the reasoning offered in support of it. That reasoning is consistent with the reasons of this Court in *C.B. Powell*, above.

[20] Before us, the Attorney General submits, as it did before the Tribunal in this case and as in *Frito-Lay*, that a declaration of MFN tariff treatment is not wrong and, thus, does not fall for correction within the context of a section 32.2 revenue-neutral correction to tariff classification and tariff treatment.

[21] The respondents point out that if that is true, then a practical, real-world problem arises, one that the Tribunal—possessing real-world knowledge and expertise—appreciated and took into account when interpreting section 32.2. An importer that does not claim NAFTA treatment

at the time of importation and that does not seek a refund of duties under section 74 of the *Customs Act* finds itself in a dilemma. In order to claim NAFTA treatment, the importer must have a valid certificate of origin at the time of making the declaration. But often the importer is waiting to receive the certificate of origin from the exporter or manufacturer. As a result, the importer has no choice but to claim MFN treatment. Under the Attorney General's interpretation, the importer would never be able to change the tariff treatment even after receiving a valid certificate of origin from the manufacturer or exporter.

[22] The respondents note that the CBSA recognized the unacceptability of this problem and came up with an "administrative" solution where it would treat non-revenue claims for NAFTA tariff treatment as applications for refunds under section 74. But, as the Tribunal correctly noted, this was contrary to the wording of section 74. In its view, this was a "spurious theory" adopted by the CBSA to avoid the application of *Frito-Lay*.

[23] Whether or not a correction to tariff classification under section 32.2 allows for a concurrent re-evaluation of tariff treatment is a matter of statutory interpretation. In this Court and before the Tribunal, the Attorney General interpreted section 32.2 narrowly, arguing that a correction to tariff classification cannot lead to a subsequent correction of tariff treatment.

[24] The Tribunal disagreed, noting that tariff classification cannot be decoupled from tariff treatment.

[25] In my view, this interpretation is reasonable. The Tribunal—equipped to appreciate how the technical provisions of the *Customs Act* address the real-world problems of trade—reached an acceptable interpretation of section 32.2 consistent with its wording. Given that an importer

will choose tariff treatment based on tariff classification, a correction of one necessitates the re-evaluation of the other.

[26] The Attorney General submits that sections 35.1 and 74 of the *Customs Act*, section 24 of the *Customs Tariff* and the *Proof of Origin of Imported Goods Regulations*, SOR/98-52 support its position.

[27] Again, I disagree. Section 35.1 of the *Customs Act* does not limit when an importer may claim NAFTA tariff treatment, but rather sets out how an importer may prove the origin of goods. Section 74 of the *Customs Act* does not provide any general limitation on claims for NAFTA tariff treatment. Finally, section 24 of the *Customs Tariff* and the *Proof of Origin of Imported Goods Regulations* do not set out rules limiting when claims for NAFTA tariff treatment may be made.

[28] Indeed this submission was soundly and correctly rejected by the Tribunal in *Frito-Lay* (at para. 64):

> [T]hat position is not founded in law … section 74 of the Act is applicable *only* in the case of a *refund* application. Accordingly, because none of the transactions involve a request for a refund, section 74 is wholly inapplicable to this matter. Rather, according to subsection 32.2(4), the *obligation* to make the corrections provided for under subsection 32.2(2) exists for a four-year period after initial accounting… [emphasis in original]

[29] The Tribunal's decision is also consistent with articles 501-503 of NAFTA. On this, the Attorney General pointed us to certain United States cases. These interpret certain domestic provisions designed to implement NAFTA. The Attorney General submitted that these interpretations differ from the interpretations adopted by the Tribunal. That may be so, but the

interpretations of domestic provisions by United States courts do not suggest that the Tribunal, interpreting differently-worded legislation, has adopted an unreasonable interpretation of that legislation.

[30] Before us, the Attorney General invoked NAFTA article 501, paragraph 502(3) and subparagraph 502(1)(*c*) in support of the proposition that an importer may claim the benefits of NAFTA on only three occasions: at the time of accounting, when applying for a refund and at the request of a customs officer. I disagree.

[31] Article 501 states that a NAFTA certificate of origin "shall be accepted by [a NAFTA Party's] customs administration for four years after the date the [c]ertificate was signed.". It does not state that a NAFTA claim must be made at the time of accounting. Article 502(3) permits a claim for a refund of duties to be made within one year of the date of importation. It does not impose a one-year limit on claims for NAFTA when no refund is sought. And Article 502(1)(*c*) simply requires an importer who has made a NAFTA claim to produce a certificate of origin at the request of the administration, nothing more.

[32] For the foregoing reasons, the Tribunal decisions are reasonable.

E. The abuse of process issue: can administrators decline to follow tribunal decisions?

[33] As mentioned above, the Canadian International Trade Tribunal found that the CBSA had committed an abuse of process: it failed to apply the Tribunal's earlier decision in *Frito-Lay* when administering the *Customs Act* and it improperly relitigated *Frito-Lay* before the Tribunal.

[34] In the course of its reasons, the Tribunal noted that the Attorney General, arguably acting on the CBSA's behalf, had appealed *Frito-Lay* to this Court but had discontinued the appeal. In its view, that should have been the end of the matter. Thereafter, the CBSA should have applied *Frito-Lay* when administering the Act. It should have applied *Frito-Lay* when considering the respondent importers' requests for correction in these three cases.

[35] In this Court, the Attorney General challenges the Tribunal's finding of abuse of process. The Attorney General submits that it is inconsistent with the legal principle that one panel of an administrative tribunal does not bind later panels. Based on this principle, it says that the CBSA was free to relitigate *Frito-Lay* in another case before a later panel of the Tribunal.

[36] The respondents disagree. They submit that the Tribunal was quite right in finding that the CBSA had committed an abuse of process. Echoing the reasons of the Tribunal, the respondents submit that an administrator like the CBSA is bound by and must always follow the jurisprudence of a tribunal that adjudicates its cases. The CBSA was wrong in failing to apply the Tribunal's decision in *Frito-Lay* and committed an abuse of process in relitigating it before the Tribunal.

[37] In my view, more principles than those identified by the parties bear upon this problem. And the principles are more nuanced than the parties and the Tribunal suggest. Despite this, in response to questioning from the Court, counsel largely agreed on the principles, their nature and their operation.

[38] It will be necessary to discuss the principles at a level of generality. In this discussion, I shall describe an adjudicative tribunal like the Canadian International Trade Tribunal as a "tribunal" and an administrator like the CBSA as an "administrator".

[39] Tribunals and administrators are both public bodies established by legislation. Both wield public power and both must obey all relevant legislation, often the same legislation. They are independent from each other. But they are in a hierarchical relationship. Tribunals pass judgment on the acts of administrators.

[40] The starting point for tribunals is that while they should try to follow their earlier decisions, they are not bound by them: *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at pages 327-28 and 333; *Tremblay v. Quebec (Commission des affairs sociales)*, [1992] 1 S.C.R. 952 at pages 974; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at pages 798-799. Further, within limits, it is possible for one tribunal panel to disagree with another and still act reasonably: *Wilson v. Atomic Energy of Canada*, 2016 SCC 29, 399 D.L.R. (4th) 193.

[41] However, that is only the starting point. Other principles come to bear. To name one, a tribunal is constrained by any rulings and guidance given by courts that govern the facts and

issues in the case: *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 NR 120 at paras. 18-19.

[42] Another principle is that, in a case like this, Parliament—with a view to furthering efficient and sound management over an area of administration—has passed a law empowering a tribunal to decide certain issues efficiently and once and for all. Certainty, predictability and finality matter. Allowing tribunal panels to disagree with each other without any limitation tears against the need for a good measure of certainty, predictability and finality.

[43] In some contexts, certainty, predictability and finality arguably matter even more. Here, for example, we are dealing with commercial importation and international trade, an area where the CBSA, customs brokers and others are deluged every day by millions of goods seeking quick, efficient and predictable entry to our domestic market: see the Tribunal decision at para. 37, quoted in para. 13, above.

[44] Therefore, while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason.

[45] A number of principles govern administrators. An administrator whose actions are regulated by a tribunal—like the CBSA whose decisions are regulated by the Canadian International Trade Tribunal—must follow tribunal decisions. Certainty, predictability and finality matter here as well. So does the principle of tribunal pre-eminence: tribunals bind those who are subject to their jurisdiction, including administrators, subject to any later orders by reviewing courts.

[46] But this general principle admits at least of two exceptions, one uncontroversial, another more controversial.

[47] It is uncontroversial that as long as an administrator is acting *bona fide* and in accordance with its legislative mandate, an administrator can assert—where principled and warranted—that an earlier tribunal decision on its facts does not apply in a matter that has different facts. In other words, in pursuit of its legislative mandate, an administrator can sometimes distinguish an earlier tribunal decision on its facts and act accordingly.

[48] More controversial, however, are cases where an administrator feels it can and must act in a certain way but an earlier tribunal decision that it cannot distinguish stands in its way. And the administrator has a well-founded, *bona fide* concern that the earlier decision is flawed and should not be followed.

[49] In certain circumstances described below, the administrator should be allowed to act upon its view of the matter and, when challenged, should be allowed to raise with the tribunal the flaw it sees. For one thing, the administrator might be right: the earlier tribunal decision might be flawed and in bad need of correction. Unless the administrator is allowed to raise the issue, the tribunal will never be able to consider the matter, nor will a reviewing court receive it. As a result, a serious error might persist, possibly perpetually. To the extent possible, this sort of immunization from correction should be avoided: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Harris v. Canada*, [2000] 4 F.C.R. 37, 187 D.L.R. (4th) 419; *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at para. 313 (dissenting, but not on this point).

[50] In my view, an administrator can act or take a position against an earlier tribunal decision only if it is satisfied it is acting *bona fide* in accordance with the terms and purposes of its legislative mandate and only if a particular threshold has been crossed. This threshold should be shaped by two sets of clashing principles discussed above: the principles of certainty, predictability, finality and tribunal pre-eminence on the one hand, and, on the other, ensuring that potentially meritorious challenges of arguably wrong decisions can go forward.

[51] What is the threshold? In an administrative regime like the one before us, the administrator must be able to identify and articulate with good reasons one or more specific elements in the tribunal's earlier decision that, in the administrator's *bona fide* and informed view, is likely wrong. The flaw must have significance based on all of the circumstances known to the administrator, including the probable impact of the flaw on future cases and the prejudice that will be caused to the administrator's mandate, the parties it regulates, or both.

[52] This is something far removed from an administrator putting essentially the same facts, the same law and the same arguments to a tribunal on the off-chance it might decide differently. Tribunal proceedings are not a game of roulette where a player, having lost, can just hope for better luck and try again.

[53] When the administrator tries to persuade the tribunal that its earlier decision should no longer be followed, the administrator must address at least the matters discussed above, offering submissions that are not simply a rerun. They must go further than just a modest modifying or small supplementing of the earlier submissions. The tribunal may then decide whether its earlier

decision remains good law after considering the evidence before it, the terms and purposes of the legislation, and any other legal standards that properly bear on its decision.

[54] When the administrator decides that an earlier tribunal decision can and should be challenged, the administrator, and later the tribunal, might wish to expedite matters so that the matter may be clarified as soon as possible.

[55] I note that there may be other ways of resolving this sort of issue. For example, an administrator and affected parties in a case pending before the tribunal can request the tribunal to state a question of law, jurisdiction, practice or procedure to the Court: *Federal Courts Act*, R.S.C. 1985, c. F-7, section 18.3. In some circumstances—especially where the question does not call for any particular administrative appreciation—a tribunal might well grant the request in order to advance the objectives of efficiency and certainty. As well, in the end, an administrator, dissatisfied by a tribunal ruling, can always try to get it reversed by asking for a legislative amendment.

[56] I also note that other particular forms of recourse may be available under specific legislative regimes. For example, under section 70 of the *Customs Act*, the President of the CBSA can refer directly to the Canadian International Trade Tribunal for decision "any questions relating to the origin, tariff classification or value for duty of any goods or class of goods.".

F. The Tribunal's finding that the CBSA had committed an abuse of process

[57] As mentioned above, the Canadian International Trade Tribunal found that the CBSA's relitigation of *Frito-Lay* in this case was an abuse of process. Based on the discussion above and bearing in mind the deference we must show to factually-suffused findings made by the Tribunal, there are no grounds for interfering with that finding.

[58] After the release of *Frito-Lay* and following the discontinuance of the appeal from it, the CBSA took administrative positions contrary to it without explanation, justification or action of the sort required: see Tribunal decision at para. 24 and see paras. 50-56 above. Later, when appearing before the Canadian International Trade Tribunal, the CBSA did not focus on particular passages in *Frito-Lay* that it felt were wrong. By and large, the CBSA simply reargued the issues decided in *Frito-Lay* on virtually identical facts and law, without identifying any flaws, let alone serious flaws, in the particular reasoning in *Frito-Lay*. In fact, in its written submissions to the Tribunal, the CBSA mentioned *Frito-Lay* not as a leading point, but more or less as an after-thought: see Appeal Book, pp. 572-599. The written submissions and oral argument before the Tribunal in these cases do not show arguments much different from those the Tribunal rejected in *Frito-Lay*; in these cases, the Tribunal had evidence before it that could lead it to the conclusion that, at best, it was receiving only a modest modification or small supplementing of arguments it had received in *Frito-Lay*: see the transcript in the *Southern Pacific* case at pages 193-194; Appeal Book at pages 1137-1138. It is true that on this record, there is no evidence of malice or ill-will. And it is also true that when an administrator may act contrary to tribunal decisions and may relitigate points before a tribunal was somewhat uncertain. But a finding of abuse of process does not require malice, knowledge or ill-will.

[59] Also relevant is the fact that the Tribunal's decision in *Frito-Lay* was appealed to this Court but the appeal was discontinued for whatever reason. Rather than fighting *Frito-Lay* in this Court, the CBSA chose to fight it by resisting it at the administrative level: Tribunal decision at para. 24.

[60] Discontinuances can have consequences. While they are not dismissals, they are still meant to terminate earlier proceedings. Later attempts by the discontinuing party or its proxies to relitigate the issues can face obstacles. As well, in public law cases, other considerations may affect the ability to relitigate. See *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at paras. 17-23.

[61] The discontinuance of *Frito-Lay* placed a higher tactical burden upon the CBSA in this case to demonstrate its good faith and to offer good reasons to the Tribunal both as to why *Frito-Lay* should not be followed and why the appeal from *Frito-Lay* was discontinued. The CBSA did not discharge this tactical burden.

[62] Overall, the evidence in the record, viewed in light of the principles set out above and bearing in mind the deference we must show to fact-suffused decisions, sustains the Tribunal's finding.

G. Proposed disposition

[63] For the foregoing reasons, I would dismiss the appeals.

[64] The respondent importers seek their costs of the appeals on a solicitor and client basis. In support of this, they invoke the CBSA's conduct at the administrative level below. However, under Rule 400 of the *Federal Courts Rules*, SOR/98-106, the focus is on the "proceedings" in this Court, not matters in the administrative levels below. Under Rule 2, both "appeals" and "applications" are "proceedings".

[65] The respondents fairly conceded that there was nothing in the conduct of these appeals that would justify an award of solicitor and client costs. In my view, there is nothing to remove these appeals from the usual disposition that costs shall follow the event. Therefore, I would grant the respondents their costs of the appeals. Since the appeals were consolidated, I would grant one set of costs.

[66] The panel wishes to thank counsel for their excellent submissions.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-534-15, A-535-15 AND A-536-15

APPEAL FROM A DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED OCTOBER 2, 2015; FILE NOS. AP-2014-017, AP-2014-027 AND AP-2014-028

DOCKET:	A-534-15
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. BRI-CHEM SUPPLY LTD.
AND DOCKET:	A-535-15
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. EVER GREEN ECOLOGICAL SERVICES INC.
AND DOCKET:	A-536-15
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. SOUTHERN PACIFIC RESOURCE CORP.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 19, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL AND SCOTT JJ.A.
DATED:	OCTOBER 21, 2016

APPEARANCES:

Andrew Gibbs	FOR THE APPELLANT
Peter Kirby Aida Mezouar	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Fasken Martineau DuMoulin LLP Montreal, Quebec	FOR THE RESPONDENTS

TAB 28

2003 SCC 63 (CanLII)

Canadian Union of Public Employees, Local 79 *Appellant*

v.

City of Toronto and Douglas C. Stanley *Respondents*

and

Attorney General of Ontario *Intervener*

INDEXED AS: TORONTO (CITY) *v.* C.U.P.E., LOCAL 79

Neutral citation: 2003 SCC 63.

File No.: 28840.

2003: February 13; 2003: November 6.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-

Syndicat canadien de la fonction publique, section locale 79 *Appelant*

c.

Ville de Toronto et Douglas C. Stanley *Intimés*

et

Procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ : TORONTO (VILLE) *c.* S.C.F.P., SECTION LOCALE 79

Référence neutre : 2003 CSC 63.

N° du greffe : 28840.

2003 : 13 février; 2003 : 6 novembre.

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

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

Droit du travail — Arbitrage — Congédiement sans motif valable — Preuve — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Déclaration de culpabilité confirmée en appel — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — Le syndicat est-il habilité à remettre en cause une question tranchée à l'encontre de l'employé dans une instance criminelle? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

Contrôle judiciaire — Norme de contrôle — Arbitrage en relations du travail — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — L'arbitre est-il habilité à revenir sur la déclaration de culpabilité? — La norme de contrôle appropriée est-elle celle de la décision correcte? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

O travaillait comme instructeur en loisirs pour la Ville intimée. Il a été accusé d'agression sexuelle contre un garçon confié à sa surveillance. Il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné

examined. The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy

et a subi un contre-interrogatoire. Le juge du procès a conclu que le plaignant était crédible, contrairement à O. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. La Ville a congédié O quelques jours après le prononcé du verdict. O a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le plaignant avait donné lors du procès criminel ainsi que les notes du superviseur de O, lequel avait rencontré le plaignant à l'époque. Le plaignant n'a pas été cité comme témoin. O a témoigné, affirmant qu'il n'avait jamais agressé sexuellement le garçon. L'arbitre a statué que la déclaration de culpabilité était recevable en preuve, mais qu'elle ne constituait pas une preuve concluante que O s'était livré à une agression sexuelle sur le garçon. Aucune nouvelle preuve n'a été présentée. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée, et que O avait été congédié sans motif valable. La Cour divisionnaire a annulé la décision de l'arbitre. La Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour : Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire. La doctrine de l'abus de procédure fait intervenir le pouvoir inhérent du tribunal d'empêcher que sa procédure soit utilisée abusivement d'une manière qui aurait pour effet de discréditer l'administration de la justice. Elle a été appliquée pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. La raison pour laquelle la partie cherche à rouvrir le débat, et le titre auquel elle le fait, ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause. D'un point de vue systémique, la remise en cause s'accompagne de graves effets préjudiciables et il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Mettre en

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result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute,

doute la validité d'une déclaration de culpabilité est une action très grave. La contestation indirecte et la remise en cause ne constituent pas des moyens appropriés car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable. Les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est nul besoin d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

Le syndicat appelant n'était pas, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle. Les faits du présent pourvoi illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. O avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Il n'y a rien en l'espèce qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de O. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville intimée avait démontré l'existence d'un motif valable pour le congédiement de O.

