EB-2019-0242

ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO

APPLICATION TO REVIEW AMENDMENTS TO THE MARKET RULES MADE BY THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

IESO BOOK OF AUTHORITIES
IN RESPONSE TO AMPCO'S REQUEST FOR A STAY

November 5, 2019

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APPLICATION TO REVIEW AMENDMENTS TO THE MARKET RULES MADE BY THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

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TAB 1

COURT FILE NO.: 03-0344
DATE: 2003-07-10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
EUGENE JOHNSON,	)	*Daniel Cox*, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
ATTORNEY GENERAL OF ONTARIO, DIRECTOR OF ONTARIO WORKS, ADMINISTRATOR OF DISTRICT OF THUNDER BAY SOCIAL SERVICES ADMINISTRATION BOARD,	)	*Shaun Nakatsuru*, for the Attorney General of Ontario
	)	*Allan D. McKitrick* for the Administrator of District of Thunder Bay Social Services Administration Board
Respondents	)	
	)	**HEARD:** May 29, 2003, at Thunder Bay, Ontario

Mr. Justice J. deP. Wright

Decision On Motion

[1] Ontario law says that a person convicted of fraud upon the welfare system is banned from the receipt of welfare for life. The applicant has pleaded guilty to defrauding the welfare system. He has challenged the constitutionality of the law which disentitles him from further benefits and he now asks the court on this interlocutory motion to compel the welfare authorities to give

him welfare until the hearing of his constitutional challenge notwithstanding this law. He submits that he is destitute and should not be deprived of benefits in the meantime.

[2] It is a principle of our constitution that everyone is equal under the law.

[3] We have inherited English law through the Imperial Constitution Act 1791, 31 Geo. III, c. 31 and our provincial Property and Civil Rights Act of 1792, 32 Geo. III, c. 1.

[4] The Stuart penchant for suspending the law or dispensing with the law came to an end in the Glorious Revolution of 1689 when Parliament passed the Bill of Rights 1 Wm & Mary sess. 2, c.2, and compelled William and Mary to acknowledge that "the pretended power of suspending the laws, or the execution of laws, by regal authority, without consent of parliament" and "the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late , is illegal". (those who are interested in the subject of the suspension of law might refer to a speech against the suspending and dispensing prerogative, made in the House of Lords, 1766—16 Parl, Hist. 263) and also Eugene Forsey's memoir of his attempt to educate the Federal bureaucracy on the subject in his autobiography A Life On The Fringe p. 181.)

[5] "Since this time nobody has presumed to advocate the existence of a dispensing power, under any circumstances whatever, as inherent in the Crown." (Brooms Constitutional law (1866, Maxwell, London) p.508)

[6] The applicant now asks me to suspend or dispense with a statutory provision passed by the Legislature and enacted as law by the Sovereign through the Lieutenant Governor.

[7] Has the court this authority? If so, should the authority be exercised in the circumstances?

[8] The applicant submits that the Charter clothes the court with the power to suspend this law or exempt him from its operation. He relies upon RJR Macdonald [1994] 1 SCR 311 where the court found jurisdiction in s. 65.1 of the Supreme Court Act and Supreme Court Rule 27 but went on to say at para. 34:

> ¶ 34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

[9] In assessing this statement, one must recognize that RJR Macdonald was not an interlocutory motion in the first instance. It was a motion before the Supreme Court of Canada for a stay in the nature of a stay of execution of a Court of Appeal decision pending an appeal to the Supreme Court of Canada and (in anticipation) a further stay for a limited time should the Supreme Court decide against the moving party. It was a motion by a party that had been successful in having the impugned legislation struck down in the first instance, only to see that decision set aside on appeal.

[10] Having said this, notwithstanding that the constitution which we have inherited generally bans the suspension or exemption from law, it appears that the court is clothed with an authority denied to the Executive branch of government to do just that.

[11] In determining whether to grant the relief sought RJR Macdonald confirms the three considerations which have evolved in our law:

> The moving party must establish that:
>
> (i) There is a serious constitutional issue to be determined.
>
> (ii) Compliance with the new regulations will cause irreparable harm.
>
> (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues, (or, in this case, favours granting the relief sought.)

[12] In determining whether there is a serious issue to be tried it must be recognized that the threshold is low.

> "¶ 78 . . . . . Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test." (RJR-Macdonald)

[13] However, in this case the constitutionality of the statute IS a pure question of law. The court cannot ignore the decision of the Divisional Court in *Masse v. Ontario* (1996) 134 D.L.R. (4th) 20:

> ¶ 350 [2] In my view, section 7 does not provide the Applicants with any legal right to minimal social assistance. The Legislature could repeal the social assistance statutes (FBA and GWAA); there is no question that the Lieutenant Governor in Council is empowered to increase and/or decrease the rates of social assistance.
>
> ¶ 351 In my view, section 7 does not confer any affirmative right to governmental aid.
>
> ¶ 352 None of CAP, GWAA or FBA provide a "Guaranteed Income Benefit". Moreover, there is no reason in law why the Government of Ontario must so provide.

¶ 353 In DeShaney v. Winnebago County Department of Social Services 109 S.Ct. 998 (1989), at p. 1004, the United States Supreme Court held that there is no affirmative duty on the part of the State to provide the necessaries of life. The court held that the fourteenth (14th) Amendment Due Process Clause provides procedural safeguards upon systems of welfare administration; it does not guarantee certain minimal levels of safety and security.

¶ 354 In Dandridge v. Williams 90 S.Ct. 1153 (1970), at p. 1163, the United States Supreme Court said:

> [T]he Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

¶ 355 At page 1153

> "the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court". ...

[14] Will compliance with the legislation cause irreparable harm?

[15] The applicant points out that there are various levels of "social safety nets" in our society but "welfare" (or "social assistance") is at the bottom. After Welfare there is nothing but charity to which a person may look for sustenance. The applicant argues that his very life is at stake. The respondent argues that while life may be inconvenient for the applicant, he has been able to manage through access to private charity. The unfortunate fact is that when he was sentenced on the fraud charge the applicant was granted a suspended sentence, conditional upon him repaying $175. a month to the welfare authorities. This was to be repaid by a man who, at best, was entitled to only $520 a month assistance and whose rent alone was $400. From a realistic point of view it appears that we are back in the conditions of England of the 1840's . In the short term it appears that the jail will once again provide that service which Scrooge contemplated when he asked those soliciting funds for the poor "What are there no jails?"

[16] The Balance of Convenience:

> ¶ 71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> ¶ 72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights. (RJR-Macdonald Inc. v. Attorney General of Canada [1994] 1 S.C.R. 311)

[17] "The purpose of the regulations is to promote the public interest. To overcome this the applicants must present a strong case. While there is also a public interest in the position of the applicants, it is a narrower and more individualistic interest than that of the regulations . A stay or injunction is an extraordinary remedy that should be granted sparingly." (*Falkiner v. Ontario* (Dec. 21, 1995) (Steele, J))

[18] It has been argued that there is a difference between a case where the applicant asks that a law be suspended and one where he asks to be exempted from the operation of that law. In this case, the applicant in effect asks that the law be suspended. He provides no basis for a holding that he should be exempted while the law should apply to others.

[19] In the result I cannot find that the applicant has satisfied the onus upon him and this application is dismissed.

[20] Under the circumstances there will be no costs.

Mr. Justice J. deP. Wright

Released: July 10, 2003

COURT FILE NO.: 03-0344
DATE: 2003-07-10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

EUGENE JOHNSON,

Applicant

- and –

ATTORNEY GENERAL OF ONTARIO,
DIRECTOR OF ONTARIO WORKS,
ADMINISTRATOR OF DISTRICT OF
THUNDER BAY SOCIAL SERVICES
ADMINISTRATION BOARD,

Respondents

DECISION ON MOTION

Mr. Justice J. deP. Wright

Released: July 10, 2003

TAB 2

Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

Other reviews of market rules

35 (1) On application by a person who is directly affected by a provision of the market rules, the Board may review the provision. 2002, c. 23, s. 3 (20).

Exception

(2) Subsection (1) does not apply to a provision of the market rules that was reviewed by the Board under section 33 or 34 within the 24 months before the application. 1998, c. 15, Sched. A, s. 35 (2).

Review of market rule made by the Minister

(3) Subsection (1) does not apply to a provision of the market rules that was made by the Minister before May 1, 2002 unless the application is made before May 1, 2005. 2004, c. 23, Sched. A, s. 44 (1).

Restriction

(4) An application shall not be made under this section by a market participant unless the applicant has made use of the provisions of the market rules relating to the review of market rules. 1998, c. 15, Sched. A, s. 35 (4).

Stay of provision

(5) An application under this section does not stay the operation of the provision pending the completion of the review. 1998, c. 15, Sched. A, s. 35 (5).

Referral back to IMO

(6) If, on completion of a review under this section, the Board finds that the provision is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order directing the IESO to amend the market rules in a manner and within the time specified by the Board. 1998, c. 15, Sched. A, s. 35 (6); 2004, c. 23, Sched. A, s. 44 (2).

Publication

(7) The IESO shall, in accordance with the market rules, publish any amendment made pursuant to an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (7); 2004, c. 23, Sched. A, s. 44 (2).

Further reviews

(8) Sections 33 and 34 do not apply to an amendment made in accordance with an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (8).

TAB 3

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0040

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

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

DECISION AND ORDER
(Issued April 10, 2007 and as corrected on April 12, 2007)

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Pamela Nowina
Member and Vice Chair

Bill Rupert
Member

The Application

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* (the "Act") seeking the review of an amendment to the market rules approved by the Independent Electricity System Operator (the "IESO") on January 17, 2007. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market pricing algorithm within the IESO-administered markets (the "Amendment").

The specific relief sought in the Application is the following:

- an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment;
- an order under section 33(9) of the Act revoking the Amendment and referring the amendment back to the IESO for further consideration; and
- an award of costs, such costs to be payable by the IESO.

On February 9, 2007, the Board issued its Notice of Application and Oral Hearing in relation to the Application.

Under section 33(6) of the Act, the Board is required to issue an order that embodies its final decision in this proceeding within 60 days after receiving AMPCO's application.

This is the first application of its kind to proceed to a hearing before, and a decision by, the Board. An earlier application by a different applicant and in relation to a different amendment to the market rules was subsequently withdrawn.

Although the Board has considered the entirety of the record in this proceeding, the Board has summarized the record only to the extent necessary to provide context for those findings.

The Amendment

The Amendment relates to the calculation of the energy price (the market clearing price or "MCP" that is calculated in five-minute intervals) in the real-time energy market administered by the IESO and, more specifically, to a change (from 12x to 3x) in the assumption that is made about the ramping capabilities of generation facilities when determining market prices.