La préclusion découlant d'une question déjà tranchée ne s'applique pas en l'espèce étant donné que l'exigence de réciprocité n'a pas été remplie. En ce qui concerne la doctrine de la contestation indirecte, l'appelant ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration.

Les juges LeBel et Deschamps : Comme le concluent les juges majoritaires, il convient de régler ce pourvoi en fonction de la doctrine de l'abus de procédure, et non des doctrines plus restreintes et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Il y a également accord avec l'opinion majoritaire selon laquelle, lorsqu'une déclaration de culpabilité est remise en cause dans le cadre d'une procédure de grief, la norme

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an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions — for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between

de contrôle applicable est celle de la décision correcte. Cette question de droit exigeait l'interprétation de la loi constitutive de l'arbitre, d'une loi non constitutive ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire ayant trait à la remise en cause, question qui est au cœur de l'administration de la justice. La décision de l'arbitre qui permettrait de remettre la déclaration de culpabilité de O en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à la déclaration de culpabilité de O. L'omission de le faire a suffi pour rendre la décision ultime portant que O avait été congédié sans motif valable — décision ressortissant entièrement au domaine d'expertise de l'arbitre et donc révisable selon une norme commandant la déférence — manifestement déraisonnable suivant la jurisprudence de la Cour.

En raison des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle, il est opportun d'approfondir l'analyse des aspects du pourvoi relevant du droit administratif. À l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. Toute décision sur une question de droit, cependant, n'est pas assujettie à la norme de la décision correcte. Le règlement de questions de droit générales peut constituer un aspect important de la tâche dévolue à certains tribunaux administratifs. Dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law ou du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. Si la question de droit générale est étroitement liée au domaine d'expertise fondamentale du décideur, sa décision fera généralement l'objet de déférence.

La cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'a pas à déterminer la décision correcte. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un fondement rationnel. La cour de révision aurait tort de modifier une décision incorrecte, et non seulement une décision sans fondement rationnel. Si cela se produit, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscursit.

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patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

Cases Cited

By Arbour J.

Referred to: *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC

La frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, et les tentatives pour établir une distinction valable entre elles comportent leurs propres difficultés. En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal était-elle conforme à la raison? En résumé, le cadre actuel présente plusieurs inconvénients, dont les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant parfois de l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte.

La cour appelée à déterminer la norme de contrôle doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire. Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure, si elle est équitable.

Le droit administratif a connu un développement considérable au cours des 25 dernières années. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reconnaît l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

Jurisprudence

Citée par la juge Arbour

Arrêts mentionnés : *Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487; *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O.,*

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42; *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249, aff'd (1984), 48 O.R. (2d) 266; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] 1 Q.B. 283; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. Banks*, [1916] 2 K.B. 621; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd [2002] 3 S.C.R. 307, 2002 SCC 63; *Franco v. White* (2001), 53 O.R. (3d) 391; *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21; *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; *R. v. McIlkenny* (1991), 93 Cr. App. R. 287; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *R. v. Bromley* (2001), 151 C.C.C. (3d) 480; *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756; *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670; *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106.

By LeBel J.

Referred to: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,

section locale 324, [2003] 2 R.C.S. 157, 2003 CSC 42; *Demeter c. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249, conf. par (1984), 48 O.R. (2d) 266; *Hunter c. Chief Constable of the West Midlands Police*, [1982] A.C. 529, conf. *McIlkenny c. Chief Constable of the West Midlands*, [1980] 1 Q.B. 283; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Danyluk c. Ainsworth Technologies Inc.*, [2001] 2 R.C.S. 460, 2001 CSC 44; *Parklane Hosiery Co. c. Shore*, 439 U.S. 322 (1979); *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Lemay c. The King*, [1952] 1 R.C.S. 232; *R. c. Banks*, [1916] 2 K.B. 621; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Scott*, [1990] 3 R.C.S. 979; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616, 2001 CSC 21; *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481, inf. par [2002] 3 R.C.S. 307, 2002 CSC 63; *Franco c. White* (2001), 53 O.R. (3d) 391; *Bomac Construction Ltd. c. Stevenson*, [1986] 5 W.W.R. 21; *Bjarnarson c. Government of Manitoba* (1987), 38 D.L.R. (4th) 32, conf. par (1987), 21 C.P.C. (2d) 302; *R. c. McIlkenny* (1991), 93 Cr. App. R. 287; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7; *R. c. Bromley* (2001), 151 C.C.C. (3d) 480; *Q. c. Minto Management Ltd.* (1984), 46 O.R. (2d) 756; *Nigro c. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, conf. par (1978), 18 O.R. (2d) 714; *Germscheid c. Valois* (1989), 68 O.R. (2d) 670; *Simpson c. Geswein* (1995), 25 C.C.L.T. (2d) 49; *Roenisch c. Roenisch* (1991), 85 D.L.R. (4th) 540; *Saskatoon Credit Union, Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Canadian Tire Corp. c. Summers* (1995), 23 O.R. (3d) 106.

Citée par le juge LeBel

Arrêts mentionnés : *Chamberlain c. Surrey School District No. 36*, [2002] 4 R.C.S. 710, 2002 CSC 86; *Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64; *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Miller c. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487; *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941; *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 565, 2001 CSC 47; *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157; *Pushpanathan*

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[1998] 1 S.C.R. 982; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 [ad. 1995, c. 6, s. 6(3)].

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(1).

Authors Cited

Allars, Margaret. "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163.

Comtois, Suzanne. *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs*. Cowansville, Qué.: Yvon Blais, 2003.

c. Canada (Ministre de la Citoyenneté et de l'Immigration), [1998] 1 R.C.S. 982; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890; *Macdonell c. Québec (Commission d'accès à l'information)*, [2002] 3 R.C.S. 661, 2002 CSC 71; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Union internationale des employés des services, local n^o^ 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382; *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425; *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983; *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756; *Canada Safeway Ltd. c. SDGMR, section locale 454*, [1998] 1 R.C.S. 1079; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Hao c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2000] A.C.F. n^o^ 296 (QL); *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Renvoi : Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217.

Lois et règlements cités

Charte canadienne des droits et libertés.

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48(1).

Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 [aj. 1995, ch. 6, art. 6(3)].

Doctrine citée

Allars, Margaret. « On Deference to Tribunals, With Deference to Dworkin » (1994), 20 *Queen's L.J.* 163.

Barreau du Haut-Canada. *Code de déontologie*. Toronto : Barreau du Haut-Canada, 2000.

Cowan, Jeff G. "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart Publishing, 1997, 279.

Elliott, David W. "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469.

Evans, J. M., et al. *Administrative Law: Cases, Text, and Materials*, 3rd ed. Toronto: Emond Montgomery, 1989.

Falzon, Frank A. V. "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia*, June 2002.

Garant, Patrice. *Droit administratif*, vol. 2, 4e éd. Cowansville, Qué.: Yvon Blais, 1996.

Holloway, Ian. "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28.

Howard, M. N., Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London: Sweet & Maxwell, 1990.

Jones, David Phillip. "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003.

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont.: Butterworths, 2000.

Law Society of Upper Canada. *Rules of Professional Conduct*. Toronto: Law Society of Upper Canada, 2000.

Lovett, Deborah K. "That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541.

MacLauchlan, H. Wade. "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281.

McLachlin, Beverley. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171.

Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.

Mullan, David J. "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import

Comtois, Suzanne. *Vers la primauté de l'approche pragmatique et fonctionnelle : Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs.* Cowansville, Qué. : Yvon Blais, 2003.

Cowan, Jeff G. « The Standard of Review : The Common Sense Evolution? », paper presented to the Administrative Law Section Meeting, Ontario Bar Association, 21 janvier, 2003.

Dyzenhaus, David. « The Politics of Deference : Judicial Review and Democracy », in Michael Taggart, ed., *The Province of Administrative Law*. Oxford : Hart Publishing, 1997, 279.

Elliott, David W. « *Suresh* and the Common Borders of Administrative Law : Time for the Tailor? » (2002), 65 *Sask. L. Rev.* 469.

Evans, J. M., et al. *Administrative Law : Cases, Text, and Materials*, 3rd ed. Toronto : Emond Montgomery, 1989.

Falzon, Frank A. V. « Standard of Review on Judicial Review or Appeal », in *Administrative Justice Review Background Papers : Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia*, June 2002.

Garant, Patrice. *Droit administratif*, vol. 2, 4e éd. Cowansville, Qué. : Yvon Blais, 1996.

Holloway, Ian. « "A Sacred Right" : Judicial Review of Administrative Action as a Cultural Phenomenon » (1993), 22 *R.D. Man.* 28.

Howard, M. N., Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London : Sweet & Maxwell, 1990.

Jones, David Phillip. « Notes on *Dr. Q* and *Ryan* : Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law », paper presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003.

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont. : Butterworths, 2000.

Lovett, Deborah K. « That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.* » (1997), 55 *Advocate (B.C.)* 541.

MacLauchlan, H. Wade. « Transforming Administrative Law : The Didactic Role of the Supreme Court of Canada » (2001), 80 *R. du B. can.* 281.

McLachlin, Beverley. « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998-1999), 12 *C.J.A.L.P.* 171.

Mullan, David J. *Administrative Law*. Toronto : Irwin Law, 2001.

2003 SCC 63 (CanLII)

Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264.

Mullan, David J. "Recent Developments in Standard of Review", in *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners*. Canadian Bar Association (Ontario), October 20, 2000.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 3rd ed. Toronto: Irwin Law, 2002.

Perell, Paul M. "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189.

Perrault, Gabrielle. *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle.* Montréal: Wilson & Lafleur, 2002.

Sossin, Lorne. "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37.

Sprague, James L. H. "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

Teplitsky, Martin. "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. I. Toronto: Lancaster House, 2002, 279.

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

APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC ¶220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC ¶220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Douglas J. Wray and *Harold F. Caley*, for the appellant.

Jason Hanson, *Mahmud Jamal* and *Kari M. Abrams*, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

Mullan, David J. « Of Chaff Midst the Corn : American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review » (1991), 45 Admin. L.R. 264.

Mullan, David J. « Recent Developments in Standard of Review », in *Taking the Tribunal to Court : A Practical Guide for Administrative Law Practitioners*. Association du Barreau canadien (Ontario), 20 octobre 2000.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 3rd ed. Toronto : Irwin Law, 2002.

Perell Paul M. « Res Judicata and Abuse of Process » (2001), 24 *Advocates' Q.* 189.

Perrault, Gabrielle. *Le contrôle judiciaire des décisions de l'administration : De l'erreur juridictionnelle à la norme de contrôle.* Montréal : Wilson & Lafleur, 2002.

Sossin, Lorne. « Developments in Administrative Law : The 1997-98 and 1998-99 Terms » (2000) 11 *S.C.L.R.* (2d) 37.

Sprague, James L. H. « Another View of *Baker* » (1999), 7 *Reid's Administrative Law* 163.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont. : Butterworths, 2002.

Teplitsky, Martin. "Prior Criminal Convictions : Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. I. Toronto : Lancaster House, 2002, 279.

Watson, Garry D. « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC ¶220-014, [2001] O.J. No. 3239 (QL), qui a confirmé un jugement de la Cour divisionnaire (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC ¶220-038, [2000] O.J. No. 1570 (QL). Pourvoi rejeté.

Douglas J. Wray et *Harold F. Caley*, pour l'appelant.

Jason Hanson, *Mahmud Jamal* et *Kari M. Abrams*, pour l'intimée la Ville de Toronto.

Personne n'a comparu pour l'intimé Douglas C. Stanley.

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Sean Kearney, *Mary Gersht* and *Meredith Brown*, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J. —

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to

Sean Kearney, *Mary Gersht* et *Meredith Brown*, pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour rendu par

LA JUGE ARBOUR —

I. Introduction

Une personne déclarée coupable d'agression sexuelle et congédiée par son employeur pour cette raison peut-elle être réintégrée dans ses fonctions par un arbitre qui conclut, eu égard à la preuve dont il dispose, qu'il n'y a pas eu d'agression sexuelle? C'est essentiellement la question que pose le présent pourvoi.

Comme la Cour d'appel de l'Ontario et la Cour divisionnaire, je conclus qu'un arbitre ne peut réexaminer une déclaration de culpabilité. Je suis donc d'avis de rejeter le pourvoi, bien que pour des motifs qui diffèrent quelque peu de ceux des juridictions inférieures.

II. Les faits

Glenn Oliver travaillait comme instructeur en loisirs pour la Ville de Toronto, intimée en l'instance. Il a été accusé d'agression sexuelle contre un jeune garçon confié à sa surveillance, et il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné et a subi un contre-interrogatoire. Il a cité plusieurs témoins en défense, dont des témoins de moralité. Le juge du procès a conclu que le plaignant était crédible mais non Oliver. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. Il a condamné Oliver à une peine d'emprisonnement de 15 mois et à un an de probation.

La Ville de Toronto intimée a congédié Oliver quelques jours après le prononcé du verdict, et Oliver a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le jeune garçon avait donné lors du procès criminel ainsi que les notes du

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testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each

superviseur d'Oliver, lequel avait rencontré le jeune garçon à l'époque, mais elle n'a pas cité le garçon comme témoin. Encore une fois, Oliver a témoigné et a affirmé qu'il n'avait pas commis d'agression sexuelle contre le jeune garçon.

5 L'arbitre a déterminé que la déclaration de culpabilité était recevable à titre de preuve *prima facie* mais qu'elle ne constituait pas une preuve concluante qu'Oliver s'était livré à une agression sexuelle sur le garçon. On n'a présenté à l'audition aucune preuve de fraude ni aucun nouvel élément de preuve non disponible au procès. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée et qu'Oliver avait été congédié sans motif valable.

III. Historique des procédures judiciaires

A. *Cour supérieure de justice (Cour divisionnaire)* (2000), 187 D.L.R. (4th) 323

6 La Cour divisionnaire a accueilli la demande de contrôle judiciaire et annulé la décision de l'arbitre. Elle a entendu cette affaire en même temps que l'affaire *Ontario c. S.E.E.F.P.O.* (*Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, dont jugement est rendu simultanément par la Cour.) Le juge O'Driscoll a déterminé que bien que l'art. 22.1 de la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, s'appliquât à tous les arbitrages, la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée (*issue estoppel*) et de l'abus de procédure. Il a fait observer que les déclarations de culpabilité constituent des jugements valides qui ne peuvent faire l'objet de contestation indirecte dans le cadre d'un arbitrage subséquent (par. 74-79). Relativement à la doctrine de la préclusion découlant d'une question déjà tranchée, en vertu de laquelle la décision rendue contre une partie est à l'abri des contestations indirectes à moins que de nouveaux éléments de preuve déterminants soient présentés ou que la fraude soit établie, le juge a statué qu'elle interdisait elle aussi la remise en cause, et il a rejeté l'argument de l'appelant selon lequel il n'y avait pas de connexité d'intérêts parce que le syndicat, non l'employé, avait déposé le grief. Le juge a également statué que la doctrine de l'abus

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case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the

de procédure, laquelle empêche la contestation indirecte de la décision d'un autre tribunal par une partie qui [TRADUCTION] « a eu l'entière possibilité de contester la décision », s'appliquait en l'espèce (par. 81 et 90). Enfin, le juge O'Driscoll a conclu que dans chaque cas il avait été satisfait à la norme de contrôle, qu'il s'agisse de la norme de la décision correcte ou de celle de la décision manifestement déraisonnable (par. 86).

B. *Cour d'appel de l'Ontario* (2001), 55 O.R. (3d) 541

Rendant jugement pour la cour, le juge Doherty a statué que, comme il s'agissait essentiellement de déterminer si le Syndicat canadien de la fonction publique (SCFP ou le syndicat) pouvait remettre en cause la question tranchée dans le procès criminel et que cette analyse [TRADUCTION] « reposait sur l'interprétation [par l'arbitre] des règles et principes de la common law relatifs à la remise en cause de questions ayant donné lieu à une décision définitive dans une instance antérieure », la norme de contrôle applicable était la norme de la décision correcte (par. 22 et 38).

Le juge Doherty a conclu que la doctrine de la préclusion découlant d'une question déjà tranchée ne s'appliquait pas. Même s'il existait un lien de droit entre le syndicat et l'employé, la Ville de Toronto intimée n'avait joué aucun rôle dans le procès criminel et n'avait aucun lien avec le ministère public. Il a également conclu que pour déterminer si la remise en cause était permise, il n'était guère utile d'assimiler la tentative du syndicat appelant de débattre à nouveau de la culpabilité de l'employé à une contestation indirecte de l'ordonnance du tribunal. Puis, affirmant qu'il valait peut-être mieux limiter l'emploi des mots « abus de procédure » aux cas où les demandeurs engagent des poursuites judiciaires pour des motifs illégitimes, il a entrepris l'examen approfondi de ce qu'il a appelé [TRADUCTION] « le principe de l'irrévocabilité ».

Le juge Doherty a rejeté l'appel en se fondant sur ce principe. Il a statué que suivant la jurisprudence sur l'autorité de la chose jugée, les tribunaux devaient mettre en balance l'importance de l'irrévocabilité — qui réduit l'incertitude et les résultats

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resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

Evidence Act, R.S.O. 1990, c. E.23

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

contradictoires tout en permettant d'économiser les ressources des parties et de l'appareil judiciaire — et [TRADUCTION] « la recherche de la justice dans chaque affaire » (par. 94). Il a exposé les questions auxquelles il fallait répondre lorsqu'il s'agit de pondérer la prétention à l'irrévocabilité et l'accès d'un justiciable particulier à la justice (au par. 100) :

[TRADUCTION]

- La doctrine de la chose jugée s'applique-t-elle?
- Si la doctrine s'applique, la partie contre qui elle s'applique peut-elle démontrer que la recherche de la justice devrait l'emporter sur le principe de l'irrévocabilité?
- Si la doctrine ne s'applique pas, la partie qui cherche à empêcher la remise en cause peut-elle démontrer que le principe de l'irrévocabilité devrait l'emporter sur la prétention voulant que la justice exige la remise en cause?

10 En fin de compte, le juge Doherty a rejeté l'appel, concluant que [TRADUCTION] « les considérations relatives à l'irrévocabilité doivent l'emporter sur le droit allégué du SCFP de remettre en cause la culpabilité d'Oliver » (par. 102). Il a tiré cette conclusion parce qu'il n'y avait pas eu d'allégation que le procès criminel était entaché de fraude, parce que les accusations en cause étant graves, il était probable que l'employé leur avait opposé la meilleure défense possible, et parce qu'aucun nouvel élément de preuve n'avait été présenté lors de l'arbitrage (par. 103-108).