The algorithm that is used to compute MCP – known as the "market schedule" and sometimes referred to as the unconstrained schedule – contains a parameter (the "TradingPeriodLength") that specifies the ramp rate multiplier to be used in determining energy market prices. Ramp rate, which is usually expressed in MW per minute, indicates how quickly the output of a generation facility can be increased or decreased.

Prior to the Amendment, the market rules authorized the IESO (then known as the Independent Electricity Market Operator or IMO)[1] to establish the "TradingPeriodLength" parameter for the pricing algorithm but did not define its value. Prior to market opening, the value of the parameter was set at 60 minutes, which is the equivalent of a 12x ramp rate. Most generation facilities, and in particular those that typically set market prices, can change their output from minimum levels to full output in roughly one hour. The result of the 12x ramp rate multiplier is that the market schedule has since market opening assumed that generation facilities are able to ramp output up or down 12 times faster than is, in fact, the case. It is widely acknowledged that use of the 12x ramp rate multiplier was implemented as a temporary solution to address extreme price excursions that were experienced during testing prior to opening of the wholesale market.

Further examination of the ramp rate multiplier issue was initiated by the IESO in December, 2005. Stakeholder consultations ensued, principally through the Market Pricing Working Group as well as through the IESO's Stakeholder Advisory Committee.

At the end of this examination, the IESO proposed to amend the market rules by setting the value of the "TradingPeriodLength" parameter at 15 minutes, which is the equivalent of a 3x ramp rate. To that end, on December 27, 2006, the IESO published the Amendment for comment. Five submissions were received in response; one from AMPCO opposing the Amendment and four from generators supporting the Amendment as a move in the right direction albeit not as the preferred solution. The Board of Directors of the IESO approved the Amendment on January 17, 2007, and it was published on January 19, 2007. The Amendment was scheduled to go into effect on February 10, 2007, the earliest date permitted by section 33(1) of the Act.

[1] For convenience, this Decision and Order will refer throughout to the IESO even though, at the time relevant to the point under discussion, it may have been called the IMO.

Once implemented, the Amendment would result in the market schedule assuming that generation facilities are able to ramp output up or down 3 times faster than is, in fact, the case.

It is to be noted that the 3x ramp rate multiplier relates solely to the calculation of energy prices. The physical dispatch algorithm (known as the "real-time schedule" and sometimes referred to as the constrained schedule), which is used by the IESO to dispatch facilities to meet market demand in any given interval, reflects the actual ramping capabilities of generation facilities (in other words, the value of the "TradingPeriodLength" parameter is set at 5 minutes, equivalent to a 1x ramp rate).

The role played by, and the impact of, the ramp rate multiplier in the determination of real-time energy prices is discussed further below under the heading "Pricing and Dispatch in the Real-time Energy Market".

The Proceeding

A brief description of the issues and the orders issued by the Board is summarized below.

1. *Stay of Operation of the Amendment*

The Amendment had an effective date of February 10, 2007. AMPCO's arguments in support of its application for an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment were that: (i) it is in the public interest to order the stay; (ii) there are legitimate concerns with respect to the Amendment that should be considered by the Board; and (iii) the balance of convenience favours a stay.

On February 9, 2007, the IESO filed a letter with the Board indicating that it consented to the stay of the operation of the Amendment, such consent being without prejudice to any arguments that the IESO might make in relation to the Board's review of the Amendment. The IESO noted that it had given due consideration to the balance of convenience and the short duration of the stay given the Board's statutory deadline for completion of its review of the Amendment.

By Order dated February 9, 2007, the Board stayed the operation of the Amendment pending completion of the Board's review of the Amendment and issuance by the Board

of its order embodying its final decision on AMPCO's application for review of the Amendment. The Board noted in particular that the balance of convenience favoured a stay of the operation of the Amendment, particularly given the long history of the ramp rate issue in the IESO-administered markets.

2. *Intervenors*

The following parties requested and were granted intervenor status in this proceeding: the Association of Power Producers of Ontario ("APPrO"); Coral Energy Canada Inc. ("Coral Energy"); the Electricity Market Investment Group ("EMIG"); Hydro One Networks Inc. ("Hydro One"); the IESO; Ontario Power Generation Inc. ("OPG"); TransAlta Energy Corp. and TransAlta Cogeneration L.P. (collectively "TransAlta"); TransCanada Energy Ltd. ("TransCanada"); and the Vulnerable Energy Consumers Coalition ("VECC").

In addition, the Board received on March 30, 2007 a letter of comment filed by Constellation Energy.

3. *Procedural Order No. 1*

On February 16, 2007, the Board issued its Procedural Order No. 1. In addition to establishing the process and timelines for this proceeding, Procedural Order No. 1 also:

- indicated that cost awards would be made available in this proceeding to eligible intervenors, and solicited written submissions on the issue of the party from whom cost awards should be recovered;

- directed the IESO to file materials associated with the development and adoption of the Amendment; and

- identified the following as the issues to be considered in this proceeding:

  (i) is the Amendment inconsistent with the purposes of the Act?

  (ii) does the Amendment unjustly discriminate against or in favour of a market participant or a class of market participants?

4. *Cost Awards*

Requests for eligibility for an award of costs were made by AMPCO, VECC and APPrO. TransAlta reserved its right to apply for an award of costs should special circumstances arise in the proceeding. In its letter of intervention, the IESO also indicated that it would seek an award of costs.

In response to Procedural Order No. 1, four parties made submissions in relation to the issue of the party from whom cost awards should be recovered. The submissions are summarized in the Board's Procedural Order No. 2 issued on March 9, 2007.
The Board determined that cost awards in this proceeding should be recovered from the IESO, for the reasons stated in Procedural Order No. 2. The Board also determined that VECC, APPrO and AMPCO are eligible for an award of costs in this proceeding, subject to any objections that the IESO might wish to make for consideration by the Board. By letter dated March 16, 2007, the IESO indicated that while it accepts and respects the Board's decision regarding cost eligibility, it reserved the right to ask the Board to limit the amount of costs recoverable by parties objecting to the Amendment in the event that it appears, at the end of the proceeding, that some or all of the grounds for the objection ought not to have been advanced.

5. *Production of Materials by the IESO*

As noted above, among other things Procedural Order No. 1 directed the IESO to file materials associated with the development and adoption of the Amendment. By letter dated March 2, 2007, AMPCO alleged that the IESO's filing in response to Procedural Order No. 1 was deficient in a number of respects. By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there is no merit to AMPCO's allegations and that the IESO had produced all of the materials required by Procedural Order No. 1.

In its Procedural Order No. 2, the Board among other things ordered the IESO to produce certain materials, including material prepared by the IESO in the context of the Day Ahead Commitment Process and/or the Day Ahead Market initiative that directly relates to ramp rate (the "DAM/DACP Materials"). In ordering the IESO to produce the DAM/DACP Materials, the Board expressly recognized that the relevance of those Materials to the criteria set out in section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Procedural Order No. 2 thus also invited parties to make submissions on the issue of the relevance to this

proceeding of the DAM/DACP Materials, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1.

On March 12, 2007, the IESO filed a letter with the Board in response to Procedural Order No. 2. In that letter, the IESO stated that the nature and extent of the task involved in satisfying the document production requirements of Procedural Order No. 2 makes completion of the task within anything remotely close to the specified timeframe completely impractical. Without waiving any of its rights or accepting the relevance to this proceeding of the materials identified in Procedural Order No. 2, the IESO put forward a proposed plan to meet the Board's information requirements within the requisite timeframes. On March 14, 2007, AMPCO filed a letter with the Board expressing its concerns regarding the IESO's proposed plan. The concerns related principally to the scope of the IESO's production in respect of the subject matter and time period to be covered.

On March 14, 2007, the Board issued its Procedural Order No. 3. The effect of Procedural Order No. 3 was to revise the nature of the production required of the IESO under Procedural Order No. 2, generally in line with the proposed plan submitted by the IESO in its letter of March 12, 2007 but with the exception that the production should cover a longer period than that proposed by the IESO.

6. *Technical Conference*

Procedural Order No. 1 made provision for a technical conference to be held in this proceeding. On March 20, 2007, and in response to inquiries received by certain parties, Board staff communicated with the parties to confirm whether they wished to proceed with the technical conference. Based on the responses received to that communication, the Board decided to cancel the technical conference and the parties were so advised by Board staff on March 21, 2007.

7. *Submissions on the "Relevance Issue"*

On March 21, 2007, AMPCO filed with the Board a letter setting out a proposal for submissions on the issue of the relevance of certain materials to this proceeding. As noted above, in its Procedural Order No. 2 the Board invited parties to make submissions on the relevance of the DAM/DACP Materials. AMPCO's proposal, made with the consent of the IESO, was to the effect that AMPCO would provide the Board and all parties with a "comprehensive submission on the relevance of materials

produced by the IESO in relation to a central theme contained in AMPCO's application: "that the Amendment violates fundamental principles of procedural fairness". The proposal also suggested that, rather than filing submissions in accordance with Procedural Order No. 2, parties should await production of AMPCO's comprehensive submission and respond to that document.

On March 22, 2007, the Board issued its Procedural Order No. 4 setting out the timeframe for the filing of AMPCO's submissions on relevance. The Board encouraged intervenors to make written submissions in response to those of AMPCO but, given the imminence of the commencement of the oral hearing, indicated that it would allow all intervenors to make oral submissions on the relevance issue at the beginning of the oral hearing.

Written submissions on relevance were filed by AMPCO, the IESO, APPrO and Coral Energy. The positions of the parties are summarized below under the heading "The Board's Mandate".

8. *The Oral Hearing and Final Written Argument*

The Board held an oral hearing in this proceeding, commencing on March 29, 2007 and concluding on March 30, 2007. The first day of the hearing was devoted almost exclusively to submissions by the parties on the "relevance issue", as described in greater detail below under the heading "The Board's Mandate". On the second day of the hearing, witnesses gave evidence on behalf of AMPCO, the IESO, APPrO and TransCanada, principally in relation to the nature and impact or effect of the Amendment. The position of the parties in this regard is discussed in greater detail below under the heading "The Impact of the Amendment".

During the hearing, proposals were also made by certain of the parties in relation to the filing of final written argument, and these were accepted by the Board. AMPCO filed its final written argument on April 2, 2007. VECC filed its final written argument on April 3, 2007. The following parties filed their final written argument on April 4, 2007: the IESO; APPrO; and TransCanada. OPG filed a letter with the Board indicating its support for the final argument filed by APPrO. Coral Energy did not file final written argument, but did indicate during the oral hearing that it would address the substantive issues associated with the Amendment through APPrO. AMPCO filed its written reply argument on April 5, 2007.

The Board's Mandate

The "relevance issue", as it has been referred to in this proceeding, arose initially in relation to the DAM/DACP Materials. As stated in Procedural Order No. 4, the issue is relevance of materials – and hence of the position or argument that the materials support – relative to the criteria set out in section 33(9) of the Act. This issue, of necessity, requires consideration of the scope of the Board's mandate on applications to review amendments to the market rules under section 33 of the Act.

As the proceeding progressed, it became clearer that AMPCO's views as to the scope of the Board's mandate differs markedly from the views of other parties. A number of the concerns raised by AMPCO regarding the Amendment relate not to the impact or effect of the Amendment, but rather to the process by which the Amendment was made by the IESO. Many of the materials filed by the IESO in response to the Board's Procedural Orders are relevant to those concerns, but have little or no relevance to the issue of the impact or effect of the Amendment.

The position of the parties in relation to the scope of the Board's mandate, as expressed in the written submissions filed in response to Procedural Order No. 4 and/or in oral submissions made at the commencement of the oral hearing, may be summarized as follows.

AMPCO's position is that the Board's mandate is not limited to the grounds set out in section 33(9) of the Act. Rather, the Board has a "plenary review jurisdiction" that would allow the Board to address what AMPCO alleges as significant failures of procedural fairness by the IESO. In support of its position, AMPCO referred to and relied on sections 33(4), 33(5) and 33(6) of the Act, on section 19(4) of the *Ontario Energy Board Act, 1998*, on the Board's authority to determine all questions of law and fact in all matters within the Board's jurisdiction, and on the Board's public interest role. On that basis, in AMPCO's view the criteria expressed in section 33(9) of the Act are better understood as the two instances in which the legislature has directed the Board on how it must exercise its review discretion, leaving the Board otherwise able to exercise its review discretion as the Board sees fit.

By contrast, the position of the IESO, APPrO, Coral, OPG and TransCanada is that the Board's mandate is limited by section 33(9) of the Act to a determination of whether (a) the amendment is inconsistent with the purposes of the Act; or (b) the amendment unjustly discriminates against or in favour of a market participant or a class of market

participants. On that basis, whether the IESO has, and breached, a common law duty of procedural fairness or acted in a manner giving rise to a reasonable apprehension of bias (both of which allegations were denied by the IESO), are not matters for consideration by the Board on a market rule amendment review application under section 33 of the Act. Materials produced by the IESO that are relevant only to the IESO's processes in making the Amendment should therefore be disregarded. The IESO also specifically requested that the Board strike AMPCO's March 26, 2007 submission from the record.

On March 29, 2007, the Board rendered an oral decision on this issue. Specifically, the Board determined that its mandate under section 33 of the Act is limited to an examination of the market rule amendment against the criteria set out in section 33(9) the Act. The Board also ordered that any evidence relating to the IESO's stakeholdering process, including AMPCO's March 26, 2007 submission, be struck from the record. An excerpt from the transcript of the oral hearing that contains the Board's decision and order in this regard is set out in Appendix A to this Decision and Order.

The parties agreed to, and filed with the Board, a list of the materials affected by the Board's decision (i.e., those to be struck from the record and those to remain on the record).

The Impact of the Amendment

It remains for the Board to determine whether the Amendment is inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or a class of market participants.

A brief summary of the position of the parties is set out below, followed by the Board's findings.

In order to better understand the position of the parties, however, it is necessary to provide some further context around the setting of prices in the IESO-administered energy market and the role that the ramp rate multiplier plays, if only at a high and simplified level.

1. *Pricing and Dispatch in the Real-time Energy Market*

The MCP, which is calculated in five-minute intervals, is determined using a market schedule (pricing algorithm) that calculates the price based on the most economical offers submitted by generators that would satisfy the demand for energy in a particular five-minute interval. Dispatchable generators receive the MCP for their output, and dispatchable loads pay MCP for the energy they consume. All other generators and loads receive or pay, respectively, the Hourly Ontario Energy Price ("HOEP"). HOEP is a simple average of the 12 MCPs determined for the hour. Ontario currently has a uniform pricing system and MCP (and thus HOEP) are the same everywhere in the province. The introduction of locational marginal pricing for the province, which has long been the subject of discussion, is not expected to occur at least in the short term. However, the IESO does calculate what the prices would be in different locations were locational marginal pricing to be in place. These are referred to as "shadow prices".

Three aspects of the market schedule are of particular relevance to this proceeding:

- the market schedule is "myopic", in that it ignores expected demand in future intervals and sets the MCP based solely on demand conditions in each five-minute interval;

- the market schedule ignores transmission constraints, and assumes for pricing purposes that the cheapest available generation facility anywhere in Ontario is available to satisfy demand in any interval when, in fact, it may be unavailable due to transmission constraints; and

- the market schedule assumes for pricing purposes that generation facilities are able to ramp output up or down faster than they might actually be able to do so (by a factor of 12 currently or by a factor of 3 under the Amendment).

By contrast, the algorithm used by the IESO to dispatch facilities has the following characteristics:

- the dispatch algorithm has, since 2004, incorporated multi-interval optimization ("MIO"), which "looks ahead" to expected demand in future five-minute intervals;

- the dispatch algorithm takes account of all physical constraints on the system; and

- the dispatch algorithm respects the actual ramping capabilities of generation facilities.

The result is that MCP does not necessarily reflect what the prices would have been had the prices been determined on the basis of the offers submitted by generation facilities that are actually dispatched to provide energy to meet demand in a given five-minute interval. The ramp rate multiplier allows the market schedule to set prices on the basis of generation facilities that are cheaper but unavailable due to actual ramping restrictions, and as a result reduces both price volatility and the average level of prices. The same can be said for the market schedule assumption that the system is unconstrained.

A consequence of the lack of complete alignment between the pricing algorithm and the dispatch algorithm is that generation facilities that were assumed by the market schedule to be supplying energy in a five-minute interval might not in fact be dispatched due to the presence of transmission or ramping constraints. A generation facility may have to be dispatched even though it had offered to supply electricity at a price that is higher than HOEP. These generation facilities will be "constrained on", and under the market rules are entitled to an additional payment referred to as a Congestion Management Settlement Credit ("CMSC") payment. Similarly, when a cheaper generation facility is not dispatched due to the presence of transmission constraints or because it can ramp down more quickly than a more expensive generation facility, the cheaper facility will be "constrained off" and also entitled to a CMSC payment. In both cases, the CMSC payment reflects the difference between HOEP and the offer made by the generation facility that has been constrained on or constrained off, as the case may be. CMSC payments are not reflected in the energy price, but are recovered through uplift charges from wholesale market participants on a pro-rata basis based on their energy consumption at the time at which the CMSC payments were incurred.

2. *Position of the Parties on the Impact of the Amendment*

The following summary is based principally on the final arguments filed by the parties. For the most part, these largely reflect the tenor of each party's participation in this proceeding.

The position of the parties to this proceeding fall into two distinct camps: AMPCO and VECC oppose the Amendment while the IESO, APPrO, Coral Energy (through APPrO),

OPG and TransCanada support it. The letter of comment received from Constellation Energy also supports the Amendment. TransAlta was not an active participant in this proceeding, but is one of the generators that indicated its support for the Amendment as an interim solution in response to the IESO's request for submissions referred to above. EMIG (of which Coral Energy and Constellation Energy Group Inc. are members) was also not an active participant in this proceeding, but noted in its letter of intervention its belief that "in order to support new private investment in generation, Ontario must transition towards a competitive market where prices reflect the true cost of power". Hydro One did not take a position in this proceeding.

A number of the arguments made by AMPCO and VECC challenge the validity or reliability of the IESO's assessment of the costs and benefits associated with the Amendment, and are therefore better understood if the position of the parties supporting the Amendment is presented first.

Parties Supporting the Amendment

Active participants in this proceeding that support the Amendment assert that the Amendment is consistent with the purposes of the Act and does not unjustly discriminate against or in favour of a market participant or a class of market participants. Certain parties have added that the evidence in this proceeding is overwhelmingly to that effect.

The IESO's position is that the Amendment is consistent with, and will promote, a number of the purposes of the Act. Specifically, the IESO submits that the Amendment will: enhance overall reliability, better protecting the interests of consumers in that regard (sections 1(a) and 1(f) of the Act); encourage conservation and demand management (sections 1(b) and 1(c) of the Act); promote economic efficiency (section 1(g) of the Act); and cultivate a financially viable electricity industry (section 1(i) of the Act). According to the IESO, the Amendment will contribute to the achievement of these objectives by: more closely aligning the dispatch and pricing algorithms; resulting in more accurate price signals for consumers and producers; reducing uneconomic exports out of Ontario with resulting efficiency gains realized through the mechanism of export arbitrage; providing immediate efficiency gains for the Province; reducing fossil fuel generation; and achieving a significant improvement in efficiency for the Ontario market.

The IESO further submits that the Amendment, a superior solution to the available alternatives (including incorporation of MIO in the pricing algorithm), will be simple and inexpensive to implement and will achieve the noted benefits with minimal, if any, impact on average prices for consumers. The IESO has estimated that the impact of the Amendment on HOEP will be an average 2.6 percent increase. However, the IESO has also estimated that the impact on consumer bills will be mitigated by: the export arbitrage response that is expected to follow implementation of the Amendment; the global adjustment; the rebate that is currently paid out on revenues earned by OPG on its non-prescribed assets (the "OPG Rebate"); savings in CMSC payments; and savings in Intertie Offer Guarantee payments (these being payments made to importers to reduce price risks for imports that result from the fact that they are scheduled based on pre-dispatch prices but settled on the basis of real-time prices). After accounting for such mitigation, and based on 2006 market prices, the impact of the Amendment would, according to the IESO, vary from a net cost of $6.68 million or 0.004 cents/kWh (assuming an export arbitrage response of 50%, which the IESO considers conservative) to a net saving of approximately $13 million or 0.008 cents/kWh (assuming an export arbitrage response of 100%). As a supplementary mitigation measure, the IESO intends to disburse surplus funds from the transmission rights clearing account (the "TR Clearing Account") over 12 consecutive months to begin in conjunction with implementation of the Amendment.

With respect to the issue of unjust discrimination, the IESO argues that discrimination, in the context of a market for electricity, refers to economic discrimination. As such, more must be involved than an economic advantage accruing to one party rather than the other. The IESO further states that, by lessening subsidies and better aligning prices and dispatch costs, the Amendment plainly lessens inappropriate economic treatment of market participants.

Similar to the IESO, APPrO submits that improvements resulting from implementation of the Amendment are consistent with the purposes set out in sections 1(b), 1(c), 1(f), 1(g) and 1(i) of the Act. According to APPrO, the Amendment addresses many of the challenges and inefficiencies resulting from the use of the 12x ramp rate multiplier by creating just price signals for generators and loads, and does so with minimal, if any, customer cost impacts. APPrO also argues that the effects resulting from the 12x ramp rate multiplier are prejudicial to, and discriminate against, consumers and suppliers. APPrO states that, by more closely aligning the pricing algorithm with the dispatch algorithm, the Amendment would mitigate those prejudicial and discriminatory effects

(such effects including that consumers are not paying the true cost of the electricity they consume and are paying for inefficiencies through uplift charges).