IV. Les dispositions législatives applicables

11 *Loi sur la preuve*, L.R.O. 1990, ch. E.23

22.1 (1) La preuve qu'une personne a été déclarée coupable ou libérée au Canada à l'égard d'un acte criminel constitue la preuve, en l'absence de preuve contraire, que l'acte criminel a été commis par la personne si, selon le cas :

a) il n'a pas été interjeté appel de la déclaration de culpabilité ou de la libération et le délai d'appel est expiré;

b) il a été interjeté appel de la déclaration de culpabilité ou de la libération, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

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(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also

(2) Le paragraphe (1) s'applique que la personne déclarée coupable ou libérée soit une partie à l'instance ou non.

(3) Pour l'application du paragraphe (1), un certificat énonçant seulement la substance et l'effet de l'accusation et de la déclaration de culpabilité ou de la libération, et omettant la partie de forme, qui se présente comme étant signé par l'officier ayant la garde des archives du tribunal qui a déclaré le contrevenant coupable ou qui l'a libéré, ou par son adjoint, constitue une preuve suffisante de la déclaration de culpabilité ou de la libération de la personne, une fois prouvé que la personne est bien celle désignée sur le certificat comme ayant été déclarée coupable ou libérée, sans qu'il soit nécessaire d'établir l'authenticité de la signature ni la qualité officielle de la personne qui paraît être le signataire.

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

48. (1) Chaque convention collective contient une disposition sur le règlement, par voie de décision arbitrale définitive et sans interruption du travail, de tous les différends entre les parties que soulèvent l'interprétation, l'application, l'administration ou une prétendue violation de la convention collective, y compris la question de savoir s'il y a matière à arbitrage.

V. Analyse

A. *La norme de contrôle*

Mon collègue le juge LeBel examine en détail la jurisprudence de notre Cour concernant les normes de contrôle. Il passe en revue les préoccupations et critiques que soulève le système de contrôle judiciaire à triple norme. Ces questions n'ayant pas été débattues devant nous en l'espèce et, sans l'éclairage qu'apporterait un véritable débat contradictoire sur ce point, je ne souhaite pas formuler de commentaires sur l'opportunité de s'écarter du cadre d'analyse des normes de contrôle que nous avons récemment réitéré. (Voir les arrêts unanimes de notre Cour *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, et *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20.)

La Cour d'appel a bien appliqué les principes de l'analyse pragmatique et fonctionnelle énoncés dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S.

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Dr. Q, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she

982 (voir aussi *Dr Q*, précité), pour déterminer l'intention du législateur quant à l'étendue du contrôle judiciaire des décisions des tribunaux administratifs.

14 Le juge Doherty a correctement déterminé que la norme de la décision manifestement déraisonnable est la norme générale de contrôle applicable à la décision d'un arbitre sur la question de savoir si l'existence d'un motif valable de congédiement a été établie. Comme il l'a signalé, toutefois, les décisions que les arbitres ont à rendre au cours d'un arbitrage n'appellent pas nécessairement toutes la même norme de contrôle. Cette remarque va dans le sens de la distinction établie par le juge Cory, s'exprimant au nom des juges majoritaires, dans l'arrêt *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, où il a dit, au par. 39 :

> Il a été statué à plusieurs reprises que les connaissances et l'expertise que possède un conseil d'arbitrage en matière d'interprétation d'une convention collective ne s'étendent habituellement pas à l'interprétation de mesures législatives extrinsèques. Les conclusions d'un conseil sur l'interprétation d'une loi ou de la common law peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte. [. . .] Il peut y avoir dérogation à cette règle dans des cas où la loi est intimement liée au mandat du tribunal et où celui-ci est souvent appelé à l'examiner. [Je souligne.]

15 En l'espèce, le caractère raisonnable de la décision de l'arbitre de réintégrer l'employé dans ses fonctions dépend du bien-fondé de sa prémisse selon laquelle il n'était pas lié par la déclaration de culpabilité, prémisse qui reposait sur son analyse de règles complexes de common law et de décisions contradictoires. Le droit en matière de remise en cause de questions ayant fait l'objet de décisions judiciaires définitives antérieures n'est pas seulement complexe; il joue également un rôle central dans l'administration de la justice. Bien interprétées et bien appliquées, les doctrines de l'autorité de la chose jugée et de l'abus de procédure règlent les interactions entre les différents décideurs judiciaires. Ces règles et principes exigent des décideurs qu'ils réalisent un équilibre entre l'irrévocabilité, l'équité, l'efficacité et l'autorité des décisions judiciaires. L'application de ces règles, doctrines et principes

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must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction — the finding of another court — admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

échappe clairement au domaine d'expertise des arbitres du travail qui peuvent devoir y faire appel. Lorsque cela se produit, les arbitres doivent trancher correctement la question de droit posée. Une analyse incorrecte peut suffire à entraîner un résultat manifestement déraisonnable. Ces observations ont récemment été réitérées par le juge Iacobucci dans l'arrêt *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42, par. 21.

La Cour d'appel avait donc raison, selon moi, de statuer que l'arbitre devait décider correctement si le SCFP était, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle.

B. *L'article 22.1 de la Loi sur la preuve de l'Ontario*

L'article 22.1 de la *Loi sur la preuve* de l'Ontario n'est pas d'un grand secours pour trancher le présent pourvoi. Il énonce que la preuve qu'une personne a été déclarée coupable d'un acte criminel fait preuve, « en l'absence de preuve contraire », que l'acte criminel a été commis par cette personne.

Comme le juge Doherty le souligne avec raison (au par. 42), l'art. 22.1 prévoit que la validité d'une déclaration de culpabilité peut être contestée dans une instance subséquente, mais il est muet sur les circonstances susceptibles de permettre ou non une telle contestation. Ce sont les doctrines de common law relatives à l'autorité de la chose jugée, à la préclusion découlant d'une question déjà tranchée, à la contestation indirecte et à l'abus de procédure qui règlent cette question. L'article 22.1 pose le principe de la recevabilité de la déclaration de culpabilité comme preuve de son contenu et établit son caractère probant en l'absence de réfutation. En tant que règle de preuve, cette disposition touche en partie au ouï-dire, en ce qu'elle établit la recevabilité de la déclaration de culpabilité — la conclusion d'un autre tribunal — comme preuve de son contenu, par dérogation à la règle interdisant le ouï-dire (D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 120; *Phipson on Evidence* (14e éd. 1990), par. 33-94 et 33-95).

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Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

19 En l'espèce, toutefois, la recevabilité de la déclaration de culpabilité n'est pas en cause : la déclaration de culpabilité est recevable en preuve en vertu de l'art. 22.1. Il faut cependant déterminer si elle peut être réfutée par une « preuve contraire ». Il y a des circonstances où des éléments de preuve visant à réfuter la présomption que la personne déclarée coupable a commis le crime sont recevables, en particulier lorsque la déclaration concerne une personne autre qu'une partie, mais il y a également des circonstances où la présentation de tels éléments de preuve n'est pas permise. Si la doctrine de la préclusion découlant d'une question déjà tranchée ou encore celle de l'abus de procédure interdisent la remise en cause des faits essentiels de la déclaration de culpabilité, aucune « preuve contraire » ne pourra en écarter l'effet. La déclaration de culpabilité constitue alors une preuve concluante que la personne qui y est visée a commis le crime.

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This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law

20 Cette interprétation est conforme à la règle d'interprétation posant qu'en l'absence d'indication expresse au contraire la loi est présumée ne pas s'écarter des principes généraux de droit. Dans *Parry Sound*, précité, par. 39, le juge Iacobucci a analysé et appliqué cette présomption. L'article 22.1 codifie le principe établi dans la décision canadienne clé *Demeter c. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (H.C. Ont.), p. 264, conf. par (1984), 48 O.R. (2d) 266 (C.A.), où après un examen approfondi de la jurisprudence canadienne et anglaise, le juge Osler a statué qu'une déclaration de culpabilité est recevable dans une instance civile subséquente comme preuve *prima facie* que la personne qui y est mentionnée a commis l'acte allégué, [TRADUCTION] « sous réserve de réfutation au fond ». Toutefois, la common law reconnaît également que la présomption de culpabilité établie par une déclaration de culpabilité ne peut être repoussée que lorsque la réfutation ne constitue pas un abus de procédure (*Demeter* (H.C.), précité, p. 265; *Hunter c. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), p. 541; voir aussi *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), p. 22, le juge Blair). L'article 22.1 ne change rien à cette situation; le législateur n'a pas explicitement écarté

doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided

les doctrines de common law et, par conséquent, la réfutation y est assujettie.

Il faut donc examiner si l'application d'une de ces doctrines interdit en l'espèce la remise en cause des faits qui fondent la déclaration de culpabilité.

C. *Les doctrines de common law*

Les décisions des juridictions inférieures, en l'espèce, ont traité abondamment des trois doctrines de common law connexes que sont la préclusion découlant d'une question déjà tranchée, l'abus de procédure et la contestation indirecte. On a vu dans chacune de ces doctrines un moyen possible d'empêcher le syndicat de remettre en cause devant l'arbitre la déclaration de culpabilité de l'employé. Bien que la Cour divisionnaire et la Cour d'appel aient toutes deux conclu que le syndicat ne pouvait débattre à nouveau de la culpabilité attestée par la condamnation, elles ont exprimé des vues divergentes sur l'applicabilité des différentes doctrines invoquées à l'appui de cette conclusion. La Cour divisionnaire s'est dite d'avis que la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure, tandis que la Cour d'appel, estimant qu'aucune de ces doctrines ne pouvaient, dans l'état où elles se trouvent, avoir pour effet d'empêcher la réfutation, s'est plutôt appuyée sur le principe autonome de « l'irrévocabilité ». Je crois utile de démêler ces diverses règles et doctrines avant d'examiner celle qui s'applique en l'espèce. Je souligne d'entrée de jeu que ces doctrines de common law sont interreliées et que souvent plus d'une doctrine permettra d'arriver à un résultat particulier. Même si la préclusion découlant d'une question déjà tranchée et la contestation indirecte peuvent être toutes deux considérées comme des applications particulières de la doctrine plus large de l'abus de procédure, les trois ne sont pas toujours entièrement interchangeables.

(1) La préclusion découlant d'une question déjà tranchée

La préclusion découlant d'une question déjà tranchée est un volet du principe de l'autorité de la chose jugée (l'autre étant la préclusion fondée

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in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

sur la cause d'action), qui interdit de soumettre à nouveau aux tribunaux des questions déjà tranchées dans une instance antérieure. Pour que le tribunal puisse accueillir la préclusion découlant d'une question déjà tranchée, trois conditions préalables doivent être réunies : (1) la question doit être la même que celle qui a été tranchée dans la décision antérieure; (2) la décision judiciaire antérieure doit avoir été une décision finale; (3) les parties dans les deux instances doivent être les mêmes ou leurs ayants droit (*Danyluk c. Ainsworth Technologies Inc.*, [2001] 2 R.C.S. 460, 2001 CSC 44, par. 25 (le juge Binnie)). La dernière exigence, à laquelle on a donné le nom de « réciprocité », a été largement abandonnée aux États-Unis et, dans ce pays ainsi qu'au Royaume-Uni, elle a suscité un ample débat en doctrine et en jurisprudence, comme elle l'a fait dans une certaine mesure ici (voir G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623, p. 648-651). Compte tenu des conclusions différentes tirées par les tribunaux inférieurs sur l'applicabilité de la préclusion découlant d'une question déjà tranchée, je crois utile d'examiner ce débat d'un peu plus près.

The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

24 Les deux premières exigences de la préclusion découlant d'une question déjà tranchée sont remplies en l'espèce. La dernière, celle de la réciprocité, ne l'est pas. Dans la poursuite criminelle initiale, le litige opposait Sa Majesté la Reine du chef du Canada et Glenn Oliver. Dans l'arbitrage, les parties étaient le SCFP et la Ville de Toronto, l'employeur d'Oliver. Il n'est pas nécessaire, pour l'application de l'exigence de la réciprocité, de décider si l'on peut raisonnablement conclure à l'existence d'un rapport d'auteur à ayant droit entre Oliver et le SCFP, puisqu'il est clair qu'il n'en n'existe pas entre la Couronne, en sa qualité de poursuivant dans l'instance criminelle, et la Ville de Toronto, et qu'il n'y en aurait pas non plus s'il s'agissait d'un employeur provincial plutôt que municipal (comme dans le pourvoi connexe *Ontario c. S.E.E.F.P.O.*).

There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement,

25 De nombreux auteurs ont critiqué l'exigence de la réciprocité en matière de préclusion découlant d'une question déjà tranchée. Dans son article, le professeur Watson, *loc. cit.*, soutient que l'abolition

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as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc*., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due

explicite de cette condition, comme aux États-Unis, réduirait la confusion juridique et supprimerait la possibilité que l'application stricte de la doctrine conduise à une injustice. Les arguments que cet auteur et d'autres (voir aussi D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)) ont mis de l'avant pour exhorter les tribunaux canadiens à abandonner l'exigence de la réciprocité ont contribué à l'élaboration des principes fondant l'interdiction de la remise en cause. Je suis toutefois d'avis que notre droit comporte les outils appropriés et qu'il n'y a pas lieu de modifier l'exigence de la réciprocité, comme le nécessiterait la présente affaire.

Dans l'étude très éclairante qu'il a consacrée à l'abandon de l'exigence de la réciprocité aux États-Unis, le professeur Watson signale, à la p. 631, que la condition a d'abord cessé d'être exigée lorsque la préclusion était invoquée en défense :

> [TRADUCTION] L'utilisation défensive de la préclusion lorsqu'il n'y a pas réciprocité est simple. Si P, n'ayant pas eu gain de cause dans une poursuite l'ayant opposé à D1, poursuit ensuite D2 pour la même question, D2 peut invoquer en défense la préclusion découlant de la précédente poursuite, à moins que l'instance n'ait pas offert l'entière possibilité de débattre équitablement de la question ou qu'en raison d'autres facteurs il soit injuste ou déraisonnable de permettre la préclusion. Le raisonnement est que P ne devrait pas être autorisé à intenter de nouveau un procès qu'il a déjà perdu simplement en changeant de défendeur . . .

Le professeur Watson expose ensuite les difficultés qui surgissent si l'on abandonne l'exigence de la réciprocité lorsque la préclusion découlant d'une question déjà tranchée est invoquée en demande, comme l'a fait la Cour suprême des États-Unis dans *Parklane Hosiery Co. c. Shore*, 439 U.S. 322 (1979). Il décrit ainsi l'utilisation offensive de la préclusion (à la p. 631) :

> [TRADUCTION] La force de cette doctrine offensive de la préclusion sans exigence de réciprocité est illustrée par les instances afférentes à des désastres résultant d'une cause unique, comme un écrasement d'avion. Supposons que P1 poursuit le transporteur aérien pour négligence dans l'exploitation de l'appareil et que le tribunal lui donne raison. La préclusion offensive sans réciprocité permet alors à une succession de P de poursuivre le transporteur et de plaider que la question de la négligence a déjà été tranchée. Cela, parce que si le transporteur aérien

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process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

Properly understood, our case could be viewed as falling under this second category — what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that

a équitablement pu opposer une défense entière à l'allégation de négligence dans la poursuite n^{o} 1, il a eu la possibilité d'être entendu, il a bénéficié de l'application régulière de la loi et ne devrait pas être autorisé à remettre en cause la question de la négligence. Dans *Parklane*, la cour s'est toutefois rendu compte que pour statuer en toute équité sur l'utilisation offensive de la préclusion sans exigence de réciprocité, il fallait apporter des réserves à la doctrine.

28 Ainsi comprise, la présente espèce pourrait être classée dans la seconde catégorie — ce qu'en droit américain on appellerait la [TRADUCTION] « préclusion offensive sans exigence de réciprocité ». En effet, bien que strictement parlant la Ville de Toronto ne soit pas « en demande » dans l'arbitrage, elle cherche à bénéficier de la déclaration de culpabilité que le ministère public a obtenue contre Oliver dans une poursuite distincte antérieure à laquelle la Ville n'était pas partie. Elle souhaite empêcher Oliver de débattre à nouveau d'une question qu'il a contestée au cours de la poursuite criminelle et sur laquelle il n'a pas eu gain de cause. Le droit américain reconnaît les difficultés particulières que pose cette catégorie. Le professeur Watson explique ce qui suit aux p. 632-633 :

[TRADUCTION] Premièrement, la cour a reconnu que la disparition de l'exigence de la réciprocité entraînait des effets différents selon que la préclusion découlant d'une question déjà tranchée était invoquée en demande ou en défense. Lorsque le moyen est invoqué en défense, il contribue à limiter les litiges, mais invoqué en demande, il encourage plutôt les demandeurs potentiels à ne pas prendre part à la première action. « Puisqu'un demandeur peut invoquer un jugement antérieur prononcé contre un défendeur, mais qu'il n'est pas lié par un jugement antérieur donnant gain de cause au défendeur, il sera plus enclin à opter pour l'attentisme dans l'espoir que la première action intentée par un autre demandeur produira un jugement favorable. » Si le moyen n'est pas assorti de limites, la préclusion offensive sans exigence de réciprocité risque donc d'accroître et non de réduire le nombre de litiges. Pour résoudre ce problème, la cour a statué, dans *Parklane*, qu'il conviendrait de rejeter la préclusion dans l'action n^{o} 2 « lorsqu'un demandeur aurait aisément pu se joindre à l'action antérieure ».

Deuxièmement, la cour a reconnu que dans certaines circonstances, « il serait injuste pour le défendeur » de recevoir la préclusion sans exigence de réciprocité, et elle a donné des exemples de situations inéquitables : a) il est possible que la partie défenderesse n'ait pas été très

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is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free

motivée à présenter une défense vigoureuse à la première action si, par exemple, le montant de dommages-intérêts réclamé était minime ou symbolique, en particulier s'il était peu prévisible que des actions subséquentes soient intentées, b) la préclusion en demande peut être injuste si le jugement invoqué est lui-même incompatible avec un ou plusieurs jugements antérieurs rendus en faveur de la partie défenderesse, c) la deuxième action offre à la partie défenderesse des moyens procéduraux dont elle ne disposait pas dans la première et qui pourraient facilement entraîner un résultat différent, par exemple lorsque la partie défenderesse a dû présenter sa défense devant un forum peu propice où elle ne pouvait citer de témoins ou lorsqu'elle jouissait de possibilités beaucoup moindres de communication de la preuve dans la première action.

En définitive, la cour a statué qu'en règle générale les affaires où un demandeur aurait facilement pu se porter codemandeur à la première action ou lorsque, pour les raisons susmentionnées ou pour d'autres, l'application du moyen en demande serait injuste pour la partie défenderesse, le juge de première instance ne devrait pas autoriser le recours à la préclusion offensive.

Il ressort clairement du passage précédent que la doctrine américaine de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, n'est pas d'application automatique, comme le démontrent les éléments discrétionnaires susceptibles d'entraîner le rejet de ce moyen. L'expérience américaine indique que l'abandon de l'exigence de la réciprocité suscite une double préoccupation : (1) l'application de la préclusion doit être suffisamment encadrée et prévisible pour assurer l'efficacité, et (2) elle doit comporter assez de souplesse pour empêcher les injustices. Selon moi, c'est ce qu'offre la doctrine de l'abus de procédure, en particulier dans des affaires mettant en cause une déclaration de culpabilité relative à un acte criminel grave, comme la présente espèce. Dans de tels cas, les véritables préoccupations, que la Cour d'appel a exposées avec justesse dans ses motifs, ne se rattachent pas tant à la réciprocité qu'à l'intégrité et à la cohérence de l'administration de la justice. Ce sera souvent le cas lorsque la préclusion reposera sur une conclusion prononcée en matière criminelle où beaucoup des préoccupations traditionnelles relatives à la réciprocité perdent de leur importance.

Par exemple, la notion du demandeur « attentiste » et « opportuniste » qui évite délibérément

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rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the

de prendre le risque de se joindre à la poursuite initiale mais qui cherche plus tard à profiter de la victoire obtenue par la partie qui aurait dû être sa codemanderesse, a peu de pertinence. Il n'y a pas lieu de craindre que cela se produise lorsque la première instance est une poursuite criminelle. Même si elles le voulaient, les victimes ne pourraient se porter partie à la poursuite criminelle de façon à ce que leur action civile contre l'accusé soit jugée dans un même procès. Les employeurs ne sont pas admis non plus à participer à la poursuite criminelle pour que leur employé soit par la même occasion congédié pour motif valable.

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31 Par contre, malgré le fait que personne ne peut se joindre à la poursuite criminelle, le poursuivant, en tant que partie, représente l'intérêt public. Il représente un intérêt collectif dans le règlement juste et régulier de la poursuite. On le considère comme un ministre de la justice qui n'a rien à gagner ni à perdre dans l'issue des procès mais qui doit veiller à ce que les tribunaux rendent des verdicts justes et bien fondés. (Voir Barreau du Haut-Canada, *Code de déontologie* (2000), règle 4.01(3) et le commentaire afférent, p. 62; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Lemay c. The King*, [1952] 1 R.C.S. 232, p. 256-257, le juge Cartwright; et *R. c. Banks*, [1916] 2 K.B. 621 (C.C.A.), p. 623.) L'exigence de réciprocité de la doctrine de la préclusion découlant d'une question déjà tranchée, qui veut que seul le ministère public et ses ayants droit soient irrecevables à remettre en cause la culpabilité de l'accusé, ne rend guère compte du vrai rôle du poursuivant.

32 Comme l'illustre la présente espèce, ce sont l'intégrité du système de justice criminel et l'autorité accrue du verdict de culpabilité qui sont les considérations primordiales, et non certaines des préoccupations plus traditionnelles de la préclusion découlant d'une question déjà tranchée où l'accent est mis sur les intérêts des parties, comme les dépens et les « incidents vexatoires » multiples. Pour ces motifs, il n'y a à mon sens aucune nécessité en l'espèce de supprimer ou d'assouplir l'exigence de la réciprocité, établie depuis longtemps, et je conclurais que

arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in

la préclusion découlant d'une question déjà tranchée n'est pas applicable. Se pose maintenant la question de savoir si la décision de l'arbitre équivalait à une contestation indirecte du verdict du tribunal criminel.

(2) La contestation indirecte

La règle interdisant les contestations indirectes rend irrecevables les actions visant l'infirmation de déclarations de culpabilité par des tribunaux n'ayant pas compétence en cette matière. Comme la Cour l'a affirmé dans l'arrêt *Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599, cette règle est

> un principe fondamental établi depuis longtemps [selon lequel] une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

Ainsi, la Cour a jugé, dans *Wilson*, précité, qu'un juge d'une juridiction inférieure n'avait pas compétence pour examiner la validité d'une autorisation d'écoute électronique délivrée par une cour supérieure. D'autres décisions jurisprudentielles constituant l'assise de cette règle avaient aussi pour contexte des tentatives de faire infirmer des décisions d'autres tribunaux et non une simple remise en cause des faits de l'espèce. Dans *R. c. Sarson*, [1996] 2 R.C.S. 223, par. 35, notre Cour a statué qu'en raison de la règle interdisant les contestations indirectes, le recours en *habeas corpus* par lequel un détenu contestait une déclaration de culpabilité fondée sur une disposition législative subséquemment jugée inconstitutionnelle ne pouvait être accueilli parce que l'affaire du détenu n'était plus « en cours » et que celui-ci « était détenu conformément au jugement d'un tribunal compétent ». De la même façon, la Cour a jugé, dans l'arrêt *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, que le propriétaire d'une mine qui avait décidé de ne pas suivre le processus administratif d'appel applicable relativement à une amende pour pollution n'était pas admis à contester la validité de la

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subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of

pénalité devant un tribunal judiciaire parce que la loi prévoyait que les appels étaient entendus par un tribunal administratif. Dans l'arrêt *Danyluk*, précité, par. 20, le juge Binnie a défini la règle prohibant les contestations indirectes comme « 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 » (je souligne).

34 Chacune des affaires susmentionnées soulève la question du tribunal compétent pour connaître de contestations relatives au jugement lui-même. En l'espèce, toutefois, le syndicat ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration. Il s'agit d'une attaque implicite du bien-fondé factuel de la décision, non pas de la contestation de la validité juridique de celle-ci, puisqu'elle est manifestement valide. Les « contestations indirectes » prohibées constituent un abus du processus judiciaire. Or, comme la règle qui prohibe les contestations indirectes met l'accent sur la contestation de l'ordonnance elle-même et de ses effets juridiques, la meilleure façon d'aborder la question en l'espèce me paraît être de recourir directement à la doctrine de l'abus de procédure.

(3) L'abus de procédure

35 Les juges disposent, pour empêcher les abus de procédure, d'un pouvoir discrétionnaire résiduel inhérent. L'abus de procédure a été décrit, en common law, comme consistant en des procédures « injustes au point qu'elles sont contraires à l'intérêt de la justice » (*R. c. Power*, [1994] 1 R.C.S. 601, p. 616) et en un traitement « oppressif » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667). La juge McLachlin (plus tard Juge en chef) l'a défini de la façon suivante dans l'arrêt *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007 :

. . . l'abus de procédure peut avoir lieu si : (1) les procédures sont oppressives ou vexatoires; et (2) elles violent les principes fondamentaux de justice sous-jacents au sens de l'équité et de la décence de la société. La première

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oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

condition, à savoir que les poursuites sont oppressives ou vexatoires, se rapporte au droit de l'accusé d'avoir un procès équitable. Cependant, la notion fait aussi appel à l'intérêt du public à un régime de procès justes et équitables et à la bonne administration de la justice.

La doctrine de l'abus de procédure s'applique dans des contextes juridiques divers. Le traitement injuste ou oppressif d'un accusé peut priver le ministère public du droit de continuer les poursuites relatives à une accusation : *Conway*, précité, p. 1667. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, notre Cour a statué qu'un délai déraisonnable causant un préjudice grave peut constituer un abus de procédure. Lorsque la *Charte canadienne des droits et libertés* est invoquée, la doctrine de l'abus de procédure reconnue en common law est subsumée sous les principes de la *Charte* de telle sorte que les principes de l'abus de procédure et les recours constitutionnels empiètent souvent les uns sur les autres (*R. c. O'Connor*, [1995] 4 R.C.S. 411). La doctrine continue néanmoins de trouver application comme réparation non fondée sur la *Charte* : *États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616, 2001 CSC 21, par. 33.

Dans le contexte qui nous intéresse, la doctrine de l'abus de procédure fait intervenir [TRADUCTION] « le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière [. . .] qui aurait [. . .] pour effet de discréditer l'administration de la justice » (*Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, approuvé par [2002] 3 R.C.S. 307, 2002 CSC 63). Le juge Goudge a développé la notion de la façon suivante aux par. 55 et 56 :

> [TRADUCTION] La doctrine de l'abus de procédure engage le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. C'est une doctrine souple qui ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité (voir *House of Spring Gardens Ltd. c. Waite*, [1990] 3 W.L.R. 347, p. 358, [1990] 2 All E.R. 990 (C.A.).

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One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application

Un cas d'application de l'abus de procédure est lorsque le tribunal est convaincu que le litige a essentiellement pour but de rouvrir une question qu'il a déjà tranchée. [Je souligne.]

Ainsi qu'il ressort du commentaire du juge Goudge, les tribunaux canadiens ont appliqué la doctrine de l'abus de procédure pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée (généralement les exigences de lien de droit et de réciprocité) n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. (Voir par exemple *Franco c. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. c. Stevenson*, [1986] 5 W.W.R. 21 (C.A. Sask.); et *Bjarnarson c. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (B.R. Man.), conf. par (1987), 21 C.P.C. (2d) 302 (C.A. Man.).) Cette application a suscité des critiques, certains disant que la doctrine de l'abus de procédure pour remise en cause n'est ni plus ni moins que la doctrine générale de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, à laquelle il manque les importantes conditions que les tribunaux américains ont reconnues comme parties intégrantes de la doctrine (Watson, *loc. cit.*, p. 624-625).

38 Certes, la doctrine de l'abus de procédure a débordé des stricts paramètres du principe de l'autorité de la chose jugée tout en lui empruntant beaucoup de ses fondements et quelques-unes de ses restrictions. D'aucuns la voient davantage comme une doctrine auxiliaire, élaborée en réaction aux règles établies de la préclusion (découlant d'une question déjà tranchée ou fondée sur la cause d'action), que comme une doctrine indépendante (Lange, *op. cit.*, p. 344). Les raisons de principes étayant la doctrine de l'abus de procédure pour remise en cause sont identiques à celles de la préclusion découlant d'une question déjà tranchée (Lange, *op. cit.*, p. 347-348) :

[TRADUCTION] Les deux raisons de principe, savoir qu'un litige puisse avoir une fin et que personne ne puisse être tracassé deux fois par la même cause d'action, ont

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of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter*, *supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in

été invoquées comme principes fondant l'application de la doctrine de l'abus de procédure pour remise en cause. D'autres principes ont également été invoqués : la préservation des ressources des tribunaux et des parties, le maintien de l'intégrité du système judiciaire afin d'éviter les résultats contradictoires et la protection du principe du caractère définitif des instances si important pour la bonne administration de la justice.

L'énoncé classique de la doctrine moderne de l'abus de procédure et de ses liens avec l'autorité de la chose jugée se trouve dans la décision *Hunter*, précitée, confirmant *McIlkenny c. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). Il s'agissait d'une poursuite en dommages-intérêts pour préjudice corporel intentée par les six hommes reconnus coupables de l'explosion de deux pubs de Birmingham. Ils prétendaient avoir été battus par la police pendant leur interrogatoire. Les demandeurs avaient soulevé le même grief lors du procès criminel, mais le juge et le jury avaient conclu que les confessions avaient été volontaires et que la police n'avait pas eu recours à la violence. Lord Denning, M.R., de la Cour d'appel, a appliqué la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, et a statué que le jugement antérieur empêchait l'examen de la question de savoir si la police avait usé de violence, même si cette question était invoquée contre un nouvel adversaire. Signalant que dans des affaires analogues, les tribunaux avaient parfois refusé d'autoriser une partie à soulever de nouveau une question parce qu'il s'agissait d'un abus de procédure, lord Denning a estimé que le principe applicable était plutôt celui de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité.

La Chambre des lords, statuant en appel, n'a pas endossé la tentative de lord Denning de modifier le principe de la préclusion découlant d'une question déjà tranchée, mais elle est parvenue à une conclusion identique en appliquant la doctrine de l'abus de procédure. Lord Diplock s'est exprimé en ces termes, à la p. 541 :

[TRADUCTION] L'abus de procédure illustré en l'espèce est l'introduction d'une instance devant un tribunal judiciaire dans le but d'attaquer indirectement une décision définitive rendue contre le demandeur par un autre tribunal compétent dans une instance antérieure, où le

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previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less

demandeur a eu l'entière possibilité de contester la décision devant le tribunal qui l'a rendue.

41 Il importe de signaler qu'une enquête publique instituée après la poursuite civile intentée par les six accusés dans l'affaire *Hunter*, précitée, a donné lieu à la conclusion que les aveux des accusés de Birmingham avaient été obtenus par suite de brutalités policières (voir *R. c. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), p. 304 et suiv.). À mon avis, cela ne saurait justifier d'alléger les mécanismes procéduraux mis en place pour assurer le caractère définitif des instances en matière criminelle. Notre Cour et d'autres tribunaux ont reconnu l'existence du risque d'erreur judiciaire (voir *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 1; et *R. c. Bromley* (2001), 151 C.C.C. (3d) 480 (C.A.T.-N.), p. 517-518). Bien qu'il faille prévoir des garanties pour protéger les innocents et, de façon plus générale, pour inspirer confiance dans les décisions judiciaires, la remise en cause perpétuelle n'est pas pour autant garante de l'exactitude factuelle.

42 L'attrait de la doctrine de l'abus de procédure provient de ce qu'elle n'est pas alourdie par les exigences précises du principe de l'autorité de la chose jugée tout en ménageant le pouvoir discrétionnaire d'empêcher la remise en cause de litiges et ce, essentiellement dans le but de préserver l'intégrité du processus judiciaire. (Voir les motifs du juge Doherty, par. 65; voir également *Demeter* (H.C.), précité, p. 264, et *Hunter*, précité, p. 536.)

43 Ceux qui critiquent cette doctrine font valoir que l'utilisation de l'abus de procédure à la place de la préclusion brouille la vraie question sans rien ajouter d'autre qu'une vague impression de pouvoir discrétionnaire. Je ne partage pas cette vue. À tout le moins dans des circonstances comme celles de la présente espèce, c'est-à-dire une tentative de remettre en cause une déclaration de culpabilité, j'estime que cette doctrine répond beaucoup mieux aux véritables enjeux. Dans tous ses cas d'application, la doctrine de l'abus de procédure vise essentiellement à préserver l'intégrité de la fonction judiciaire. Qu'elle ait pour effet de priver le ministère public du droit de continuer la poursuite à cause de délais inacceptables (voir *Blencoe*, précité), ou d'empêcher

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on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to

une partie civile de faire appel aux tribunaux à mauvais escient (voir *Hunter*, précité, et *Demeter*, précité), l'accent est mis davantage sur l'intégrité du processus décisionnel judiciaire comme fonction de l'administration de la justice que sur l'intérêt des parties. Dans une affaire comme la présente espèce, c'est cette préoccupation qui commande d'interdire la remise en cause, plus que toute perception d'injustice envers une partie qui serait de nouveau appelée à faire la preuve de ses prétentions, par exemple. Cela compris, il est plus facile d'établir les paramètres de la doctrine et de définir les principes applicables à l'exercice du pouvoir discrétionnaire.

Le processus décisionnel judiciaire, et l'importance d'en préserver l'intégrité, ont été bien décrits par le juge Doherty. Voici ce qu'on peut lire au par. 74 de ses motifs :

> [TRADUCTION] Dans ses diverses manifestations, le processus décisionnel judiciaire vise à rendre justice. Par processus décisionnel judiciaire, j'entends les divers tribunaux judiciaires ou administratifs auxquels il faut s'adresser pour le règlement des litiges. Lorsque la même question est soulevée devant divers tribunaux, la qualité des décisions rendues au terme du processus judiciaire se mesure non par rapport au résultat particulier obtenu de chaque forum, mais par le résultat final découlant des divers processus. Par justice, j'entends l'équité procédurale, l'obtention du résultat approprié dans chaque affaire et la perception plus générale que l'ensemble du processus donne des résultats cohérents, équitables et exacts.

Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire défini précédemment. Lorsque l'accent est correctement mis sur l'intégrité du processus, la raison pour laquelle la partie cherche à rouvrir le débat ou sa qualité de défendeur plutôt que de demandeur dans le nouveau litige ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question.

En l'espèce, il importe donc peu qu'Oliver veuille principalement rouvrir le débat pour être réengagé et

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secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter*, *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

The appellant relies on *Re Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues

non pour contester sa déclaration de culpabilité afin d'en attaquer la validité. Il n'y a pas lieu ici d'invoquer les arrêts *Hunter* et *Demeter* (H.C.), précités, pour souligner l'importance de la raison de la remise en cause. Il était certes évident, dans les deux affaires, que les parties cherchant à rouvrir le débat voulaient faire casser leur déclaration de culpabilité, mais cela a peu d'importance dans l'application de la doctrine de l'abus de procédure. Il n'est pas illégitime en soi de vouloir attaquer un jugement; la loi permet de poursuivre cet objectif par divers mécanismes de révision comme l'appel ou le contrôle judiciaire. De fait, la possibilité de faire réviser un jugement constitue un aspect important du principe de l'irrévocabilité des décisions. Une décision est irrévocable ou définitive et elle lie les parties seulement lorsque tous les recours possibles en révision sont épuisés ou ont été abandonnés. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. Par conséquent, les raisons animant la partie ont peu ou pas d'importance.

47 Il n'y a pas de raison non plus de restreindre l'application de la doctrine de l'abus de procédure aux seuls cas où la remise en cause est le fait du demandeur. La désignation des parties au second litige peut masquer la situation réelle. En l'espèce, par exemple, indépendamment des formalités de la procédure de grief, qui d'Oliver et de son syndicat ou de la Ville de Toronto faudrait-il considérer comme à l'origine du différend en matière de travail? D'un point de vue formaliste, c'est le syndicat qui est la partie demanderesse dans la procédure d'arbitrage, mais c'est la Ville qui a invoqué la déclaration de culpabilité d'Oliver comme motif de congédiement. Du point de vue de l'intégrité du processus juridictionnel, toutefois, je ne vois pas quelle différence il y a entre caractériser Oliver comme demandeur ou le caractériser comme défendeur relativement à la remise en cause de sa déclaration de culpabilité.

48 L'appelant invoque *Re Del Core*, précité, à l'appui de sa prétention que la doctrine de l'abus de procédure ne s'applique qu'aux demandeurs. Dans cet arrêt, toutefois, les juges majoritaires ne se sont pas prononcés sur la question de savoir dans quelles

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determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined . . . . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter*, *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, *supra*, at pp. 26-27; *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also

circonstances, le cas échéant, l'intérêt public peut empêcher la remise en question de conclusions formulées dans une instance criminelle. Le juge Blair, notamment, n'a pas limité les circonstances permettant de conclure à l'abus de procédure aux seules affaires où une personne déclarée coupable cherche à remettre en question la validité de cette déclaration dans une instance subséquente qu'elle-même a engagée (à la p. 22) :

> [TRADUCTION] Le droit de contester une déclaration de culpabilité est assorti d'une importante réserve. Une personne visée par une déclaration de culpabilité ne peut tenter de prouver que la déclaration était erronée lorsque dans les circonstances cela constituerait un abus de procédure. [. . .] Les tribunaux ont rejeté les tentatives de remettre en cause les questions mêmes qui avaient été examinées au procès criminel, dans les cas où ils estimaient que l'instance civile constituait une contestation indirecte de la déclaration de culpabilité. La portée de cette réserve reste à déterminer . . . [Je souligne.]