TransCanada's position is that the Amendment will improve the operation of Ontario's competitive electricity market and, since many of the purposes of the Act have as their object the promotion of a competitive market, improvements to the market support the purposes of the Act. According to TransCanada, by moving the market closer to real prices, the Amendment will also specifically encourage conservation (section 1(b) of the Act) and promote the use of cleaner energy sources (section 1(d) of the Act). TransCanada also submits that market efficiency will be promoted by: more closely aligning the pricing and dispatch algorithms; increasing the internal consistency of the market rules; improving price signals and inducing more efficient investment; and improving price transparency and reducing less transparent uplift payments (by reducing CMSC payments). While not a perfect solution, in TransCanada's view the Amendment represents an important step in the right direction.

On the issue of unjust discrimination, TransCanada agrees with the view expressed by Coral Energy in submissions made before and during the oral hearing to the effect that "unjust" discrimination equates with "inefficient" discrimination.

Parties Opposing the Amendment

AMPCO and VECC take the position that the Amendment fails when considered in light of the criteria set out in section 33(9) of the Act, and should therefore be revoked and referred back to the IESO for further consideration.

AMPCO's position is that the Amendment is inconsistent with certain of the purposes of the Act. The purposes of the Act that underlie this position are: (i) ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand (section 1(a) of the Act); and (ii) protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service (section 1(f) of the Act). AMPCO also submits that the Amendment unjustly discriminates against consumers (by increasing prices) and in favour of generators (by providing "windfall profits" to generators – such as nuclear generators – that are unable to respond quickly to changing demand conditions).

In support of its position, AMPCO submits that the IESO is not at liberty to pick and choose the purposes of the Act that it will further while ignoring others in favour of perceived improvements in efficiency. The Act does not assign differing weights or priorities to the various purposes of the Act and, if anything, the protection of the interests of consumers has been given priority.

AMPCO also submits that the IESO's estimates of the costs and benefits of moving to a 3x ramp rate multiplier in terms of determining the wealth transfer implied by the Amendment are unreliable. According to AMPCO, the efficiency gains flowing from the Amendment, as articulated by the IESO and other parties, are: (i) not supported by economic theory having regard to the "Theory of the Second Best"; (ii) based on the mistaken view that uneconomic exports are principally the result of the 12x ramp rate multiplier rather than being largely attributable to Ontario's uniform pricing structure; and (iii) overstated. AMPCO states that, by contrast, the impact of the Amendment on consumers – a price impact variously estimated by the IESO at approximately $225 million, $197 million, $112 million and $100 million depending on whether the effect of arbitrage is taken into account – has been understated. AMPCO notes that a number of the price mitigation mechanisms identified by the IESO are of short (the OPG Rebate and the disbursement of funds from the TR Clearing Account) or uncertain (the global adjustment) duration or are speculative (export arbitrage), and a longer term price mitigation strategy is required. AMPCO also notes that the 3x ramp rate multiplier solution is inferior to incorporation of MIO in the pricing algorithm, which is a superior solution that could be implemented at a modest cost, and is not the preferred option identified by any market participant.

In its reply argument, AMPCO submits that the evidence in this proceeding does not, contrary to the position expressed by APPrO, answer the question of whether the Amendment will result in a HOEP that more closely approximates the price that would result were the pricing and dispatch algorithms perfectly aligned. AMPCO also submits that the evidence does not address what the "true cost" of electricity might be, nor how such notion compares based on the current HOEP versus HOEP calculated on the basis of the Amendment. Moreover, given the hybrid nature of the market, prices are not in AMPCO's view expected to have more than a marginal impact on investment decisions. AMPCO also notes that, contrary to the view articulated by TransCanada, the Act does not have as one of its objectives the promotion of a competitive market.

VECC's position is that the Amendment unjustly discriminates against consumers because it results in a pricing algorithm that moves away from, rather than towards, the

prices generated by the IESO's dispatch algorithm, resulting in overall inefficiency in the setting of HOEP by unjustifiably increasing the prices consumers pay on a province-wide basis. While agreeing that the Board's role is not to "remake" the IESO's decision in relation to the Amendment, VECC submits that the Board must determine whether the decision-making process was sound and led to a reasonable result in that: the issue was clearly defined; the criteria used by the IESO were comprehensive and consistent with the purposes of the Act; and the criteria were applied on a consistent and balanced basis throughout the decision-making process. VECC argues that the IESO's characterization of the issue changed over time from a focus on the differences between the pricing algorithm and the dispatch algorithm to a focus on inefficient exports. According to VECC, there is no confidence that the Amendment is the best way to address the newly framed issue without unjustly discriminating against consumers. In VECC's view, the IESO should therefore be directed to reconsider alternative solutions to the inefficient export issue that do not unjustly discriminate against consumers by inexplicably raising domestic prices.

VECC also expressed concern regarding use of the IESO's cost/benefit analysis as the measure of economic efficiency for changes in rules dealing with the market schedule and the determination of energy prices, noting that: uneconomic exports are largely the result of the fact that Ontario has uniform pricing; the IESO has narrowly redefined the issue of economic efficiency as reducing exports to New York; certain of the benefits that the IESO has identified in relation to the Amendment are unsubstantiated; and any amendment to the market rules that increased market prices would be judged as economically efficient when based on the IESO's analytical framework.

3. *Position of the Parties on the Burden of Proof*

An issue that arose most squarely in the exchange of final written argument is the question of which party bears the burden of proof in an application under section 33 of the Act.

Certain references in the IESO's final written argument make it clear that, in the IESO's view, in an application under section 33 of the Act the burden of proof is on the applicant to demonstrate that the market rule amendment is inconsistent with the purposes of the Act or is unjustly discriminatory.

AMPCO takes a different view, and submits that the burden of proof is ultimately on the IESO to show that the market rule amendment at issue in fact satisfies the test to be

applied by the Board as set out in section 33(9) of the Act. In support of that view, AMPCO notes that a market rule amendment review is fundamentally different from a more typical proceeding before the Board in that, among other things, applicants have no ability to pursue the relief of their choice by seeking an alternative or different amendment to the one adopted by the Board of Directors of the IESO. AMPCO also notes that the 60-day timeline within which the Board must issue its order on an application under section 33 of the Act supports AMPCO's position on the burden of proof issue. It would be patently unreasonable to expect that any applicant could develop a traditional applicant's filing complete with a full array of econometric and other analyses in the time allowed.

4. *Board Findings*

a. The Burden of Proof

In applications before the Board, the burden of proof is typically on the applicant to satisfy the Board that the requested relief should be granted. The Board certainly expects that the IESO will participate fully in proceedings relating to applications under section 33 of the Act in support of the amendment that is under review. However, the Board has heard no compelling reason that would cause it to take a different approach and place the burden of proof on the IESO in the circumstances of this case.

b. The Merit of Addressing the 12x Ramp Rate Multiplier Issue

Before turning to an examination of the impact or effect of the Amendment, the Board considers it useful to provide further context regarding the history and impact of the 12x ramp rate multiplier in the marketplace. Several parties noted that, as the wholesale market was designed for implementation at market opening, inputs to both the pricing algorithm and the dispatch algorithm were aligned in relation to the value to be used to reflect the ramping capabilities of generation facilities (in both algorithms, the value of the "TradingPeriodLength" was set at 5 minutes). To this day, that remains the case for the dispatch algorithm. As noted above, however, prior to market opening the market rules were amended to allow the IESO to set a different value for the "TradingPeriodLength" parameter in the pricing algorithm as a temporary measure to address extreme real-time price excursions that occurred during market testing. This is reflected in the "Explanation for Amendment" contained in market rule amendment proposal MR-00189-R00, dated April 16, 2002, which proposed the amendment to the

market rules that would allow the IMO the discretion to set the value of the TradingPeriodLength parameter in the pricing algorithm:

> The proposed amendment would permit the IMO to establish a longer Trading Period Length in the market schedule (unconstrained) to overcome the [price excursion] problems identified above. With a longer Trading Period Length within the market schedule (unconstrained), generation facilities will have large ramping capability and there will be less need to select additional higher cost resources to meet the increasing demand. As a result, less extreme price excursions will occur.
>
> The real-time schedule (constrained) will continue to use the 5 minute Trading Period Length. Therefore, discrepancies will increase between the real-time schedule and the market schedule (unconstrained). As a consequence, congestion management settlement credit (CMSC) payments will increase. However, the decreases in energy prices, resulting from the change in the ramp time in the market schedule, are expected to offset increases in CMSC payments.
>
> It should be noted that using a longer Trading Period Length in the determination of the market schedule is judged to be a transitional provision. It is expected that a longer term solution will need to be considered which could include a day-ahead market with unit commitment, increased generator self-scheduling, contracted ramp capability, or multi-period optimization.

The Board has not heard any evidence in this proceeding that would point to the introduction of the 12x ramp rate multiplier as having a basis rooted in market economics. To the contrary, the evidence in this proceeding is that the 12x ramp rate multiplier distorts wholesale market prices downwards and engenders adverse consequences for the marketplace in the form of generation and demand side inefficiencies. For example, dampened wholesale prices diminish incentives for conservation, load management and demand side management. The evidence in this proceeding is also that the 12x ramp rate multiplier contributes to inefficient exports. Inefficient exports, in turn, can increase the need for coal-fired generation to meet Ontario demand and thereby contribute to increased emissions. These adverse consequences were identified and discussed at some length in the evidence filed by, and the testimony given on behalf of, the IESO and APPrO, and are also discussed in the evidence filed by TransCanada. That adverse consequences flow from the 12x ramp rate multiplier was not seriously contested by evidence to the contrary filed by

AMPCO, although AMPCO did challenge the strength of any causal connection between the 12x ramp rate multiplier and inefficient exports.

The Board also notes that the 12x ramp rate multiplier issue has been the subject of comment by the Market Surveillance Panel. Specifically, the potential adverse market impact of the 12x ramp rate multiplier has been referred to or discussed in the following Market Surveillance Panel semi-annual monitoring reports, which were referred to by a number of parties to this proceeding: December 13, 2003 (covering May 2002 to October 2003); December 13, 2004 (covering the period May to October 2004); June 9, 2005 (covering the period November 2004 to April 2005); June 14, 2006 (covering the period November 2005 to April 2006); and December 13, 2006 (covering the period May to October 2006).

For example, after concluding that a significant portion of the difference between the constrained and unconstrained real-time prices, and of the remaining difference between HOEP and the unconstrained pre-dispatch price, is due to the 12x ramp rate assumption, the Market Surveillance Panel stated as follows in its December 13, 2004 report (at page 66):

> The Panel is of the view that the continued understatement of the HOEP leads to inefficient decisions by both loads and generators in both the short-term and the long-term. This takes the form of an inefficient load profile and of under-investment in both conservation and generation.
>
> With respect to the argument that the assumption that ramp rates are 12-times their true value results in a more stable HOEP, the Panel recognizes that price stability can be beneficial to market participants. The Panel observes, however, that it is open to market participants to insulate themselves contractually from price variation. Moreover, price volatility presents a profit opportunity for more price responsive generation and loads. To the extent that it is efficient to do so, volatility can be reduced by the actions of market participants. This is much better, in the Panel's view, than suppressing price variation by artificial means, especially when this has the side effect of understating the average price. The Panel strongly recommends that actual ramp rates be used to determine the HOEP.

Eighteen months later, the Market Surveillance Panel further commented on the issue in its June 14, 2006 report (at page 79) as follows:

> For these and possibly other reasons, arbitrage between Ontario and New York is focused on the HOEP. The result is inefficient exports and the effective extension of the cross-subsidy inherent in Ontario's uniform price regime to New York loads. This problem has been exacerbated by market rules that, other things being equal, would have reduced the HOEP relative to prices in the constrained schedule. For example, the 12 times ramp rate assumption, which has the appearance of systematically lowering the HOEP (i.e., because it removes ramp effects in price), may simply lead to more exports than would otherwise occur.

In its most recent report, dated December 13, 2006, the Market Surveillance Panel stated as follows on page 106:

> There are two major causes of socially inefficient exports from Ontario to New York. First, like privately inefficient exports, the lack of accurate price signals or information can lead to "guessing wrong" and hence socially inefficient exports ex post. Improvements in price signals should result in a higher frequency of socially efficient exports. Socially inefficient exports can also occur, however, if there are defects in the market design. Ontario's uniform pricing regime is poorly designed in the sense that it admits to the possibility that the prices that exporters pay do not reflect the incremental cost of supply. Other aspects of the unconstrained pricing algorithm such as the 12 times ramp rate assumption can further misalign the HOEP and the relevant nodal prices thereby contributing to the potential for ex post socially inefficient exports... (footnote omitted)

And again at pages 147 and 148:

> Moreover, with the Global Adjustment dampening the redistributive effects of changes in HOEP and mitigating any harm that might be said to be visited upon consumers from potentially higher HOEP, the Panel contends that there may be no better time than now to address the remaining sources of inefficiency in the design of the Ontario spot market. Artificially reducing the HOEP, as is the outcome under the current market design, simply means that consumers pay more (or receive a smaller rebate) through the Global Adjustment, all the while inducing market inefficiencies from which all Ontarians lose.

The real-time price signals generated by an efficient wholesale market are central to the economic success of the new hybrid market for several reasons:

- First, the real time production and consumption decisions of many wholesale market participants will continue to be guided by real-time prices. If these price signals continue to ignore certain system realities such as transmission constraints or the actual ramping capabilities of generation facilities, they will at times induce these participants to make decisions that reduce the short-term dispatch efficiency. As we have indicated in Chapter 3, factors such as the uniform pricing system and the 12 times ramp rate assumption create a wedge between the HOEP and local shadow prices. This can result in inefficient production and consumption decisions such as the inefficient exports from Ontario to New York that we began documenting in our last report....(footnote omitted)

- Second, even though long-term investment will be guided through central planning in the near term, price signals from an efficient wholesale market can and should play an important role in guiding this planning process...Furthermore, as we have argued above, attempts to subsidize consumers by suppressing real-time prices leads to over-consumption and could ultimately lead to over-investment by the planners at [the Ontario Power Authority].

These comments reinforce the evidence in this proceeding as to the inefficiencies to which the 12x ramp rate multiplier contributes.

The observations of the Market Surveillance Panel in its most recent (December 13, 2006) report also support the assertion made by the IESO and others that addressing efficiency of the market remains a relevant objective even in the context of the hybrid framework under which Ontario's electricity sector operates at this time. Even AMPCO's expert witness, Dr. Murphy, who questioned the relevance or merits of the Amendment in light of the evolution of the market to a hybrid structure, conceded on cross-examination that improvements in wholesale market efficiency and accurate price signals are important even in a hybrid market.

The Board accepts that the 12x ramp rate multiplier, introduced as a temporary measure, has price distorting effects that can and do engender inefficiencies. The Board therefore also accepts that, in principle, there is merit in addressing the 12x ramp

rate multiplier issue if and to the extent that efficiency improvements can be expected to result, and that this is so even in the context of the hybrid market.

c. Evaluation of the Amendment as a Solution

The IESO has put forward credible evidence that the Amendment will result in greater efficiency in the IESO's real-time market as compared to the status quo. The benefits from this improved efficiency include, but are not limited to, reduced uneconomic exports to New York. The impact of this latter benefit is quantifiable, and has been quantified by the IESO. The other benefits are less easily quantified, but bear consideration nonetheless.

The Board does not agree with AMPCO's argument that the Amendment is inconsistent with the purposes of the Act and that the IESO has selectively chosen the purposes of the Act it will further while ignoring others. AMPCO asserts that the Amendment is contrary to section 1(a) of the Act ("responsible planning and management of electricity resources, supply and demand"). The Board concurs with the IESO's view that greater economic efficiency will further that objective. AMPCO also argues that the Amendment is inconsistent with section 1(f) of the Act ("protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service"). As discussed more fully below, the Board finds that the IESO has carefully considered the impact of the Amendment on consumers' average bills and determined that the impact is likely to be relatively modest. It may even be positive. The IESO has also noted that, while there may be a modest impact on consumers' bills, the Amendment is consistent with the purpose of protecting the interests of consumers with respect to the adequacy and reliability of supply.

There is no evidence before the Board in this proceeding that would lead the Board to take issue with the assertion made by the IESO and others that improvements in the economic efficiency of the electricity system in Ontario will promote adequacy and reliability of supply by providing more accurate price signals and triggering more appropriate price responsive behaviour. The same can be said for the assertions that the Amendment will encourage conservation, load management and demand side management and will, by reducing inefficient exports, also reduce the need for coal-fired generation to meet Ontario demand and thereby contribute to a lessening of emissions.

AMPCO and VECC both assert that the "3x myopic" Amendment is, by the IESO's own submission, inferior to a "1x MIO" solution. They support this view by reference to

documents that were prepared by the IESO at various times in the Amendment development process. They submit that this is a valid basis on which the Board should revoke the Amendment.

The Board does not accept that view. Although it is obvious that the IESO reviewed several alternatives in the course of developing the Amendment, it has consistently taken the position in this proceeding that a "3x myopic" rule is superior to a "1x MIO" option. This conclusion appears in the document issued by the Board of Directors of the IESO when the Amendment was approved, and it is supported by the IESO's and APPrO's experts. Other than referring to earlier assessments that the IESO does not currently support, AMPCO and VECC provided no evidence that "1x MIO" is a superior solution.

d. The Anticipated Impact on Consumer Bills

The Board has also considered the possible impact of the Amendment on consumers' electricity bills.

As noted above, the IESO has calculated that the net annual cost to consumers of adopting the 3x ramp rate assumption in the pricing algorithm is $6.68 million, or 0.004 cents/kWh. That calculation is based on the following assumptions and estimates:

- an average annual HOEP of $49 per MWh (the average price in 2006);
- an increase of 2.6% in the average HOEP as a result of the Amendment, before consideration of mitigating factors;
- mitigation of 50% of the estimate increase in HOEP due to "export arbitrage";
- mitigation of 80% of the net price increase (that is, after the export arbitrage effect) due to the global adjustment and the OPG Rebate; and
- reductions in CMSC payments and Intertie Offer Guarantees that are paid through uplift charges.

In its calculation of the net consumer impact, the IESO also takes into account a planned distribution to consumers of approximately $54 million from the IESO's TR Clearing Account. The Board does not believe that this particular distribution is

appropriately considered as a mitigation measure in relation to the Amendment. Elimination of this particular mitigation measure does not affect the Board's overall assessment of the Amendment.

Dr. Rivard of the IESO testified that, on the basis of additional analysis on the elasticity of export response, the export arbitrage effect on HOEP would likely be higher than 50%, which would reduce further the net cost of the Amendment to consumers. He noted that were the export arbitrage effect to reach approximately 65%, and keeping the other assumptions the same, the impact of the Amendment would be a net reduction in consumers' bills.

AMPCO disputes most of the assumptions and estimates that underlie the IESO's calculations. It claims that the IESO's estimates are unreliable, although it provided little evidence about the estimates it believes should be used.

Predicting the net effect of the Amendment on consumer's bills is a complex exercise and is not something the Board believes can be done with precision. The Board does, however, view the IESO's calculation as an indicator of the order of magnitude of the net effect of the Amendment. The Board agrees with AMPCO that the base price of $49 per MWh, which is the starting point of the IESO's calculation, is low by historical standards. The Board notes, however, that the IESO provided additional information on a range of net consumer costs using higher average HOEPs. The Board also acknowledges AMPCO's comment that the OPG Rebate is scheduled to expire in two years. Even if the OPG Rebate is discontinued at that time, the IESO has estimated that the global adjustment would still provide significant price mitigation, approximately 60% compared to the current 80% from the combined global adjustment and OPG Rebate.

The Board finds that the expected impact on consumers' bills is relatively modest. The IESO's published calculation shows a very minor impact – just 0.004 cents/kWh – based on estimates that the IESO considers to be conservative. Even if a higher base price were used (an average annual HOEP of $70 per MWh based on 2005 prices), and assuming no replacement for or extension of the OPG Rebate in two years, the estimated net impact would be larger but still relatively small. The difference resulting from the use of a higher base price relative to use of the lower one would be much less than 1/10th of a cent/kWh.

e. Conclusions

The Board concludes that the efficiency benefits that are anticipated to arise as a result of the Amendment are consistent with the purpose of the Act that speaks to promoting economic efficiency in the generation, transmission, distribution and sale of electricity. The Amendment also supports the purposes that relate to encouraging electricity conservation, demand management and demand response; ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario; and protecting the interests of consumers in relation to the adequacy and reliability of electricity service. While the Board acknowledges that the Amendment may result in an increase in average consumer bills, that increase is anticipated to be modest.

The Board is also of the view that, in the context of its mandate under section 33 of the Act, unjust discrimination means unjust economic discrimination.

Based on the record of this proceeding, the Board finds that the Amendment is consistent with the purposes of the Act. The Board also finds that the Amendment does not unjustly discriminate for or against a market participant or a class of market participants.

Other Matters

1. *Stay of the Amendment Pending Appeal*

By the terms of the Board's February 9, 2007 Order, the stay of the operation of the Amendment applies pending completion of the Board's review of the Amendment. Issuance of this Decision and Order completes the Board's review, and has by the terms of the Order the effect of lifting the stay. For greater certainty, however, the Board will include an order to that effect in this Decision and Order.