S'il est vrai que la jurisprudence le plus souvent citée à l'appui du pouvoir des tribunaux d'empêcher la remise en cause de questions sur lesquelles il a déjà été statué, lorsque la préclusion découlant d'une question déjà tranchée n'est pas applicable, se rapporte à des affaires où une personne déclarée coupable a intenté une action civile dans le but d'attaquer une conclusion formulée dans l'instance criminelle (savoir *Demeter* (H.C.), précité, et *Hunter*, précité; voir aussi *Q. c. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), et *Franco*, précité, par. 29-31), il n'existe aucune raison de principe pour que ce droit ne s'exerce que dans ces circonstances. Les tribunaux ont appliqué la doctrine de l'abus de procédure à plusieurs reprises pour empêcher un défendeur de remettre en cause des conclusions formulées contre lui dans une instance antérieure. Voir notamment *Nigro c. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), p. 218, conf. sans mention de ce point par (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, précité, p. 26-27; *Bjarnarson*, précité, p. 39; *Germscheid c. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson c. Geswein* (1995), 25 C.C.L.T. (2d) 49 (B.R. Man.), p. 61; *Roenisch c. Roenisch* (1991), 85 D.L.R. (4th) 540 (B.R. Alb.), p. 546; *Saskatoon Credit Union, Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (C.S.C.-B.), p. 438; *Canadian Tire*

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P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that

Corp. c. Summers (1995), 23 O.R. (3d) 106 (Div. gén.), p. 115; voir aussi P. M. Perell, « Res Judicata and Abuse of Process » (2001), 24 *Advocates Q.* 189, p. 196-197; et Watson, *loc. cit.*, p. 648-651.

50 Des auteurs ont soutenu qu'il est difficile de concevoir comment le fait de se défendre peut constituer un abus de procédure (voir M. Teplitsky, « Prior Criminal Convictions : Are They Conclusive Proof? An Arbitrator's Perspective », dans K. Whitaker et autres, dir., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). On donne souvent comme raison d'être du principe de l'autorité de la chose jugée qu'une partie ne devrait pas être tracassée deux fois pour la même cause d'action, c'est-à-dire qu'on ne devrait pas lui imposer le fardeau de débattre une autre fois de la même question (Watson, *loc. cit.*, p. 633). Bien sûr, un défendeur peut se réjouir d'avoir une autre occasion de mettre en cause une question tranchée contre lui. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause dans un tel cas.

51 La doctrine de l'abus de procédure s'articule autour de l'intégrité du processus juridictionnel et non autour des motivations ou de la qualité des parties. Il convient de faire trois observations préliminaires à cet égard. Premièrement, on ne peut présumer que la remise en cause produira un résultat plus exact que l'instance originale. Deuxièmement, si l'instance subséquente donne lieu à une conclusion similaire, la remise en cause aura été un gaspillage de ressources judiciaires et une source de dépenses inutiles pour les parties sans compter les difficultés supplémentaires qu'elle aura pu occasionner à certains témoins. Troisièmement, si le résultat de la seconde instance diffère de la conclusion formulée à l'égard de la même question dans la première, l'incohérence, en soi, ébranlera la crédibilité de tout le processus judiciaire et en affaiblira ainsi l'autorité, la crédibilité et la vocation à l'irrévocabilité.

52 La révision de jugements par la voie normale de l'appel, en revanche, accroît la confiance dans le résultat final et confirme l'autorité du processus ainsi que l'irrévocabilité de son résultat. D'un

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from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended

point de vue systémique, il est donc évident que la remise en cause s'accompagne de graves effets préjudiciables et qu'il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Il peut en effet y avoir des cas où la remise en cause pourra servir l'intégrité du système judiciaire plutôt que lui porter préjudice, par exemple : (1) lorsque la première instance est entachée de fraude ou de malhonnêteté, (2) lorsque de nouveaux éléments de preuve, qui n'avaient pu être présentés auparavant, jettent de façon probante un doute sur le résultat initial, (3) lorsque l'équité exige que le résultat initial n'ait pas force obligatoire dans le nouveau contexte. C'est ce que notre Cour a dit sans équivoque dans l'arrêt *Danyluk*, précité, par. 80.

Les facteurs discrétionnaires qui visent à empêcher que la préclusion découlant d'une question déjà tranchée ne produise des effets injustes, jouent également en matière d'abus de procédure pour éviter de pareils résultats indésirables. Il existe de nombreuses circonstances où l'interdiction de la remise en cause, qu'elle découle de l'autorité de la chose jugée ou de la doctrine de l'abus de procédure, serait source d'inéquité. Par exemple, lorsque les enjeux de l'instance initiale ne sont pas assez importants pour susciter une réaction vigoureuse et complète alors que ceux de l'instance subséquente sont considérables, l'équité commande de conclure que l'autorisation de poursuivre la deuxième instance servirait davantage l'administration de la justice que le maintien à tout prix du principe de l'irrévocabilité. Une incitation insuffisante à opposer une défense, la découverte de nouveaux éléments de preuve dans des circonstances appropriées, ou la présence d'irrégularités dans le processus initial, tous ces facteurs peuvent l'emporter sur l'intérêt qu'il y a à maintenir l'irrévocabilité de la décision initiale (*Danyluk*, précité, par. 51; *Franco*, précité, par. 55).

Ces considérations revêtent une pertinence particulière s'agissant de la tentative de remettre en cause une déclaration de culpabilité. Mettre en doute la validité d'une déclaration de culpabilité est une action très grave et, dans un cas comme celui qui nous intéresse, il est inévitable que la conclusion de

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or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of

l'arbitre ait précisément cet effet, qu'il ait été voulu ou non. L'administration de la justice doit disposer de tous les moyens légitimes propres à prévenir les déclarations de culpabilité injustifiées et à y remédier s'il s'en présente. La contestation indirecte et la remise en cause, toutefois, ne constituent pas des moyens appropriés, selon moi, car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable.

55 Compte tenu de ce qui précède, il est clair que les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est donc nul besoin, comme l'a fait la Cour d'appel, d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

D. *L'application de la doctrine de l'abus de procédure en l'espèce*

56 À mon avis, les faits de la présente espèce illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. L'employé avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Pourtant, comme l'a signalé le juge Doherty (au par. 84) :

[TRADUCTION] Même si l'arbitre s'est défendu d'avoir examiné le bien-fondé de la décision du juge Ferguson, c'est exactement ce qu'il a fait. Il est impossible de ne pas conclure, à la lecture des motifs de l'arbitre, qu'il avait la conviction que l'instance criminelle était entachée de graves erreurs et qu'Oliver avait été condamné à tort. Cette conclusion tirée à l'occasion d'une instance à laquelle la poursuite n'était pas même partie ne peut que porter atteinte à l'intégrité du système de justice criminel. Tout observateur sensé se demanderait comment il se peut qu'un tribunal ait conclu hors de tout doute raisonnable qu'Oliver était coupable, et qu'après confirmation du verdict par la Cour d'appel, il soit déterminé, dans une autre instance, qu'il n'a pas commis cette même agression. Cet observateur ne comprendrait pas non plus qu'Oliver

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sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court — or the jury —, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

ait pu à bon droit être reconnu coupable d'agression sexuelle contre le plaignant et condamné à quinze mois d'emprisonnement, mais qu'une autre instance donne lieu à la conclusion qu'il n'a pas commis l'agression sexuelle et qu'il doit être réintégré dans des fonctions où des jeunes comme le plaignant seraient placés sous sa surveillance.

Ces décisions contradictoires mettraient inévitablement la Ville de Toronto dans une situation où une personne condamnée pour agression sexuelle est rétablie dans un emploi qui la met en contact avec des jeunes très vulnérables comme la victime de l'agression dont elle a été déclarée coupable. On peut supposer que cela induirait le public informé et sensé à évaluer le bien-fondé de l'un ou l'autre des jugements relatifs à la culpabilité de l'employé. L'autorité et l'irrévocabilité des décisions de justice visent précisément à éliminer la nécessité d'un tel exercice.

De plus, l'arbitre est beaucoup moins en mesure de rendre une décision correcte sur la culpabilité que le juge présidant une instance criminelle — ou que le jury —, qui dispose pour le guider de règles de preuve axées sur la recherche équitable de la vérité ainsi que d'une norme de preuve exigeante, et qui a l'expérience des questions en cause. Qui plus est, la norme de contrôle applicable aux conclusions de l'arbitre, en cas de contestation, est moins exigeante que celle qui s'applique aux décisions des juges de cours criminelles. Bref, il n'y a rien, dans une affaire comme la présente espèce, qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de l'employé. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville de Toronto avait démontré l'existence d'un motif valable pour le congédiement d'Oliver.

VI. Dispositif

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

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The reasons of LeBel and Deschamps JJ. were delivered by

LeBel J. —

I. Introduction

I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of our Court.

While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R.

Version française des motifs des juges LeBel et Deschamps rendus par

Le juge LeBel —

I. Introduction

60 J'ai pris connaissance des motifs de la juge Arbour et je souscris au dispositif qu'elle propose dans le présent pourvoi. Je conviens que le sort de ce pourvoi doit être réglé en fonction de l'abus de procédure, et non des principes plus restreints et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Je conviens également que la norme de contrôle appropriée est celle de la décision correcte, à l'égard de la question de la remise en cause d'une déclaration de culpabilité dans le cadre d'une procédure de grief. La nature de cette question de droit demandait de l'arbitre qu'il interprète non seulement la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, mais aussi la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, et qu'il statue sur l'applicabilité d'un certain nombre de principes de common law portant sur la remise en cause de questions déjà décidées dans le cadre d'un litige antérieur. Comme le fait remarquer la juge Arbour, ce problème se situe au cœur de l'administration de la justice. Enfin, je conviens que la décision de l'arbitre qui permettait de remettre la déclaration de culpabilité de Glenn Oliver en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à cette déclaration de culpabilité. L'omission de le faire a suffi pour rendre manifestement déraisonnable, suivant la jurisprudence de notre Cour, la décision finale selon laquelle Oliver avait été congédié sans motif valable — une décision qui ressortissait entièrement au domaine d'expertise de l'arbitre et devait donc faire l'objet d'un contrôle selon une norme commandant la déférence.

61 Même si je suis d'accord avec la conclusion de la juge Arbour en l'espèce, j'estime opportun d'approfondir l'examen des aspects du pourvoi relevant du droit administratif. Dans mes motifs concourants dans *Chamberlain c. Surrey School*

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710, 2002 SCC 86, I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the

District No. 36, [2002] 4 R.C.S. 710, 2002 CSC 86, j'ai soulevé quelques inquiétudes quant au caractère approprié d'une approche qui traiterait la méthode pragmatique et fonctionnelle comme cadre d'analyse fondamental destiné à s'appliquer sans flexibilité lors du contrôle judiciaire sur le fond dans toutes les affaires de droit administratif, y compris celles relatives à la décision d'une instance non juridictionnelle. Dans certaines circonstances, comme celles de *Chamberlain*, le recours à ce cadre d'analyse pour circonscrire la norme de contrôle appropriée risque d'occulter la véritable question que doit trancher la cour de justice chargée du contrôle.

Dans le présent pourvoi et *Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, sur lesquels statue simultanément notre Cour et qui portent tous deux sur le contrôle judiciaire de la décision d'une instance juridictionnelle, je ne suis pas préoccupé par l'applicabilité de l'analyse pragmatique et fonctionnelle proprement dite. Cependant, lorsque, comme en l'espèce, la question en litige constitue si clairement une question de droit, à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre, il devient inutile qu'une cour se livre à une analyse pragmatique et fonctionnelle détaillée pour identifier une norme de contrôle fondée sur la décision correcte. En pareilles circonstances, pour déterminer la norme de contrôle applicable, la cour doit en fait éviter d'adopter une démarche rigide. En effet, celle-ci risquerait de réduire l'analyse pragmatique et fonctionnelle et le cadre souple et contextuel qu'elle offre à la vérification et à l'application pure et simple d'une liste de facteurs prédéterminés (voir *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, par. 149; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26; *Chamberlain*, précité, par. 195, le juge LeBel).

La présente espèce et le pourvoi connexe *Ontario c. S.E.E.F.P.O.* soulèvent une question plus particulière, celle des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes

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pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular

de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle. Des auteurs et avocats ont affirmé douter sérieusement que notre Cour ait exposé de manière suffisamment claire le fondement théorique de chacune des normes existantes. Une bonne partie de leurs critiques vise ce qu'ils ont qualifié de confusion « épistémologique » qui entourerait la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* (voir, par exemple, D. J. Mullan, « Recent Developments in Standard of Review », dans l'Association du Barreau canadien (Ontario), *Taking the Tribunal to Court : A Practical Guide for Administrative Law Practitioners* (2000), p. 26; J. G. Cowan, « The Standard of Review : The Common Sense Evolution? », exposé présenté initialement à la rencontre de la section du droit administratif, Association du Barreau de l'Ontario, 21 janvier 2003, p. 28; F. A. V. Falzon, « Standard of Review on Judicial Review or Appeal », dans *Administrative Justice Review Background Papers : Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), p. 32-33). Les cours de justice chargées de contrôles ont parfois également exprimé de la frustration à l'égard de ce qu'elles perçoivent comme un manque apparent de clarté dans ce domaine, comme l'illustrent les propos du juge Barry dans *Miller c. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (C.S.T.-N. (1re inst.)), par. 27 :

> [TRADUCTION] Tenter de comprendre les distinctions établies par la cour entre la décision « manifestement déraisonnable », « raisonnable » ou « correcte » s'apparente parfois à observer un jongleur maniant trois objets transparents. Selon l'éclairage, à certains moments l'on croit apercevoir les objets. Mais à d'autres, l'on ne voit rien et l'on se demande en fait s'il y a vraiment trois objets distincts.

64

La Cour ne peut rester insensible aux préoccupations ou critiques constantes de la communauté juridique concernant l'état de la jurisprudence canadienne dans une partie importante du droit. Il est vrai que les parties au présent pourvoi n'ont pas présenté d'observations qui remettaient en cause la jurisprudence en matière de normes de contrôle. Il n'en reste pas moins qu'à l'occasion une analyse ou un examen en profondeur de l'état du droit

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representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

– the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,

– the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less

peut s'avérer nécessaire malgré l'absence d'observations particulières dans une espèce donnée. Étant donné leur vaste domaine d'application, les règles de droit qui régissent les normes de contrôle doivent être prévisibles, pratiques et cohérentes. Les parties à un litige n'ont souvent aucun intérêt personnel à assurer la cohérence globale de notre jurisprudence en matière de normes de contrôle et l'uniformité de son application. Leur objectif, bien compréhensible, consiste à démontrer en quoi les positions qu'elles avancent sont conformes aux règles de droit telles qu'elles existent, et non de suggérer des améliorations à ces règles pour le bénéfice du bien commun. La tâche d'assurer le caractère prévisible, pratique et cohérent de la jurisprudence incombe en premier lieu aux juges, tâche qu'ils accomplissent de préférence avec, mais exceptionnellement sans le concours des avocats. J'ajouterais que, même si les parties n'ont pas présenté d'observations sur l'analyse que je me propose d'entreprendre dans les présents motifs, elles n'en subiront aucun préjudice.

Dans ce contexte, le présent pourvoi nous offre l'occasion de réévaluer les contours des différentes normes de contrôle, ce qui s'impose particulièrement, selon moi, à l'égard de la norme du manifestement déraisonnable. J'examinerai donc :

– l'interaction entre la décision correcte et la décision manifestement déraisonnable, tant en l'espèce que dans le contexte du contrôle judiciaire de la décision d'une instance juridictionnelle en général, afin de clarifier la relation conflictuelle entre ces deux normes;

– la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*, qui demeure nébuleuse malgré bien des tentatives d'explication.

Comme le confirme l'analyse qui suit, à l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Dès le début, la norme du manifestement déraisonnable a parfois été confondue, de manière préoccupante, avec ce qui devrait être son antithèse, la norme de la décision correcte. En outre, il devient de plus en plus

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deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions — for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

difficile de distinguer la norme de ce qui est réputé représenter sa contrepartie, commandant une moins grande déférence, la norme de la décision raisonnable *simpliciter*. Il reste à voir comment il est possible de résoudre ces difficultés.

II. Analyse

A. *Les deux normes de contrôle applicables en l'espèce*

Deux normes de contrôle entrent en jeu en l'espèce, et certaines précisions s'imposent au préalable sur l'application de la norme de la décision correcte. Comme je l'ai déjà signalé brièvement, certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. À mon avis, la cour de justice chargée du contrôle devra rarement se livrer à l'analyse pragmatique et fonctionnelle de manière exhaustive pour conclure en ce sens. Je ne voudrais pas, cependant, que l'on déduise de mes propos à ce sujet ou des motifs des juges majoritaires en l'espèce qu'il faut appliquer la norme de la décision correcte chaque fois qu'un arbitre ou une autre instance administrative spécialisée est appelé à interpréter et à appliquer les règles générales de la common law ou du droit civil. S'il en allait ainsi, le contrôle judiciaire selon la norme de la décision correcte verrait sa portée s'accroître sensiblement. Une telle approche rendrait les tribunaux administratifs moins aptes, spécialement dans des domaines complexes et très spécialisés comme le droit du travail, à apporter à un problème juridique une solution originale particulièrement adaptée au contexte. À mon sens, dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law et du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. De brèves explications s'imposent.

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(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate

(1) La norme de la décision correcte

Notre Cour a à maintes reprises souligné l'importance de la déférence judiciaire dans le domaine du droit du travail. En général, les lois régissant les relations de travail confèrent aux arbitres et aux commissions ou conseils des relations de travail de larges pouvoirs pour le règlement de la vaste gamme de problèmes susceptibles de se poser dans ce domaine et elles font bénéficier les décisions de ces instances de la protection d'une clause privative. Si le législateur en a décidé ainsi c'est que, comme l'a signalé le juge Cory dans *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 35, le domaine des relations de travail est « délicat et explosif » et « [i]l est essentiel de disposer d'un moyen de pourvoir à la prise de décisions rapides, par des experts du domaine sensibles à la situation, décisions qui peuvent être considérées définitives par les deux parties » (voir également *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941 (« *AFPC* »), p. 960-961; *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 565, 2001 CSC 47, par. 32). Il est donc rare qu'une cour de justice appelée à contrôler une décision en matière de relations de travail applique la norme de la décision correcte.