In its final written argument, AMPCO requested that, in the event that the Board does not revoke the Amendment, the Board order a stay of the Amendment pursuant to section 33(6) of the *Ontario Energy Board Act, 1998* pending appeal to the Divisional Court.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application and is out of time. While the IESO therefore did not address this request in its final written argument, the IESO did in its

letter express the view that the Board does not have jurisdiction to grant such relief, and that if AMPCO wants a stay it must apply to the Divisional Court. APPrO's position is to the same effect.

In the circumstances of this case, the Board has decided not to extend its February 9, 2007 order staying the operation of the Amendment.

The Board understands that the IESO may wish to proceed with implementation of the Amendment on a timely basis, and that parties that are supportive of the Amendment would be equally supportive of prompt implementation. However, the Board does not believe that it is in the best interests of the wholesale electricity marketplace to face the prospect of the Amendment being implemented one day and suspended shortly thereafter further to the invocation of a judicial process. The Amendment is not urgently required for reasons such as reliability and the ramp rate issue is one that has been outstanding for several years. In the circumstances, the Board expects that the IESO will act responsibly by allowing AMPCO a reasonable opportunity to request judicial recourse prior to taking whatever steps may be required to implement the Amendment. The Board similarly expects that AMPCO will act responsibly by ensuring that any request for a stay of the operation of the Amendment that it may wish to make to the Divisional Court is made without undue delay.

2. *New Obligations for IESO under its Licence*

In its final written argument, AMPCO requested that the Board require the following, either under an existing condition of the IESO's licence or by way of a new licence condition:

- that the IESO prepare and submit to the Board, for every proposed market rule and market rule amendment, a report supported by appropriate analysis and available to the public, that explains how the proposed rule or amendment is consistent with the objects of the IESO and promotes the purposes of the Act; and

- that, in relation to the Amendment and such other market rules or market rule amendments as the Board considers appropriate, the IESO report publicly on an annual basis with respect to whether and the extent to which the amendments have met the IESO's objectives and provided the benefits anticipated by the IESO at the time each of the amendments were made.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application, is out of time, was not dealt with in any way in this proceeding and is entirely inappropriate.

Whatever the Board may think of AMPCO's request on the merits, the Board does not consider it appropriate to address the request at this stage in the proceeding. The issue of new reporting requirements for the IESO in relation to amendments to the market rules was not raised by AMPCO on a timely basis, and the other parties to this proceeding will not have had a fair opportunity to consider and respond to the request. AMPCO may, if it so wishes, pursue this matter further outside the context of this proceeding.

3. *Cost Awards*

Parties eligible for an award of costs, as identified in Procedural Order No. 2, shall submit their cost claims by April 24, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on the IESO. The cost claims must comply with section 10 of the Board's *Practice Direction on Cost Awards.*

The IESO will have until May 8, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

A party whose cost claim was objected to will have until May 15, 2007 to make a reply submission as to why its cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on the IESO.

The Board will issue its decision on cost awards at a later date once the above process has been completed.

THE BOARD ORDERS THAT:

1. The Application by the Association of Major Power Consumers in Ontario for an order under section 33(9) of the *Electricity Act, 1998* revoking the market rule amendment identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and referring the amendment back to the IESO for further consideration is denied.

2. The stay of the operation of the market rule amendment identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule", as ordered by the Order of the Board dated February 9, 2007, is lifted.

DATED at Toronto, April 10, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

to

Decision and Order
April 10, 2007

Association of Major Power Consumers in Ontario
Review of Market Rule Amendment
EB-2007-0040

Excerpt from Transcript of Oral Hearing Held March 29, 2007

(see attached document)

our binder. I apologize, it might just be me, but the record, the decision does not bear out the quote that that included.

MR. RUPERT: Mr. Rodger, I was going to mention, I think the page 5 reference, at least as I read it here, didn't refer to the page that was doing what you thought it did. Maybe there is a cross-reference issue in your submissions.

MR. RODGER: I'll certainly check that. Sorry, Mr. Rupert.

MR. KAISER: Why don't you have a look now, and see if you can help us.

MR. RODGER: Mr. Chair, we'll endeavour to get copies during the lunch break.

MR. KAISER: All right. We'll take the lunch break now. We'll come back at 2 o'clock.

--- Recess taken at 12:34 p.m.

--- On resuming at 2:11 p.m.

DECISION:

MR. KAISER: Please be seated.

The Board has decided to issue a decision now on the matter of the relevance of the evidence with respect to the process, rather than deferring it, as Mr. Rodger suggested, in order that we can proceed with the case in a more orderly manner.

We are dealing with an application by AMPCO under section 33(4) of the *Electricity Act* for review of the three times ramp rate market rule amendment. In that

context there has been a discussion and a concern about the scope of the case, and particularly whether evidence regarding the process by which the IESO reached this rule is relevant.

AMPCO submits that the three times ramp rate market rule amendment should be revoked by this Board and referred back to the IESO for stakeholder consultation, based on the following grounds: First, that the process followed by the IESO in the three times ramp rate stakeholder consultation process violated IESO's common-law duty of procedural fairness, by breaching AMPCO's legitimate expectation that the IESO would follow its published stakeholder engagement process and apply its stakeholder engagement principles, and raising a reasonable apprehension of bias that the IESO favoured the interests of generators; secondly, that the integrity of the statutorily-mandated consultation process has been undermined. They say this is inconsistent with the purposes of the *Electricity Act* and unjustly discriminates against Ontario consumers in favour of Ontario generators.

They also allege certain substantive failures, as well, which are not at issue in the proceeding this morning.

Accordingly, AMPCO argues that the materials produced by IESO relating to procedural matters are relevant both to the issue of procedural fairness and also the substantive issues.

The starting point in this discussion is section 33(9)

of the *Electricity Act*. It has been referred to by virtually everyone this morning. It provides that:

> "If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this *Act*, or unjustly discriminates against or in favour of a market participant or a class of market participants, then the Board shall make an order revoking the amendment on the date specified by the Board and referring the amendment back to the IESO for further consideration."

AMPCO argues that all of the IESO materials are relevant because they demonstrate that the IESO failed to follow procedural fairness in developing the amendment. According to AMPCO, the lack of procedural fairness demonstrates that the amendment unjustly discriminates against its members in favour of generators.

In other words, AMPCO argues that it has rights of natural justice in IESO rule-making and that those rights should be enforced by the Board in the market review amendment process.

All of the other parties appearing before us this morning state that this is an incorrect interpretation of section 33(9), because it equates the term "unjustly discriminates" with a violation of the rules of natural justice and it equates the Board's review process with a judicial review application.

They argue that the purpose of the Board's review in a

market review amendment should be aimed at economic efficiency and not natural justice.

They say that the OEB should be reviewing an amendment to the IESO rules and not the IESO stakeholdering process; that the scope of the Board's review should be aimed at the rule itself, and the impact of that rule, not the process by which the amendment was made.

In other words, it's argued before us that the issue is whether the rule is unjustly discriminatory. The Board agrees with that position.

Sections 19(1) and 20 of the *OEB Act*, read together, provide that the Board has general authority to determine any question of law or fact arising in any matter before it except where that authority is limited by statutory provision to the contrary.

In the case of a market rule amendment, another statutory provision does limit the Board's jurisdiction. Section 33(9) of the *Electricity Act* specifically sets out certain grounds on which the Board may make an order.

Accordingly, we find that section 33(9) of the *Electricity Act* is a jurisdiction-limiting provision, not another jurisdiction-granting provision. That is, with respect to a market rule amendment, the Board's jurisdiction is not as broad as suggested by section 20 of the *OEB Act*, but limited by section 33(9) of the *Electricity Act*.

In this regard, the Board has also considered the submissions of various parties, and agrees, that the 60-day

time limit for disposing of this review is consistent with the conclusion that the Board's scope of review is limited to the criteria set out in section 33(9).

The legislature can be taken as having known that an exhaustive review of the process would render it impossible to meet these timelines.

We then come to what can be seen as a second and distinct issue. That is whether there is a common-law principle of administrative law that the IESO has violated in the course of this market rule amendment process which yields a separate and distinct remedy.

The IESO says the common-law principles of administrative law do not assist AMPCO in extending the jurisdiction of the Board to review the details of the stakeholdering process. They say that the IESO is a statutory corporation whose affairs are managed and supervised by an independent board of directors, and the functions carried out by the IESO under the review at issue in this proceeding is a rule-making function and is essentially a legislative function.

They rely upon the Supreme Court of Canada's 1980 decision in the Inuit Tapirisat as support for the proposition that in legislative functions these rules do not apply.

AMPCO takes a different view and it relies upon the Supreme Court of Canada 1990 decision in Baker, as well as the Divisional Court decision in Bezaire.

The aspects of the decision that AMPCO relies upon can

be found at pages 15 and 14, where the Court stated that one of the criteria that must be looked at in determining whether the rules of natural justice apply to a process is whether the parties had a legitimate expectation that those rules would be followed. The Court states, in part:

> "Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstance."

They go on to say:

> "This doctrine as applied in Canada is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers and it would generally be unfair for them to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights."

The Court also noted that another factor to be considered in determining the nature and extent of the duty of fairness that's owed to the parties is the importance of the decision to individuals involved.

As has been pointed out, there's no question that there's a significant amount of money involved in this decision; it's an important decision. With respect to the expectations of the parties, there is a provision in section 13.2 of the *Electricity Act* requiring the IESO to

establish processes by which consumers, distributors and generators may provide advice. AMPCO makes the point that a framework was established to govern the process by which these rules would be amended and implemented. They say that this procedure, despite the expectation they were entitled to, has not been followed.

That may or may not be the case, but this Panel is of the view that that is not a matter for our consideration. Mr. Vegh in his submissions questioned whether the Board should be a parallel Divisional Court. We don't think it should be.

IESO may or may not have followed the rules of natural justice. And they may or may not have been required to do so based upon the different authorities that have been cited by the different parties. But that, we believe, is a matter to be determined by the Divisional Court, not the Ontario Energy Board.

Mr. Rodger did refer us to a decision of this Board on September 20th, 2005. That appears at tab 11 of Ms. DeMarco's brief. I'm reading in part:

> "The Board concludes that stakeholder concerns have been substantially met. The true test will, however, be the experience of stakeholders in the new process. Stakeholders and the Board will have opportunities to review how well the process works over time as they are implemented. The Board therefore approves the IESO proposals on its stakeholdering process. It should be noted,

however, that this approval relates to the processes that the IESO has proposed. It does not change the Board's obligation to review IESO programs that have implications for IESO fees, expenses and revenue requirements, even when these programs have been subjected to the IESO stakeholdering process."

Mr. Rodger's submission was that having approved the stakeholdering process it was incumbent upon the Board to follow through and police, if you will, the rule-making process.

We differ on that. The two are distinct functions. The review at question is a judicial review and best reserved for the courts.

That leads us to the Order requested. Pursuant to this decision, the Board will order that any evidence relating to the stakeholdering process be struck. That would include Mr. Rodger's submission of March 26th. If the parties are unable to agree on what evidence is to be excluded or not excluded, the Board may be spoken to.