En l'espèce et dans *Ontario c. S.E.E.F.P.O.*, je conviens qu'il y a lieu d'appliquer la norme de la décision correcte à la décision de l'arbitre relative à la remise en cause de la déclaration de la culpabilité, mais un certain nombre de mises en garde me paraissent indispensables. Tout d'abord, même si l'arbitre était tenu de rendre une décision correcte relativement à cette question de droit, ceci n'entraînait pas pour autant l'application d'un contrôle fondé sur la norme de la décision correcte à l'ensemble de sa décision (voir *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 48). La déférence s'imposait à l'égard de la décision de l'arbitre sur l'existence d'un motif de congédiement valable dans le cas d'Oliver. Dire que, compte tenu des faits de l'espèce, la décision incorrecte de l'arbitre concernant la question de

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question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention"

droit a eu une incidence sur le caractère raisonnable de l'ensemble de sa décision diffère sensiblement de l'affirmation selon laquelle la décision de l'arbitre sur la question ultime du congédiement injustifié devait être correcte. L'absence d'une telle distinction risque de provoquer un « élargissement considérable et injustifié des possibilités de contrôler les décisions administratives » (voir *Société Radio-Canada*, précité, par. 48).

70 Deuxièmement, il importe de rappeler que, en l'espèce, l'application de la norme de la décision correcte est intimement liée à la nature de cette question de droit en particulier : la déclaration de culpabilité d'un employé peut-elle être remise en cause dans le cadre d'un arbitrage? Cette question de droit exigeait l'interprétation de la loi constitutive de l'instance administrative, une mesure législative extrinsèque, ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire. Qui plus est, il s'agit d'une question d'une importance fondamentale, de grande portée et susceptible d'avoir de graves répercussions sur l'administration de la justice dans son ensemble. En d'autres termes, cette question mettait en jeu l'expertise et le rôle essentiel des cours de justice. L'on ne saurait prétendre que le décideur jouit à son égard d'une quelconque compétence ou expertise institutionnelle relative. Par conséquent, sa décision doit être correcte sur ce point.

71 Cependant, notre Cour s'est montrée très prudente en signalant que toute décision sur une question de droit n'était pas assujettie à la norme de la décision correcte. Tout d'abord, comme notre Cour l'a fait observer, dans bien des cas il est difficile d'établir une ligne de démarcation claire entre une question de fait, une question mixte de fait et de droit et une question de droit; en fait, ces questions sont souvent inextricablement liées (voir *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 37; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 37). De manière encore plus précise, comme l'a écrit le juge Bastarache dans *Pushpanathan*, précité, « il peut convenir de faire preuve d'un degré élevé de retenue même à l'égard de pures questions de

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(para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop

droit, si d'autres facteurs de l'analyse pragmatique et fonctionnelle semblent indiquer que cela correspond à l'intention du législateur » (par. 37). Le facteur crucial à cet égard demeure l'expertise.

Comme le juge Bastarache l'a signalé dans *Pushpanathan*, précité, par. 34, « une fois établie l'expertise relative », notre Cour s'est montrée disposée à faire preuve « de beaucoup de retenue même dans des cas faisant jouer des questions très générales d'interprétation de la loi, si le texte en cause est la loi constitutive du tribunal » : voir par exemple *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, et *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324. Notre Cour a par ailleurs statué que même si les interprétations de mesures législatives intrinsèques par les tribunaux administratifs « peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte », des exceptions peuvent exister à cette règle générale et la déférence peut s'imposer lorsque « la loi est intimement liée au mandat du tribunal et [que] celui-ci est souvent appelé à l'examiner » : voir *Conseil de l'éducation de Toronto (Cité)*, précité, par. 39; *Société Radio-Canada*, précité, par. 48. Et, ce qui importe peut-être davantage à la lumière des questions que soulève le présent pourvoi, notre Cour a décidé que la déférence peut s'imposer lorsque, avec le temps, le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé : voir *Ivanhoe*, précité, par. 26; la juge L'Heureux-Dubé (dissidente), dans *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, p. 599-600, motifs approuvés dans *Pushpanathan*, précité, par. 37.

Dans le domaine des relations de travail, les questions générales relevant de la common law et du droit civil se trouvent souvent étroitement imbriquées avec celles qui relèvent plus particulièrement du droit du travail. Le règlement de questions de droit générales peut donc constituer un aspect important de la tâche dévolue à certains tribunaux administratifs dans ce domaine. L'assujettissement de toutes ces décisions à la norme de décision correcte donnerait au contrôle judiciaire une portée

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a body of jurisprudence that is tailored to the specialized context in which they operate.

Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe*, *supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan*, *supra*, at para. 49; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can

beaucoup plus grande que celle voulue par le législateur, ce qui affaiblirait fondamentalement la capacité des tribunaux du travail à développer une jurisprudence adaptée à ce domaine spécialisé.

74 Lorsqu'un tribunal administratif doit trancher une question de droit générale dans l'accomplissement de son mandat légal, sa décision fera généralement l'objet de déférence (surtout en présence d'une clause privative), pour autant que la question soit étroitement liée au domaine d'expertise fondamentale du tribunal. C'est ce qu'a essentiellement conclu notre Cour dans *Ivanhoe*, précité, où, après avoir relevé l'existence d'une clause privative, la juge Arbour a ajouté que, même si la question en litige relevait tant du droit civil que du droit du travail, les commissaires du travail et le tribunal du travail avaient droit à la déférence judiciaire parce qu'ils « ont développé [. . .] une expertise particulière en la matière, adaptée au contexte spécifique des relations de travail, qui n'est pas partagée par les cours de justice » (par. 26; voir également *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890). Dans le présent pourvoi, notre Cour ne déroge pas à ce principe général.

75 La dernière mise en garde qui s'impose selon moi a trait à l'application de deux normes de contrôle en l'espèce. Notre Cour a reconnu à un certain nombre d'occasions que les différentes décisions d'un tribunal administratif dans une affaire donnée peuvent commander différents degrés de déférence, selon les circonstances (voir *Pushpanathan*, précité, par. 49; *Macdonell c. Québec (Commission d'accès à l'information)*, [2002] 3 R.C.S. 661, 2002 CSC 71, par. 58, les juges Bastarache et LeBel, dissidents). Ce pourrait être le cas dans la présente affaire où l'arbitre a statué sur une question de droit fondamentale échappant à son domaine d'expertise. Cette question de droit, malgré son caractère fondamental pour l'appréciation de la décision dans son ensemble, se distingue aisément d'une deuxième question pour laquelle la décision de l'arbitre appelait la déférence : Oliver a-t-il été congédié pour un motif valable?

76 Toutefois, je le répète, même si la question tranchée par l'arbitre en l'espèce peut se scinder en

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be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC*, *supra*, of patent unreasonableness as a "very strict test",

deux questions distinctes dont l'une peut faire l'objet d'un contrôle judiciaire fondé sur la norme de la décision correcte, cela n'arrive que rarement. Les divers éléments qui sous-tendent une décision ont plus de chance d'être inextricablement liés les uns aux autres, en particulier dans un domaine complexe comme celui des relations de travail, de sorte que la cour de justice chargée du contrôle doit considérer que la décision du tribunal forme un tout.

(2) La norme de la décision manifestement déraisonnable

Dans les présents motifs, je me penche sur la manière dont le critère de la décision manifestement déraisonnable s'applique à l'heure actuelle, compte tenu des liens existant entre cette norme et celles de la décision correcte et de la décision raisonnable *simpliciter*. Mes observations à cet égard valent dans le contexte du contrôle judiciaire de la décision d'une instance administrative de nature juridictionnelle.

a) *Les définitions du caractère manifestement déraisonnable*

Notre Cour a donné un certain nombre de définitions du « caractère manifestement déraisonnable », chacune d'elles devant indiquer le degré élevé de déférence inhérent à cette norme de contrôle. L'on observe un chevauchement entre les définitions, qui sont souvent combinées les unes aux autres. Elles appartiennent à deux catégories principales. La première met l'accent sur l'importance du défaut requis pour qu'une décision soit manifestement déraisonnable. La deuxième insiste sur le caractère « flagrant ou évident » du défaut et, par conséquent, sur le caractère plus ou moins envahissant du contrôle nécessaire à sa mise au jour.

Pour analyser les principales définitions, je mettrais dans la première catégorie celle du juge Dickson (plus tard Juge en chef) dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *SCFP* ») : une décision n'est manifestement déraisonnable que si elle est « déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente »

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which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

In the second category, I would place Iacobucci J.'s description in *Southam*, *supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

(p. 237). Dans *AFPC*, précité, le juge Cory qualifie la norme de la décision manifestement déraisonnable de « critère très strict », qui n'est respecté que lorsqu'une décision est « clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison » (p. 963-964). Cette définition appartient également à la première catégorie (bien qu'elle puisse également faire partie de la seconde, selon l'interprétation qu'on en fait).

80 Figure dans la seconde catégorie la définition proposée par le juge Iacobucci dans *Southam*, précité, savoir une décision entachée, de manière « flagrante ou évidente » d'un défaut : « Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57).

81 Plus récemment, dans *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, le juge Iacobucci a qualifié de manifestement déraisonnable la décision qui est « à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir », en faisant appel aux deux catégories susmentionnées pour concevoir cette définition. Voici ses commentaires à ce propos (au par. 52) :

> Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

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82 Similarly, in *C.U.P.E. v. Ontario*, *supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam*, *supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario*, *supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain*, *supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain*, *supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q*, *supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

De même, dans *S.C.F.P. c. Ontario*, précité, le juge Binnie a lié les deux catégories en qualifiant de décision manifestement déraisonnable « celle qui comporte un défaut "flagrant et évident" (*Southam*, précité, par. 57) et qui est à ce point viciée, pour ce qui est de mettre à exécution l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier logiquement de la maintenir (*Ryan*, précité, par. 52) » (par. 165 (je souligne)).

L'on a suggéré à propos des différentes formulations du critère par notre Cour qu'« [i]l s'[agissait] non pas de critères indépendants ou de rechange, mais simplement de façons d'exprimer la seule question qui se pose : qu'est-ce qui fait qu'une chose est manifestement déraisonnable? » (*S.C.F.P. c. Ontario*, précité, par. 20, le juge Bastarache, dissident). Bien que ce puisse être effectivement le cas, il me paraît néanmoins important de reconnaître que, en raison de ce qui constitue, sous certains rapports, des différences subtiles, mais quand même assez importantes entre les diverses réponses de notre Cour à cette question, les paramètres du « manifestement déraisonnable » ne sont pas aussi clairs qu'ils pourraient l'être. Ce qui a contribué à rendre de plus en plus difficile l'application de cette norme, ce sur quoi je me penche ci-après.

b) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte*

Comme je l'ai fait remarquer dans *Chamberlain*, précité, la différence entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme de la décision manifestement déraisonnable est « intuitive et relativement facile à constater » (*Chamberlain*, précité, par. 204, le juge LeBel). Ces normes se situent aux deux extrémités de l'échelle de la déférence judiciaire, un contrôle judiciaire serré s'imposant dans le cas de la première et la question étant laissée à l'appréciation quasi exclusive du décideur dans le cas de la seconde (voir *Dr Q*, précité, par. 22). Malgré la frontière conceptuelle qui sépare clairement ces deux normes, en pratique, il n'est pas toujours aussi facile que l'on pourrait le croire de les distinguer.

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(i) Patent Unreasonableness and Correctness in Theory

In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE*, *supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE*, *supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*"), at p. 389, and in *CUPE*, *supra*, at p. 237:

> . . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969]

(i) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en théorie

85 Pour comprendre l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte, il vaut la peine de signaler que, dès le début, il semble avoir existé, à tout le moins, un certain degré d'incertitude conceptuelle quant à la juste portée du contrôle selon la norme de la décision manifestement déraisonnable. Dans *SCFP*, précité, le juge Dickson a défini le caractère manifestement déraisonnable de deux manières, qui tendaient à orienter la mise en application de ce critère dans des directions opposées (voir D. J. Mullan, *Administrative Law* (2001), p. 69; voir également H. W. MacLauchlan, « Transforming Administrative Law : The Didactic Role of the Supreme Court of Canada » (2001), 80 *R. du B. can.* 281, p. 285-286).

86 Le professeur Mullan explique que, d'une part, le juge Dickson a justifié le contrôle visant à faire ressortir le caractère manifestement déraisonnable par le fait que les dispositions législatives sont souvent ambiguës et peuvent donc se prêter à de multiples interprétations; la question que doit poser la cour est de savoir si l'interprétation du tribunal peut « rationnellement s'appuyer sur la législation pertinente » (*SCFP*, précité, p. 237). D'autre part, le juge Dickson a également assimilé la décision manifestement déraisonnable à une décision entachée de certaines erreurs emportant annulation, comme celles qu'il avait auparavant énumérées dans *Union internationale des employés des services, local n^o^ 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382 (« *Nipawin* »), p. 389, et *SCFP*, précité, p. 237 :

> . . . le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la question, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi.

87 Curieusement, comme le fait observer Mullan, cette énumération [TRADUCTION] « reprend la liste des erreurs emportant annulation que lord Reid a dressée dans l'arrêt de principe de la

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2 A.C. 147. *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law*, *supra*, at pp. 69-70; see also *National Corn Growers*, *supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law*, *supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *CUPE*, *supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as

Chambre des lords » *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 A.C. 147. Cet arrêt [TRADUCTION] « est habituellement considéré comme fondamental, en droit anglais, pour ce qui est de l'assujettissement de toutes les décisions relatives à une question de droit au contrôle selon la norme de la décision correcte » (je souligne). En fait, notre Cour [TRADUCTION] « a cité en l'approuvant cet extrait des motifs de lord Reid et l'a invoqué pour justifier l'intervention judiciaire dans une affaire qualifiée de "point culminant" du contrôle "activiste" au Canada : *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796* », [1970] R.C.S. 425 (voir Mullan, *Administrative Law*, *op. cit.*, p. 69-70; voir également *National Corn Growers*, précité, p. 1335, la juge Wilson).

Dans *SCFP*, pour caractériser la norme du manifestement déraisonnable, le juge Dickson a ensuite invoqué simultanément un degré élevé de déférence (choix parmi un ensemble de solutions raisonnables possibles) et une attitude historiquement interventionniste (fondée sur l'existence d'erreurs emportant annulation). C'est pourquoi, pour citer Mullan, [TRADUCTION] « il est facile de comprendre que le renvoi à *Anisminic* soit problématique » (Mullan, *Administrative Law*, *op. cit.*, p. 70).

Si, dans *SCFP*, précité, le renvoi du juge Dickson à *Anisminic* suggère la présence d'une certaine ambiguïté quant à la portée prévue du contrôle selon la norme du manifestement déraisonnable, des jugements ultérieurs ont également fait ressortir l'existence d'un rapport quelque peu problématique entre cette norme et celle de la décision correcte pour ce qui est de l'établissement et, surtout, de l'application de la démarche que commande la norme du manifestement déraisonnable. La tension à cet égard tient en partie à des désaccords sur l'hypothèse de départ du contrôle selon la norme du manifestement déraisonnable. *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983 (« *Paccar* »), en est un bon exemple.

Dans *Paccar*, le juge Sopinka (motifs concourants du juge Lamer (plus tard Juge en chef)) a dit que, dans le cadre de la démarche appropriée

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one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE*, *supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J.

pour l'application de la norme du manifestement déraisonnable, la cour de justice se demande tout d'abord si la décision du tribunal administratif est correcte : « la retenue judiciaire n'entre en jeu que si la cour de justice est en désaccord avec le tribunal administratif. Ce n'est qu'à ce moment-là qu'il est nécessaire de se demander si l'erreur (ainsi découverte) est raisonnable ou déraisonnable » (p. 1018). Comme Mullan le fait observer, cette démarche soulève des inquiétudes en ce que non seulement elle est entièrement incompatible [TRADUCTION] « avec la position du juge Dickson dans [*SCFP*, précité], savoir qu'il arrive souvent qu'un problème d'interprétation législative n'appelle pas qu'une seule solution, mais elle suppose également la prépondérance de la cour de justice sur l'organisme ou le tribunal administratif lorsqu'il s'agit de circonscrire la portée des dispositions en cause » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20).

91 À mon avis, cette démarche comporte des difficultés supplémentaires. Il peut être difficile pour une cour de justice de conclure qu'[TRADUCTION] « une erreur a été commise [. . .] et de s'abstenir de la corriger au motif qu'elle n'est pas aussi importante qu'elle aurait pu l'être » (voir Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20; voir également D. J. Mullan, « Of Chaff Midst the Corn : American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review » (1991), 45 Admin. L.R. 264, p. 269-270). De plus, conclure tout d'abord que la décision du tribunal est incorrecte peut orienter l'analyse subséquente visant à déterminer si d'autres interprétations sont raisonnables (voir M. Allars, « On Deference to Tribunals, With Deference to Dworkin » (1994), 20 *Queen's L.J.* 163, p. 187). La distinction cruciale entre ce qui, de l'avis de la cour de justice, est « incorrect » et ce qui « n'est pas rationnellement défendable » est alors compromise.

92 L'autre solution veut que la cour de justice s'abstienne de décider si la décision du tribunal administratif est « correcte » (voir Allars, *loc. cit.*, p. 197). Il s'agit essentiellement de la

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concurring) took to patent unreasonableness in *Paccar*, *supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> . . .
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local 301*, *supra*, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan*, *supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

démarche préconisée par le juge La Forest (motifs concourants du juge en chef Dickson) dans *Paccar*, précité. Il a dit aux p. 1004 et 1005 :

> Les cours de justice doivent prendre soin de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci.
>
> . . .
>
> J'estime qu'il n'est pas nécessaire de déterminer de façon concluante si la décision de la Commission est « juste » en ce sens que c'est la décision à laquelle je serais parvenu si la cause avait été entendue quant au fond par notre Cour. Il suffit de dire que le résultat auquel la Commission est arrivée n'est pas manifestement déraisonnable.

Cette thèse, du moins pour l'essentiel, l'a emporté. Comme l'a fait remarquer la juge L'Heureux-Dubé dans *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793 (« *SCFP, section locale 301* »), « notre Cour l'a mentionné à plusieurs reprises, lorsqu'on évalue si une action de nature administrative est manifestement déraisonnable, l'objectif n'est pas de réviser la décision ou l'action quant au fond mais plutôt de déterminer si elle est manifestement déraisonnable, étant donné les dispositions législatives régissant ce conseil en particulier et la preuve présentée devant lui » (par. 53). En d'autres termes, l'application de la norme du manifestement déraisonnable ne doit pas « devenir un moyen pour permettre à une cour de justice de substituer sa propre opinion » (*SCFP, section locale 301*, précité, par. 59; voir également *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 771 et 774-775).

Récemment, notre Cour a reformulé ce point de vue avec fermeté dans *Ryan*, précité, par la voix du juge Iacobucci (aux par. 50-51) :

> [L]orsqu'elle décide si une mesure administrative est déraisonnable, la cour ne doit à aucun moment se demander ce qu'aurait été la décision correcte. [. . .] La norme de la décision raisonnable n'implique pas que l'instance décisionnelle dispose simplement d'une « marge d'erreur » par rapport à ce que la cour estime être la solution correcte.