That completes the Board's ruling in this matter.

PROCEDURAL MATTERS:

Mr. Rodger and Mr. Mark, we were going to suggest, subject to your convenience, that you may want to adjourn for the rest of the day and regroup in light of that.

MR. MARK: It probably makes sense.

MR. KAISER: Unless there be some debate and discussion as to what evidence is to be struck and what

TAB 4

CITATION: Naji v. Denys, 2018 ONSC 6568
COURT FILE NO.: CV-18-27019
DATE: 20181101

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Nizar Naji and Naji Medicine Professional Corporation Plaintiffs	Tom Serafimovski, for the Plaintiffs
– and –	
Allen Philip Denys, Denys Medicine Professional Corporation, 1974583 Ontario Inc., Jennifer Cruickshanks and Nicole Miller Defendants	Jay Strosberg, for the Defendants
	HEARD: October 31, 2018

RULING ON MOTION FOR INJUNCTION

BONDY J.

A. BACKGROUND

1) Introduction

[1] The plaintiffs maintain that they have a valid right of first refusal ("ROFR") to purchase the shares and/or assets of a medical clinic owned by one or more of the defendants before they can be offered to a third party. The defendants have entered into an agreement of purchase and sale for the shares and/or assets of the medical clinic with a third party. That agreement is scheduled to close November 15, 2018 (the "sale transaction").

[2] On October 22, 2018, an *ex parte* interim injunction was granted by Patterson J. preventing the completion of that sale. Patterson J. ordered that his order be served on the defendants and that the matter would return October 30, 2018, so that the defendants could have an opportunity to be heard and a decision could be made as to whether or not to extend that injunction. The matter was actually returned the following day - October

31, 2018. This is the decision regarding the extension of that injunction and reasons for that decision, based upon a more complete record than the one before Patterson J.

2) The parties

[3] The plaintiff, Nizar Naji ("Dr. Naji") is a licensed medical practitioner in the province of Ontario. Dr. Naji is an officer, director and operating mind of the other plaintiff Naji Medicine Professional Corporation ("Naji PCorp.") through which he practices sleep medicine and respirology.

[4] The defendant, Allen Philip Denys ("Dr. Denys") is also a licensed medical practitioner in the province of Ontario. He is an officer, director and operating mind of the defendant Denys Medicine Professional Corporation ("Denys PCorp."). He practices sleep medicine and respirology through that corporation.

[5] Dr. Naji maintains that Dr. Denys is also an officer, director and operating mind of the defendant 1974583 Ontario Inc. ("197"). That corporation operates a clinic known as the "Windsor Sleep Disorders Clinic" ("the clinic"). This is the clinic which is at the centre of this litigation.

[6] Dr. Naji's assertion as to Dr. Denys' ownership of 197 however lacks harmony with other aspects of his own evidence. For example, the corporate profile report attached as an exhibit to his own affidavit shows the defendants, Jennifer Cruickshank ("Ms. Cruickshank") and Nicole Miller ("Ms. Miller"), who are both daughters of Dr. Denys, are the officers and directors of 197. As another example, the letters of intent forwarded by Dr. Naji's accountant on July 15, 2018 show Ms. Cruickshank and Ms. Miller as the shareholders of 197 and the vendors.

[7] Dr. Denys denies the assertion of ownership and maintains that he has never been an owner, officer, director, or operating mind of 197, and deposes that he does not have authority to bind 197. Dr. Denys also deposes that Ms. Cruickshank and Ms. Miller are also the sole shareholders of that corporation.

[8] For reasons which follow, I concluded that the truth as to Dr. Denys' relationship with 197 more likely than not falls somewhere between those two positions.

3) The history of the relationship between the parties

[9] The evidence of both parties regarding the relationship up to about May or June of 2018 is remarkably similar.

[10] On June 3, 2013, Dr. Naji entered into an associate agreement with Denys PCorp. (the "original associate agreement"). Dr. Naji was initially operating under a restricted license. On May 8, 2014, he became a fully licensed medical professional in internal medicine and respirology. On December 15, 2016, he became fully licensed by the College of Physicians and Surgeons of Ontario (the "College") in sleep medicine.

[11] Given Dr. Naji's new status, the original associate agreement was re-negotiated and on April 4, 2018, a replacement association agreement (the "association agreement") was entered into between Denys PCorp. and Naji PCorp. Those were the only two parties to either agreement. In other words, neither Dr. Naji nor Dr. Denys personally signed either of the agreements, nor did 197.

[12] According to that agreement, Dr. Naji carries on his practice from Dr. Denys' office. He pays a fee equal to 20% of the medical fees charged and collected and in exchange Denys PCorp. is solely responsible for the expenses related to the office, including but not limited to employee wages and IT support.

[13] Historically, Dr. Denys had acted as the Medical Director and Quality Advisor ("MDQA") for the clinic for 15 years. On April 3, 2018, Dr. Denys was advised by the College that he was the subject of a referral to the discipline committee. He states that as a result, the Ontario Health Insurance Plan ("OHIP") ceased making payments to the clinic in respect of patients for whom he had reviewed the sleep results.

[14] His lawyer was able to negotiate an arrangement with OHIP that would require him to appoint or retain a new MDQA for the clinic and give him time to do so. In the meantime, Dr. Denys would continue to act as the MDQA for the clinic. In that way the clinic could continue to operate while the investigation was ongoing.

[15] Dr. Denys deposed that his daughters instructed him to approach Dr. Naji in that regard. In late April or early May 2018, Dr. Denys asked Dr. Naji to act as MDQA for the business. Consistent with that evidence, according to Dr. Naji, in mid-May 2018 Dr. Denys told Dr. Naji that he was considering selling the clinic. Dr. Naji states that Dr. Denys told him that he would allow him to bid on the clinic. According to Dr. Naji, that agreement was subject to a condition that he acted as MDQA without compensation. If he agreed to do so, Dr. Denys was to grant him an ROFR.

[16] There was consensus that further to that arrangement there were negotiations related to the granting of the terms and conditions of the proposed ROFR and the proposed arrangement for Dr. Naji to act as MDQA for the clinic. The parties also agree that several drafts were sent back and forth between the parties respective counsel.

[17] The parties, however, agreed that an agreement was never signed with respect to either the proposed ROFR or the proposed arrangement for Dr. Naji to act as MDQA for the clinic.

[18] The evidence of the parties as to what happened next is somewhat conflicted.

4) Dr. Naji's version of the events after the restrictions were placed on Dr. Denys license

[19] I reiterate that it is Dr. Naji's position that he agreed to act as MDQA, and that the right of first refusal was the consideration for him having done so but that an agreement was never reached as to the terms of that arrangement.

[20] One or more of the defendants were using a broker by the name of Robert Isaacson ("Mr. Isaacson").

[21] According to Dr. Naji, through his accountant and pursuant to the ROFR, he submitted two letters of intent through Mr. Isaacson on July 15, 2018. The first was to buy the shares of the business for $2.8 million and the other was to buy the assets of the business for $3.2 million.

[22] Again, the parties agree that a consensus was never reached between the plaintiffs and the defendants with respect to any of these draft agreements.

[23] Dr. Naji, however, deposed that Mr. Isaacson told him that he had been advised by Dr. Denys that Dr. Denys had granted him a right of first refusal. This evidence is more fully considered below.

[24] Dr. Naji maintains that he and Dr. Denys reached an agreement on June 22, 2018 wherein he was granted an ROFR without any conditions related to him acting as MDQA for the clinic. He maintains that that arrangement was confirmed in three emails. The first was sent the following day on June 23, and the other two were sent September 15 and October 12, 2018.

[25] Later, in August, Dr. Denys provided Dr. Naji with a draft share and asset purchase agreement (the "draft SAPA"). On September 15, 2018, Dr. Naji submitted an offer. Again, the parties agree a consensus was never reached between the plaintiffs and defendants with respect to these documents.

[26] On October 10, 2018, Dr. Naji was advised by Mr. Isaacson that Dr. Denys had decided to sell the business to another party.

[27] According to Dr. Naji, he confronted Dr. Denys on that same day and told Dr. Denys he would be willing to match any price for the business and perhaps pay more. According to Dr. Naji, Dr. Denys said that he would consider his offer.

[28] Dr. Naji deposes that on October 17, 2018, he was told by Dr. Denys that the sale to the third party was not yet finalized. At that point, Dr. Naji offered to match the sale price offered by the third-party and pay an additional $200,000. According to Dr. Naji, Dr. Denys said that he was prepared to sell to him provided he could confirm the availability of sufficient funds to complete the transaction.

[29] Dr. Naji maintains that he provided Dr. Denys with evidence reasonably confirming the availability of funds to complete the transaction.

5) Dr. Denys' version of the events after the restrictions were placed on his license

[30] Dr. Denys' evidence as to the events which occurred after the negotiations with respect to the ROFR had begun is similar to that of Dr. Naji with some exceptions. The most notable are as follows.

[31] The first is that Dr. Denys denies having the authority to bind 197. Consistent with that proposition, neither the June 3, 2013 original associate agreement nor the April 4, 2018 new association agreement take into consideration the clinic owned by 197, nor was 197 a party to either of those agreements.

[32] The second is that the offers to purchase being negotiated were just that, offers to purchase. Those offers had nothing to do with the exercise of an ROFR.

[33] The third is that Dr. Denys' willingness to grant an ROFR was always conditional on Dr. Naji executing an acceptable agreement to act as the MDQA of the sleep clinic, and assigning the necessary forms and documents required by the Ministry to approve him as the MDQA for the clinic. I reiterate the parties agree that neither happened.

[34] Consistent with that proposition, on August 3, 2018, Dr. Denys' lawyer sent Dr. Naji's lawyer an email which states:

> "... Our client is prepared to give your client a ROFR for 10 days, so long as your client is prepared to be the MDQA of the Sleep Clinic until the earlier of February 1, 2019 and the date the shares of the Sleep Clinic are sold."

[35] Also consistent with that proposition, there is an email from Dr. Denys' counsel to Dr. Naji's counsel dated September 17, 2018, which unequivocally states that Dr. Naji had not agreed to sign an agreement that he act as MDQA of the clinic. There is no return correspondence denying that the assertion.

[36] The fourth also relates to the August 3, 2018 email. I reiterate, that email contains an offer for an ROFR. Dr. Denys maintains the offer is inconsistent with the existence of another ROFR at that point in time.

[37] The fifth is that Dr. Denys maintains that he and his daughters had concerns about Dr. Naji's financial ability to complete a transaction, concerns which were never resolved. Consistent with that assertion, what Dr. Naji maintains is confirmation of his financial ability to purchase is actually confirmation that an individual named Mohammed Qasi and an entity named Ciena Group were interested in a partnership with Dr. Naji. In other words, it was they rather than Dr. Naji who had the necessary funds available to complete the transaction. Dr. Denys knew nothing about either Mohammed Qasi or Ciena Group and accordingly took the position he and his daughters had no way of testing the veracity of that information, or the ability of that combination of purchasers to receive Ministry approval for the purchase.