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. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness — whether the employees' criminal convictions could be relitigated — and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness — whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision — indeed, what that decision is wholly premised on — is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable — a conclusion that flows from the applicability of two separate standards of review — is very different from suggesting

. . . À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

Même si le juge Iacobucci a tenu ces propos en liaison avec la norme de la décision raisonnable *simpliciter*, ils s'appliquent également à la norme de la décision manifestement déraisonnable, qui commande une plus grande déférence.

Il me paraît important de préciser que ni les présents motifs ni ceux de l'arrêt connexe *Ontario c. S.E.E.F.P.O.* n'entendent déroger au principe voulant que la cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'ait pas à déterminer la décision « correcte ». Dans chacun de ces pourvois, deux normes de contrôle étaient en cause : la norme de la décision correcte s'appliquait à une question de droit fondamentale — les déclarations de culpabilité des employés pouvaient-elles être remises en cause — et celle de la décision manifestement déraisonnable s'appliquait à une question relevant de l'expertise même du tribunal — les employés avaient-ils été congédiés pour un motif valable. Comme l'a estimé la juge Arbour, l'omission des arbitres de trancher correctement la question fondamentale de la remise en cause était suffisante pour conclure au caractère manifestement déraisonnable de leurs décisions. En effet, dans des circonstances comme celles de la présente espèce, il ne peut en être qu'ainsi : les décisions incorrectes que les arbitres ont rendues relativement à la question de droit fondamentale ont entièrement fondé leurs analyses juridiques, de même que leurs conclusions quant à savoir si les employés avaient été congédiés pour un motif valable. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un fondement rationnel; ce critère ne peut être respecté lorsque, comme en l'espèce, ce qui fonde la décision du décideur — et la sous-tend de fait en entier — est une conclusion de droit qui aurait dû être tirée correctement, ce qui n'a pas été le cas. Cependant, l'affirmation qu'en pareils cas une décision sera manifestement déraisonnable — une conclusion qui découle

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that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 — "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" — the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed,

de l'applicabilité de deux normes de contrôle distinctes — diffère sensiblement de la proposition que, avant d'appliquer la norme du manifestement déraisonnable, la cour doive décider si la décision du tribunal est correcte ou non ou que, pour appliquer cette norme, la cour doive chercher, au cours de son analyse, à déterminer la décision correcte. En d'autres mots, pour les motifs exposés précédemment, l'application de la norme du manifestement déraisonnable ne saurait reposer sur la conclusion que la décision est incorrecte.

(ii) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en pratique

Bien que notre Cour incline désormais à partager l'avis du juge La Forest dans *Paccar*, p. 1004 — « [l]es cours de justice doivent prendre soin [pour l'application de la norme du manifestement déraisonnable] de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci » —, le problème de la tension entre la norme du manifestement déraisonnable et celle de la décision correcte n'a pas été entièrement résolu. Le glissement de l'une à l'autre ressort encore parfois de la manière dont est appliquée la norme de la décision manifestement déraisonnable.

Après avoir analysé un certain nombre de décisions récentes, les observateurs ont signalé l'intensité et le caractère fondamental du contrôle en se demandant si notre Cour appliquait la norme de la décision manifestement déraisonnable en faisant preuve, dans les faits, de déférence. Je cite, à titre d'exemple, les observations du professeur Lorne Sossin sur l'application de ce critère dans *Canada Safeway Ltd. c. SDGMR, section locale 454*, [1998] 1 R.C.S. 1079 :

> [TRADUCTION] Après avoir établi que la déférence s'imposait à l'égard de l'interprétation des dispositions législatives par le Conseil, la Cour a procédé à l'analyse approfondie de cette interprétation. Les juges majoritaires ont estimé que le Conseil avait mal interprété l'expression « mise à pied déguisée » et avait omis d'accorder suffisamment d'importance aux dispositions de la convention collective. Leurs motifs expliquent clairement la préférence d'une autre interprétation que celle

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there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*

(I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review

retenue par le Conseil. Ils sont moins explicites quant à l'absence de fondement rationnel de cette dernière. En fait, la Cour ne fait guère preuve de déférence vis-à-vis de l'interprétation, par le Conseil, de sa propre loi constitutive ou de sa détermination du poids à accorder aux dispositions de la convention collective. *Canada Safeway* soulève la question habituelle : comment une cour de justice doit-elle manifester sa déférence, en particulier dans le domaine des relations de travail?

(L. Sossin, « Developments in Administrative Law : The 1997-98 and 1998-99 Terms » (2000), 11 *S.C.L.R.* (2d) 37, p. 49)

98 Le professeur Ian Holloway formule des observations semblables relativement à *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644 :

> [TRADUCTION] Dans ses motifs, [la juge McLachlin (maintenant Juge en chef)] a cité les extraits familiers de *SCFP*, mais elle a fondé sa décision sur la jurisprudence. Elle ne s'est pas demandé si, malgré le fait qu'elle différait des décisions rendues dans d'autres ressorts, la conclusion de la Commission des relations de travail de Terre-Neuve pouvait « rationnellement » s'appuyer sur les dispositions de la *Labour Relations Act* relatives à l'obligation du successeur. Elle s'est plutôt demandé si la Commission avait correctement interprété la loi, tout comme l'aurait fait une cour d'appel pour la décision d'un juge de première instance. En d'autres termes, elle a effectivement *établi une équivalence entre la norme du manifestement déraisonnable et celle de la décision fondée en droit*.

(I. Holloway, « "A Sacred Right" : Judicial Review of Administrative Action as a Cultural Phenomenon » (1993) 22 *R.D. Man.* 28, p. 64-65 (en italique dans l'original); voir également Allars, *loc. cit.*, p. 178.)

99 Dans certains cas, lorsqu'elle applique la norme de la décision manifestement déraisonnable, l'on peut reprocher à notre Cour de faire implicitement ce qu'elle rejette explicitement, soit modifier une décision qu'elle juge incorrecte, et non seulement une décision sans fondement rationnel. Dès lors, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscurcit. Il est fort possible qu'un tel risque soit inhérent au

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under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear",

contrôle selon une norme de raisonnabilité, quelle qu'elle soit, étant donné la nature du processus intellectuel que ce contrôle suppose. Néanmoins, l'existence de deux normes de raisonnabilité paraît avoir accentué la tension sous-jacente entre ces deux normes et la norme de la décision correcte.

c) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision raisonnable simpliciter*

La différence conceptuelle entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme du manifestement déraisonnable peut être intuitive et relativement facile à constater (bien que, en pratique, des éléments du premier empiètent parfois de manière inquiétante sur le second), toutefois la frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, même sur le plan théorique.

(i) Le fondement théorique de la norme du manifestement déraisonnable et de la norme du raisonnable *simpliciter*

L'absence d'une frontière suffisamment claire entre ces deux normes est attribuable au fait que celle du manifestement déraisonnable est apparue avant l'adoption de l'analyse pragmatique et fonctionnelle (voir *S.C.F.P. c. Ontario*, précité, par. 161) et, plus particulièrement, avant (et non en même temps que) la formulation de la norme de la décision raisonnable *simpliciter* dans *Southam*, précité. Puisque la norme de la décision manifestement déraisonnable, qui traduit une attitude de déférence judiciaire, avait été conçue par opposition uniquement à la norme de la décision correcte, il suffisait, pour en circonscrire la portée, que notre Cour mette l'accent sur l'idée que l'interprétation d'une loi ou le règlement d'un litige appelle souvent plus d'une interprétation correcte et que, dans certains cas, un tribunal administratif spécialisé peut être plus à même qu'une cour de justice de choisir entre les interprétations possibles. Le cas échéant, à condition que la décision puisse « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation

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the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *CUPE*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to

pertinente », la cour doit s'abstenir de la modifier (*Nipawin*, précité, p. 389).

102 L'adoption de la norme du raisonnable *simpliciter* a cependant changé la donne, la validité d'interprétations multiples constituant également la prémisse de cette nouvelle variante du contrôle selon la norme de la décision raisonnable. Considérons par exemple l'extrait suivant de *Ryan*, cité précédemment, sur la norme de la décision raisonnable *simpliciter* :

> À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

(*Ryan*, précité, par. 51; voir également par. 55.)

Il est difficile de distinguer ces propos de ceux tenus pour décrire la norme du manifestement déraisonnable, non seulement dans les arrêts ayant établi cette norme, comme *Nipawin* et *SCFP*, précités, mais aussi dans les arrêts plus récents où notre Cour l'a appliquée. Par exemple, dans *Ivanhoe*, précité, la juge Arbour fait observer que « la reconnaissance par le législateur et les tribunaux de la multiplicité de solutions qui peuvent être apportées à un différend constitue l'essence même de la norme de contrôle du manifestement déraisonnable, qui perdrait tout son sens si l'on devait juger qu'une seule solution est acceptable » (par. 116).

103 Comme la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* se fondent toutes deux sur ce principe directeur, il a été difficile de concevoir qu'elles étaient distinctes du point de vue analytique, et non sur le seul plan sémantique. Les tentatives pour établir une distinction valable entre les deux normes ont principalement revêtu deux formes reflétant les deux catégories de définitions du caractère manifestement déraisonnable. L'une d'elles distingue entre manifestement déraisonnable et raisonnable *simpliciter* en fonction de l'importance relative du défaut. L'autre met l'accent sur le caractère « flagrant ou évident » du défaut et, partant sur le caractère plus ou moins envahissant

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find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC*, *supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> . . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense

du processus d'analyse nécessaire à sa mise au jour. Chacune comporte ses propres difficultés.

(ii) L'importance du défaut

Dans *AFPC*, précité, p. 963-964, le juge Cory a décrit comme suit la décision manifestement déraisonnable :

> Dans le Grand Larousse de la langue française, l'adjectif manifeste est ainsi défini : « Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente ». On y trouve pour le terme déraisonnable la définition suivante : « Qui n'est pas conforme à la raison; qui est contraire au bon sens ». Eu égard donc à ces définitions des mots « manifeste » et « déraisonnable », il appert que si la décision qu'a rendue la Commission, agissant dans le cadre de sa compétence, n'est pas clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison, on ne saurait prétendre qu'il y a eu perte de compétence.

Cette définition n'était peut-être pas problématique en soi, mais elle l'est devenue lorsque la norme de la décision raisonnable *simpliciter* a vu le jour, en partie à cause de ce que les observateurs ont appelé la [TRADUCTION] « difficulté tautologique de distinguer des normes de rationalité à partir du terme "clairement" » (voir Cowan, *op. cit.*, p. 27-28; voir également G. Perrault, *Le contrôle judiciaire des décisions de l'administration : De l'erreur juridictionnelle à la norme de contrôle* (2002), p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle : Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), p. 34-35; P. Garant, *Droit administratif* (4e éd. 1996), vol. 2, p. 193).

Mullan fait allusion aux difficultés tant pratiques que théoriques du maintien d'une distinction fondée sur l'importance du défaut, c'est-à-dire sur le degré d'irrationalité d'une décision :

> [TRADUCTION] . . . il est vrai que dans *AFPC*, le juge Cory a accolé l'épithète « clairement » au mot « irrationnelle » en faisant état d'un cas particulier de décision manifestement déraisonnable. Cependant, je serais fort étonné qu'il ait employé l'adverbe « clairement » pour autre chose qu'un effet de rhétorique. En fait, soutenir que seule la décision « clairement irrationnelle » est manifestement déraisonnable, à l'exclusion de celle qui est irrationnelle simpliciter, vide de sens la règle de droit.

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of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead

Rattacher l'adverbe « clairement » à l'adjectif « irrationnelle » est certes une tautologie. Tout comme l'« unicité », l'irrationalité est ou n'est pas. Une décision ne peut être un peu irrationnelle. En d'autres termes, je mets au défi tout juge ou avocat d'illustrer concrètement la différence entre une décision simplement irrationnelle et une décision clairement irrationnelle! Quoi qu'il en soit, il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence.

(Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 24-25)

Sont également pertinentes à ce propos ces observations de la juge Reed dans *Hao c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2000] A.C.F. nº 296 (QL) (1re inst.), par. 9 :

Je fais remarquer que je n'ai jamais été convaincue que la norme de la « décision manifestement déraisonnable » différait sensiblement de celle de la « décision déraisonnable ». Le mot « manifestement » veut dire clairement ou de toute évidence. Si le caractère déraisonnable d'une décision n'est ni clair, ni évident, je ne vois pas comment cette décision peut être considérée comme déraisonnable.

106

Même un bref examen des caractéristiques que notre Cour a attribuées aux décisions manifestement déraisonnables et aux décisions déraisonnables fait ressortir qu'il est extrêmement difficile, sinon impossible, de maintenir entre ces deux formes du critère de la décision raisonnable une distinction véritable fondée sur la gravité du défaut et l'importance de l'écart entre la décision et une décision raisonnable. Pour l'application de l'une et l'autre des normes, la cour doit prendre soin de vérifier « si la décision du tribunal a un fondement rationnel » (voir par exemple *Paccar*, précité, p. 1004, le juge La Forest; *Ryan*, précité, par. 55-56). L'on a affirmé de la décision manifestement déraisonnable qu'elle « ne saurait être maintenue selon une interprétation raisonnable des faits ou du droit » (*National Corn Growers*, précité, p. 1369, le juge Gonthier) ni « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation pertinente » (*Nipawin*, précité, p. 389). Notre Cour a ajouté par ailleurs de la décision déraisonnable qu'« aucun des raisonnements

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that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar*, *supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness

avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée » (*Ryan*, précité, par. 53).

Suivant les normes actuelles du manifestement déraisonnable et du raisonnable *simpliciter*, le seul désaccord avec la décision du tribunal ne suffit pas pour justifier l'intervention de la cour (voir par exemple *Paccar*, précité, p. 1003-1004, le juge La Forest, et *Chamberlain*, précité, par. 15, la juge en chef McLachlin). Lorsqu'elle appliquera la norme de la décision manifestement déraisonnable, « la cour de justice fera preuve de retenue même si, à son avis, l'interprétation qu'a donnée le tribunal [. . .] n'est pas la "bonne" ni même la "meilleure" de deux interprétations possibles, pourvu qu'il s'agisse d'une interprétation que peut raisonnablement souffrir le texte de la convention » (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341). Au regard de la norme de la décision raisonnable *simpliciter*, « une décision peut satisfaire à la norme du raisonnable si elle est fondée sur une explication défendable, même si elle n'est pas convaincante aux yeux de la cour de révision » (*Ryan*, précité, par. 55). Il me paraît n'y avoir aucune différence qualitative réelle entre ces définitions d'une analyse axée sur la recherche d'un fondement rationnel; comment, par exemple, une décision non « fondée sur une explication raisonnable » (et donc « simplement » déraisonnable) se distingue-t-elle d'une décision qui ne peut « raisonnablement s'appuyer » sur la législation pertinente (et qui est donc manifestement déraisonnable)?

En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal est-elle conforme à la raison? Si la réponse est négative du fait que, par exemple, les dispositions en cause ne peuvent rationnellement appuyer l'interprétation du tribunal, l'erreur entraîne l'invalidation de la décision, que la norme appliquée soit celle du raisonnable *simpliciter* ou du manifestement déraisonnable (voir D. K. Lovett, « That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.* » (1997), 55 *Advocate (B.C.)* 541, p. 545). Puisque les deux variantes de la norme de

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are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam*, *supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obvious-

la décision raisonnable possèdent le même fondement théorique, l'intervention de la cour de justice s'appuiera sur sa conclusion selon laquelle la décision du tribunal déborde des limites du raisonnable, et non sur de « subtiles nuances » entre le critère du manifestement déraisonnable et celui du raisonnable *simpliciter* (voir Falzon, *loc. cit.*, p. 33).

109 L'existence de ces deux variantes de la norme de la décision raisonnable contraint la cour chargée du contrôle à continuer à affronter les grandes difficultés d'ordre pratique que comporte en soi l'établissement d'une distinction réelle entre les deux normes. Une distinction proposée sur le fondement de la gravité relative du défaut comporte non seulement des difficultés d'ordre pratique, mais soulève également des questions de principe, en ce qu'elle suppose que la norme du manifestement déraisonnable, en exigeant que la décision soit « clairement », et non « simplement », irrationnelle, offre une marge de manœuvre dans l'appréciation des décisions qui ne sont pas conformes à la raison. À cet égard, je me permets de rappeler les propos de Mullan selon lesquels [TRADUCTION] « il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 25).

(iii) Le caractère flagrant ou évident du défaut

110 Il convient d'examiner un autre critère appliqué pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*. Dans *Southam*, précité, par. 57, notre Cour a mis l'accent sur le caractère « flagrant ou évident » du défaut :

> La différence entre « déraisonnable » et « manifestement déraisonnable » réside dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable.

111 À mon avis, l'insistance sur le caractère « flagrant ou évident » du défaut et, partant, sur la nature

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ness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above — i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam*, *supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*,

plus ou moins envahissante de l'examen nécessaire à sa découverte, pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*, a fait naître deux difficultés. La première est de circonscrire dans chacun des cas l'examen qui est assez envahissant sans l'être trop. La deuxième se retrouve dans l'ambiguïté de la définition du caractère « flagrant ou évident » dans ce contexte : est-ce le caractère évident du défaut, le fait qu'il ressorte à première vue de la décision, qui définit fondamentalement le contrôle selon la norme du manifestement déraisonnable (voir J. L. H. Sprague, « Another View of *Baker* » (1999), 7 *Reid's Administrative Law* 163, p. 163 et 165, note 5) ou s'agit-il plutôt du caractère évident du défaut, compte tenu de la facilité avec laquelle il peut être qualifié de grave après sa découverte? Cette dernière interprétation peut poser des problèmes semblables à ceux mentionnés précédemment — l'établissement d'une échelle de l'irrationalité. La première interprétation me paraît comporter ses propres difficultés, dont je fais état ci-après.

En ce qui concerne tout d'abord la difficulté d'appliquer *de facto* une distinction fondée sur le caractère « flagrant ou évident » du défaut, d'aucuns ont déploré que le critère de l'« examen assez poussé » (voir *Southam*, précité, par. 56) ne soit pas suffisamment clair (voir D. W. Elliott, « *Suresh* and the Common Borders of Administrative Law : Time for the Tailor? » (2002), 65 *Sask. L. Rev.* 469, p. 486-487). Comme le fait observer Elliott : [TRADUCTION] « [l]a nuance entre un "examen assez poussé" et un examen simplement poussé ou moins poussé, est subtile. Elle est trop subtile pour permettre aux cours de justice de différencier clairement les trois normes. »

Notre Cour a elle-même eu du mal à effectuer, dans tous les cas d'application de la norme du manifestement déraisonnable, un examen moins poussé par rapport à l'examen « assez poussé » qui caractérise la norme du raisonnable *simpliciter*. Même si l'on a affirmé qu'un examen moins envahissant constituait la caractéristique fondamentale de la norme du manifestement déraisonnable, dans un certain nombre d'arrêts récents, y compris *Conseil*

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and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

Southam itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is

de l'éducation de Toronto (Cité) et *Ivanhoe*, précités, l'on peut qualifier d'« assez » poussée, à tout le moins, l'analyse que notre Cour a effectuée en fonction de cette norme.

114 Même avant *Southam* et l'élaboration de la norme du raisonnable *simpliciter*, un degré d'incertitude régnait quant au caractère plus ou moins approfondi que devait revêtir le contrôle en fonction de la norme du manifestement déraisonnable. Cela ressort particulièrement de *National Corn Growers*, précité (voir généralement Mullan, « Of Chaff Midst the Corn », *loc. cit.*; Mullan, *Administrative Law*, *op. cit.*, p. 72-73). Dans cette affaire, alors que, se fondant sur son interprétation de *SCFP*, précité, la juge Wilson préconise la retenue, le juge Gonthier, au nom des juges majoritaires, se livre à un examen plutôt approfondi de la décision du Tribunal canadien des importations. Selon lui, « [d]ans certains cas, le caractère déraisonnable d'une décision peut ressortir sans qu'il soit nécessaire d'examiner en détail le dossier. Dans d'autres cas, il se peut qu'elle ne soit pas moins déraisonnable mais que cela ne puisse être constaté qu'après une analyse en profondeur » (p. 1370).

115 À lui seul, *Southam* n'a pas réglé définitivement la question de l'examen plus ou moins envahissant que commande la norme du manifestement déraisonnable. L'énoncé « s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57) paraît militer contre un examen en profondeur. Cependant, l'énoncé suivant laisse planer la possibilité que, dans certains cas, la norme de la décision manifestement déraisonnable commande un examen assez approfondi : « Si la décision contrôlée par un juge est assez complexe, il est possible qu'il lui faille faire beaucoup de lecture et de réflexion avant d'être en mesure de saisir toutes les dimensions du problème » (par. 57).

116 Ces réflexions nous amènent à l'examen de la deuxième difficulté : qu'entend-on par défaut flagrant ou évident? L'arrêt *Southam* reste ambigu sur ce point. Comme je l'ai exposé, d'une part, l'on entend par décision manifestement déraison-

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flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident — i.e., clear, obvious, or immediate — is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

nable la décision qui, à première vue, est entachée d'un défaut, alors que la décision déraisonnable est celle qui est affectée d'un défaut dont la découverte exige maintes recherches ou vérifications. Toutefois, dans *Southam*, notre Cour laisse entendre par ailleurs que le caractère « flagrant ou évident » d'un défaut manifestement déraisonnable ne tient pas à la facilité de sa détection mais bien à celle de sa qualification de grave une fois qu'il a été découvert. Revêt alors une importance particulière à cet égard l'énoncé selon lequel « une fois que les contours du problème sont devenus apparents, si la décision est manifestement déraisonnable, son caractère déraisonnable ressortira » (par. 57). On reconnaît ainsi (parfois seulement tacitement, il est vrai) que ce qui doit en fait ressortir — c'est-à-dire être clair, manifeste ou flagrant — c'est l'importance du défaut lors de sa mise au jour et admettre que, dans certains cas, [TRADUCTION] « il ne sera tout simplement pas possible de comprendre l'argumentation relative au caractère manifestement déraisonnable et d'y répondre sans procéder à une analyse et à une évaluation approfondies du dossier du tribunal et de son raisonnement » (voir Mullan, *Administrative Law*, *op. cit.*, p. 72; voir également *Ivanhoe*, précité, par. 34).

Dans le récent arrêt *Ryan*, par. 52, notre Cour a apporté plus de clarté à l'arrêt *Southam*, malgré la persistance d'une part d'ambiguïté :

> Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir. [Je souligne.]

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This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan*, *supra*, at para. 53)

Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record . . . Or can one go beyond the record to demonstrate — "identify" — why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

Cet extrait met l'accent non plus sur le caractère évident du défaut en ce qu'il ressort à première vue de la décision, mais sur celui de l'importance du défaut une fois qu'il est découvert. Un autre passage, cependant, insiste plutôt sur le caractère plus ou moins envahissant de l'examen qui s'impose pour découvrir le défaut comme critère de distinction entre le manifestement déraisonnable et le raisonnable *simpliciter* :

> Une décision peut être déraisonnable sans être manifestement déraisonnable lorsque le défaut dans la décision est moins évident et qu'il ne peut être décelé qu'après « un examen ou [. . .] une analyse en profondeur » (*Southam*, précité, par. 57). L'explication du défaut peut exiger une explication détaillée pour démontrer qu'aucun des raisonnements avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée.

(*Ryan*, précité, p. 53)

118 Cette ambiguïté a incité des observateurs comme David Phillip Jones à se demander encore, à la lumière de *Ryan*, si

> [TRADUCTION] ce qui rend la décision « manifestement déraisonnable » doit ressortir à première vue du dossier [. . .] Ou peut-on tenir compte d'autres facteurs que le dossier pour établir en quoi la décision est manifestement déraisonnable? Est-ce le caractère « flagrant ou évident du défaut » qui la rend manifestement déraisonnable ou cette norme exige-t-elle une extravagance viciant à tel point la décision qu'aucun degré de déférence judiciaire ne peut justifier son maintien?

(D. P. Jones, « Notes on *Dr. Q* and *Ryan* : Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law », exposé initialement présenté à l'Institut canadien d'administration de la justice, table ronde de l'Ouest, Edmonton, 25 avril 2003, p. 10.)

119 Comme nous l'avons vu, les réponses à ces questions sont loin d'aller de soi, même sur le plan théorique. Quand jugera-t-on excessif le mal que doivent se donner pour y répondre les cours de justice et les avocats s'efforçant d'appliquer non seulement la norme du manifestement déraisonnable, mais aussi celle du raisonnable *simpliciter*? (Voir à cet égard les observations de Mullan dans « Recent Developments in Standard of Review », *loc. cit.*, p. 4.)

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120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch — i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language — and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan*, *supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators

À défaut d'une réforme en la matière ou d'une clarification des normes, la confusion « épistémologique » entourant la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* persistera. Ainsi, tant les types d'erreurs que les deux variantes de la norme de la décision raisonnable permettent de déceler — soit les interprétations qui ne peuvent être tenues pour « raisonnables », « rationnelles » ou « défendables » compte tenu des dispositions en cause — que la manière dont les deux normes sont appliquées seront en pratique, si ce n'est nécessairement en théorie, essentiellement les mêmes.

Il n'existe pas de solution facile à ce problème délicat. En dépit des mesures prises pour préciser le contenu des catégories actuelles de décisions manifestement déraisonnables ou la relation existant entre elles, cette norme et celle de la décision raisonnable *simpliciter* continueront d'avoir une raison d'être commune : il arrive souvent que le législateur s'exprime de manière équivoque et qu'une disposition [TRADUCTION] « se prête à plus d'une interprétation »; tant que l'interprétation du tribunal administratif spécialisé [TRADUCTION] « ne dépasse pas les limites d'une conception raisonnable de l'interprétation qui s'impose, rien ne justifie la cour d'intervenir » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 18). Il demeurera donc difficile d'assurer l'étanchéité conceptuelle de ces normes et je m'interroge sur l'utilité, au bout du compte, des efforts théoriques que cet exercice exige. De toute évidence, la décision qui ne satisfait pas à la norme du manifestement déraisonnable ne répond pas non plus à celle du raisonnable *simpliciter*, mais il paraît difficile de concevoir un cas où l'inverse n'est pas également vrai : lorsqu'une décision n'est pas fondée sur une explication défendable (et est de ce fait déraisonnable) (*Ryan*, précité, par. 55), quelle est la possibilité de sa confirmation « selon une interprétation raisonnable des faits ou du droit » (sans qu'elle soit tenue pour manifestement déraisonnable) (*National Corn Growers*, précité, le juge Gonthier, p. 1369)?

Ainsi, la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* exigent des cours de justice qu'elles accordent une « attention

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in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan*, *supra*, at para. 49).

Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be

respectueuse » aux motifs des tribunaux administratifs en se prononçant sur la rationalité de leurs décisions (voir *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65, la juge L'Heureux-Dubé, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286, et *Ryan*, précité, par. 49).

123 Il est peu probable que, en pratique, les efforts visant à distinguer ces deux variantes de la déférence judiciaire en qualifiant l'examen que commande l'une d'elles d'« un peu plus poussé » se révèlent plus fructueux que par le passé. Fonder la distinction sur l'aisance relative avec laquelle peut être découvert le défaut crée par ailleurs un dilemme plus théorique : pourquoi un défaut ressortant à première vue de la décision justifierait-il davantage la cour d'intervenir qu'un défaut caché? Même si un défaut peut être aisément décelé en raison de sa gravité, un défaut grave ne sera pas nécessairement facile à découvrir; par ailleurs, une erreur peut être d'emblée évidente ou manifeste, mais sans avoir d'effet sérieux.

124 Par contre, préciser que le caractère « flagrant ou évident » ne tient pas à la facilité de la détection du défaut, mais bien à la facilité avec laquelle, une fois mis au jour (à l'issue d'un examen superficiel ou poussé), le défaut peut être qualifié de grave pourrait bien amener les cours de justice à soumettre plus fréquemment les décisions qu'elles contrôlent en fonction de la norme du manifestement déraisonnable à un examen aussi approfondi que celui effectué au regard de la norme du raisonnable *simpliciter*, gommant ainsi davantage la différence, s'il en est, entre les deux.

125 Préciser que le caractère « flagrant ou évident » du défaut ne renvoie pas au fait qu'il ressort à première vue de la décision, mais plutôt à son importance, une fois découvert, donne également à penser qu'il est possible et opportun qu'une cour de justice tente de recourir à une échelle de l'irrationalité lorsqu'elle évalue la décision d'un tribunal administratif. Par exemple, telle décision est suffisamment irrationnelle pour être déraisonnable, mais elle ne

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overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam*, *supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible — whether its illegibility is evident on a cursory glance or only after a close examination — the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the

l'est pas assez pour être infirmée suivant la norme du manifestement déraisonnable. Un tel résultat conduit à se demander si le législateur a pu vouloir qu'une décision irrationnelle soit maintenue. Quoi qu'il en soit, une telle interprétation paraît difficile à concilier avec les exigences d'un régime juridique fondé sur la règle de droit.

Je reconnais que le cadre établi par notre Cour depuis l'adoption, dans *Southam*, précité, d'une troisième norme de contrôle, comporte certains avantages, du moins en théorie. L'existence d'une norme intermédiaire paraît permettre aux cours de justice de mieux adapter le degré de déférence à la situation considérée. Toutefois, j'estime qu'une leçon doit être tirée de notre expérience : les inconvénients du cadre actuel, y compris les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant de l'interaction paradoxale entre la norme du manifestement déraisonnable et celle de la décision correcte, paraissent l'emporter sur ces avantages.

Plus particulièrement, l'impossibilité de maintenir une distinction analytique viable entre les deux variantes de la norme de la décision raisonnable a fait obstacle, en pratique, à une application présumément plus fidèle à l'intention du législateur. En fin de compte, tenter d'établir une distinction entre une décision déraisonnable et une décision manifestement déraisonnable peut être aussi stérile que d'essayer de distinguer ce qui est « illisible » de ce qui est « manifestement illisible ». Même s'il est possible d'établir, dans l'abstrait, une distinction conceptuelle, la réalité fonctionnelle veut que, une fois le texte jugé illisible — que cette illisibilité ressorte d'un examen sommaire ou uniquement d'une analyse en profondeur —, le résultat demeure le même. Il serait vain de chercher à savoir si le texte est illisible *simpliciter* ou manifestement illisible; dans l'un et l'autre des cas, il ne peut être lu.

Il ne faut pas non plus perdre de vue les fondements théoriques et l'objectif ultime du contrôle judiciaire. Le contrôle judiciaire vise à maintenir l'ordre juridique normatif en s'assurant que les

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decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q*, *supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, *supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". . . . A third aspect of the rule of law is . . . that "the exercise of all public

décisions des tribunaux administratifs soient rendues conformément à la procédure établie et soient défendables quant au fond. Comme l'a expliqué la juge en chef McLachlin dans *Dr Q*, précité, par. 21, les deux fondements du contrôle judiciaire sont l'intention du législateur et la primauté du droit :

> [Dans *Pushpanathan*,] [l]e juge Bastarache affirme que « [l]a détermination de la norme de contrôle que la cour de justice doit appliquer est centrée sur l'intention du législateur qui a créé le tribunal dont la décision est en cause » (par. 26). Cependant, cette méthode tient aussi dûment compte des « conséquences qui découlent d'un octroi de pouvoir » (*Bibeault*, p. 1089) et, tout en sauvegardant « [l]e rôle des cours supérieures dans le maintien de la légalité » (p. 1090), renforce le principe selon lequel il ne faut pas recourir sans nécessité à ce pouvoir de surveillance. La méthode pragmatique et fonctionnelle implique ainsi l'examen de l'intention du législateur, mais sur l'arrière-plan de l'obligation constitutionnelle des tribunaux de protéger la légalité.

En somme, la cour appelée à déterminer la norme de contrôle applicable doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire.

129

Comme notre Cour l'a signalé, « la règle de droit » est une « expression haute en couleur qui, sans qu'il soit nécessaire d'en examiner ici les nombreuses implications, communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale » (*Renvoi : Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, p. 805-806). Notre Cour a développé sa pensée sur le sujet dans *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 71 :

> Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, aux pp. 747 à 752, notre Cour a défini les éléments de la primauté du droit. Nous avons souligné en premier lieu la suprématie du droit sur les actes du gouvernement et des particuliers. En bref, il y a une seule loi pour tous. Deuxièmement, nous expliquons, à la p. 749, que « la primauté du droit exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif ». [. . .] Un troisième aspect de la primauté du droit

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power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*

(See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original); see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a

[. . .] tient à ce que l'« exercice de tout pouvoir public doit en bout de ligne tirer sa source d'une règle de droit ». En d'autres termes, les rapports entre l'État et les individus doivent être régis par le droit. Pris ensemble, ces trois volets forment un principe d'une profonde importance constitutionnelle et politique.

« À son niveau le plus élémentaire », notre Cour a-t-elle ajouté, au par. 70, « le principe de la primauté du droit assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités. Elle fournit aux personnes un rempart contre l'arbitraire de l'État. »

Parce que l'État ne peut agir arbitrairement, l'exercice du pouvoir doit être justifiable. Comme la Juge en chef l'a fait observer :

> [TRADUCTION] . . . les sociétés où prime le droit se caractérisent par une certaine *obligation de justification*. Dans une société démocratique, ce pourrait bien être la caractéristique générale de la primauté du droit dans laquelle sont subsumés les idéaux plus spécifiques. Dans une société caractérisée par une culture de la justification, l'exercice d'un pouvoir public n'est opportun que s'il peut être justifié aux yeux des citoyens sur les plans *de la rationalité et de l'équité.*

(Voir madame la juge B. McLachlin, « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998-1999), 12 *C.J.A.L.P.* 171, p. 174 (en italique dans l'original); voir également MacLauchlan, *loc. cit.*, p. 289-291.)

Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure (la décision satisfait-elle aux exigences de l'équité procédurale?), si elle est équitable.

Au cours des dernières années, notre Cour a reconnu que tant les cours de justice que les tribunaux administratifs ont un rôle important à jouer dans le maintien et l'application de la primauté du droit. Comme l'a souligné la juge Wilson dans *National Corn Growers*, précité, les cours de justice ont conclu que « souvent, les dispositions législatives ne se prêtent pas à une seule interprétation qui soit particulièrement juste » et qu'un tribunal administratif peut être « mieux en mesure que la cour

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way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

chargée du contrôle de dissiper les ambiguïtés dans le texte d'une loi et d'en combler les lacunes » d'une manière judicieuse dans son domaine spécialisé (p. 1336, citant J. M. Evans et autres, *Administrative Law* (3e éd. 1989), p. 414). L'interprétation et l'application du droit ne ressortissent donc plus uniquement aux cours de justice. Les tribunaux administratifs jouent un rôle vital, un rôle de plus en plus important. Comme la juge McLachlin l'a dit fort à-propos dans une récente allocution sur le rôle des cours de justice et des tribunaux administratifs dans le maintien de la primauté du droit : [TRADUCTION] « Une culture de la justification fait en sorte que l'analyse ne porte plus sur les institutions elles-mêmes, mais, plus subtilement, sur ce qu'elles sont en mesure de faire pour le progrès rationnel de la société civile. Bref, la primauté du droit peut s'exprimer par plusieurs voix, à condition que l'harmonie qui en résulte se fasse l'écho des valeurs d'équité et de rationalité qui la sous-tendent » (McLachlin, *loc. cit.*, p. 175).

In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

132 En confirmant le rôle des tribunaux administratifs dans l'interprétation et l'application du droit, il convient cependant de rappeler une distinction importante : dire que l'Administration a un rôle légitime à jouer dans le règlement des litiges équivaut à affirmer que les tribunaux administratifs sont aptes (et peut-être plus aptes) à choisir entre plusieurs décisions raisonnables. Ce n'est pas conclure que le prononcé de décisions déraisonnables a place dans le système de justice. N'est-ce pas là l'effet de l'application d'une norme de la décision manifestement déraisonnable eu égard à une norme intermédiaire de la décision raisonnable *simpliciter*?

On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts

133 À supposer que l'on puisse effectivement distinguer entre une décision déraisonnable et une décision manifestement déraisonnable, il arrivera qu'une décision déraisonnable (c'est-à-dire irrationnelle) doive être maintenue. Ceci se produira si la norme de contrôle est celle du manifestement déraisonnable lorsque la décision contestée est déraisonnable, sans l'être manifestement. Je le répète, je doute qu'un tel résultat puisse être concilié avec l'intention du législateur, l'analyse pragmatique et fonctionnelle devant, en théorie, refléter le plus fidèlement possible cette volonté législative. En matière

should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

d'interprétation législative, une cour de justice doit toujours être très réticente à imputer au législateur l'intention de laisser l'Administration accomplir un acte irrationnel, à moins que cette intention ne soit formulée sans aucune équivoque (voir *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 367-368). Sur le plan théorique, le principe constitutionnel de la primauté du droit, un principe fondamental d'interprétation toujours applicable dans ce contexte, le confirme : lorsqu'une cour de justice conclut que le législateur a voulu qu'il n'existe aucun recours contre une décision irrationnelle, il paraît très probable qu'elle a mal interprété l'intention du législateur.

Le droit administratif a connu un développement considérable au cours des 25 dernières années, soit depuis l'arrêt *SCFP*. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reflète l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

III. Dispositif

Sous réserve des observations formulées dans les présents motifs, je souscris au dispositif que la juge Arbour propose dans le présent pourvoi.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Caley & Wray, Toronto.

Procureurs de l'intimée la Ville de Toronto : Osler, Hoskin & Harcourt, Toronto.

Procureur de l'intervenant : Procureur général de l'Ontario, Toronto.

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