B. ANALYSIS

1) Introduction

[38] The test to be applied where an interlocutory injunction is sought was first summarized in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.), and then modified in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.

[39] The test has three components:

i. there is a serious issue to be tried;

ii. there will be irreparable harm not compensable in monetary damages if the requested injunction is not granted; and

iii. The balance of convenience favors granting the injunction.

[40] The three steps are to be considered as a whole: see *Bell Canada v. Rogers Communications Inc.* (2009), 76 C.P.R. (4th) 61 (Ont. S.C.), at para. 29.

[41] To be clear, it is not necessary to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor is it necessary to treat the relative strength of each party's case only as a last step in the process: see *Apotex Fermentation Inc. v. Novopharm Ltd.* (1994), 95 Man. R. (2d) 241 (C.A.).

2) The issues to be tried

a) <u>The issues</u>

[42] The "serious issue to be tried" threshold is very low, ordinarily requiring an applicant to establish little more than that the case is not frivolous or vexatious. The issues between the parties are quite narrow.

[43] The threshold issue is simple and straightforward. That is, whether or not Dr. Naji was actually granted a valid ROFR. If there was no right of first refusal, the offer to purchase accepted by the vendors of 197 would not have entitled the plaintiffs to an offer to purchase or specific performance: see *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641, at para. 23; and *Harris v. McNeely* (2000), 47 O.R. (3d) 161 (C.A.), at para. 12.

[44] If there was no valid ROFR, the plaintiffs would at best be entitled to damages. Injunctions are to be granted only where damages would provide an inadequate remedy. As was stated in *London & Blackwall Railway Co. v. Cross* (1886), 31 Ch. D. 354 (C.A.), at p. 369, "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy": see also *Dowell v. Mengen Institution* (1983), 72 C.P.R. (2d) 238 (Ont. H.C.), at p. 241.

[45] There was argument from both sides as to whether or not Dr. Denys was an officer and/or Director and/or the operating mind of 197.

[46] I reiterate, the corporate profile search demonstrates that Dr. Denys is neither an officer nor a director of that corporation. That said, Dr. Denys' own affidavit leaves the impression that he was the principal negotiator for 197, and that he had been given authority to act in that capacity by his two daughters. Consistent with that observation, Mr. Isaacson who had been retained by Dr. Denys and his two daughters to find potential purchasers for the practice sent an email on October 10, 2018. In that email Mr. Isaacson states "Dr. Denys has made the decision to sell the Windsor Sleep Disorders Clinic to another party."

[47] In summary, on the less than complete evidentiary record before me, I conclude that it is more likely than not that Dr. Denys held himself out to have the authority to bind 197, and that his daughters had potentially given him that authority.

[48] Notwithstanding that conclusion, I find that issue to be somewhat of a red herring. I say that because, as said above, the central and threshold issue for trial is whether or not Dr. Denys or anyone else on behalf of 197 actually had a meeting of the minds with Dr. Naji as to the granting of an ROFR.

[49] Prior to leaving this issue, I am aware that the trial judge may come to a different conclusion on this and other issues because of the limitations of the evidentiary record before me. For example, neither Dr. Naji nor Dr. Denys were cross-examined as to this issue. Further, there was no evidence from either Ms. Cruickshank or Ms. Miller who, as I said above, were the officers, directors and shareholders of 197.

b) Viability of the plaintiffs' claim

Introduction

[50] A preliminary assessment of the relative strength of the plaintiffs' case is a relevant factor, which I agree is appropriately considered in conjunction with the serious issue factor: see *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.* (2001) 12 C.P.R. (4th) 317 (Ont. S.C.), at para. 37.

[51] I do not find the plaintiffs' case at all strong. However, I am not convinced that it is frivolous or vexatious.

[52] I begin with the observation that neither the June 3, 2013 original associate agreement nor the April 4, 2018 association agreement address the clinic which is owned by 197. It is not even a party to either agreement. Rather, the agreements focus on the medical sleep medicine and respiratory medicine practices which are owned by the two doctors and/or their professional corporations. In other words, there is nothing inherent in the relationship between the parties which would suggest that Dr. Naji had any right to purchase the clinic other than any right arising from an agreement reached after April 4, 2018.

[53] I reiterate the parties agree that despite several draft agreements being exchanged by counsel, a written ROFR was never entered into. The parties also agree that the

documents required for Mr. Naji to act as the MDQA were never completed or sent to the Ministry.

[54] As said above, the plaintiffs' entire case is based upon the proposition that an oral agreement was made between Dr. Naji and Dr. Denys on June 22, 2018, and that that agreement is evidenced by emails from Dr. Naji and/or his lawyer to Dr. Denys and/or his lawyer dated June 23, 2018, September 15, 2018, and October 12, 2018.

[55] Prior to engaging in an analysis of the evidence as to that proposition, I find it important to observe that there were two sets of negotiations ongoing simultaneously.

[56] One set of negotiations relate to Dr. Naji's ongoing attempts to purchase either the shares or the assets of the clinic. As said, there were several documents, and amendments to documents, passed back and forth between counsel further to that end but no agreement was ever reached. Further, they had nothing to do with an ROFR. Accordingly, I find that the evidence related to these negotiations is for the most part also somewhat of a red herring.

[57] The other set of negotiations related to a right of first refusal. As said above, these negotiations go to the very heart of the issues between the parties.

Introduction to the evidence related to the existence of an ROFR

[58] Again, it is clear from the evidentiary record that there were negotiations as to an ROFR, and as to Dr. Naji being the MDQA of the clinic.

[59] As said, there was no evidence provided other than Dr. Naji's bald assertion as to the existence of an oral ROFR, together with his assertion that Dr. Denys' broker, Mr. Isaacson, told him that Dr. Denys acknowledged having granted a right of first refusal.

[60] I find that Dr. Naji's evidence as to the existence of a valid ROFR problematic for the following overarching reasons.

The condition that Dr. Naji agreed to act as MDQA of the sleep clinic as consideration for the granting of the ROFR

[61] The first reason the evidence is problematic relates to the very cogent evidence that throughout the negotiations Dr. Naji agreeing to be the MDQA of the clinic was both the consideration for the ROFR and a condition precedent to the granting of the ROFR. I say again, there is consensus that condition was never complied with or fulfilled by Dr. Naji. To the contrary, all of the evidence supports the opposite conclusion. The following are examples.

[62] Beginning with Dr. Naji's affidavit, sworn October 26, 2018, he deposes that "the conditions requested by Dr. Denys in the draft MOUs were too onerous and not acceptable to me." The term MOUs refers to the memorandums of understanding/agreement related to the ROFR and Dr. Naji being the MDQA of the

clinic. In other words, according to Dr. Naji's own evidence there was no meeting of the minds as to him becoming the MDQA.

[63] Consistent with that evidence, Stephen Chiefetz ("Mr. Chiefetz"), who was Dr. Denys' counsel during negotiations with Dr. Naji's lawyer, deposed that Dr. Naji refused to sign the agreement unless the percentage of his billing payable to Denys PCorp. was reduced from 20% to 10%. In other words, according to Mr. Chiefetz there was no meeting of the minds.

[64] Consistent with that evidence, there is an email from Dr. Denys' counsel to Dr. Naji's counsel dated September 17, 2018, which unequivocally states that Dr. Naji had not agreed to sign an agreement that he act as MDQA of the clinic. Further, Dr. Denys maintains that it was necessary for Dr. Naji to sign forms and documents required by the Ministry to approve him as the MDQA for the clinic. There was consensus these documents were neither prepared nor signed by Dr. Naji, and consequently according to Dr. Denys there was no meeting of the minds.

[65] In other words, the evidence of Dr. Naji, Dr. Denys, and Mr. Chiefetz all support the conclusion that there had never been a meeting of the minds as to the MDQA.

The emails

[66] As said, the June 23, 2018 email is central to Dr. Naji's position. That email states:

> "I am hoping that my offer will be satisfactory, but if in case you feel my bid is unsatisfactory and then you receive another bid afterwards, you kindly agreed to let me know of that bid or the last bid and I will try to match it with a final bid."

[67] Dr. Naji suggests this his email is consistent with and confirms the existence of an ROFR.

[68] That email however goes further, and Dr. Naji agrees to assist managing the lab and acting as interim director if he is still needed until the process is completed.

[69] I make the following observations as to that email and Dr. Naji's position as to the inferences that should be drawn from it.

[70] The first observation is that when that and the other two emails, relied upon by Dr. Naji, are read in their entirety and in the context of the email chains in which they are found, those emails tend to support the proposition that Dr. Naji agreeing to act as the MDQA was always a condition precedent to, and the consideration for the granting of an ROFR.

[71] For example, as said previously, the June 23, 2018 email states that Dr. Naji agrees to assist managing the lab and acting as interim director if he is still needed until the process is completed. In other words, Dr. Naji is aware of a link between him acting as MDQA and the ROFR.

[72] Consistent with that observation, the June 23, 2018 email is followed by an email from Dr. Denys lawyer dated August 3, 2018, offering Dr. Naji a right of first refusal on the condition that he is prepared to be the MDQA. There are two aspects of that August 3, 2018 email that are important. One aspect is that Dr. Denys clearly continues to consider the MDQA as a condition precedent and consideration for the granting of the ROFR. The other aspect is that it defies common sense that Dr. Denys would offer Dr. Naji an ROFR if one was already in existence.

[73] Further, only four days prior to that June 23, 2018 email, Dr. Denys' lawyer sent a draft agreement relating to the ROFR which clearly provides that the granting of the ROFR is conditional upon "Dr. Naji being approved in writing to be the medical Director and quality advisor of the sleep clinic." In other words, that condition and requisite consideration were clearly expressed in writing both before and after Dr. Naji states that the oral agreement was reached.

[74] As to the September 15, 2018 email, a return email dated September 17, 2018 states that while an ROFR was discussed it was conditional on Dr. Naji becoming the MDQA, and he had never agreed to do so. In other words, that email further supports the theme that the MDQA was a condition precedent to and consideration for the ROFR, and confirms that there had never been a meeting of the minds with respect to either.

[75] As to the October 12, 2018 email, Dr. Denys' lawyer wrote a return email on October 15, 2018 reiterating that although the ROFR had been discussed it was conditional on Dr. Naji becoming the MDQA for the clinic, and that he had never agreed to do so.

[76] In an October 19, 2018 email Dr. Naji states, "I am happy to be the director immediately if you still need me." Again, that confirms that Dr. Naji appreciated the important link between acting as medical director and the ROFR.

[77] Finally, the October 12, 2018 email offers to pay $200,000 more than the offer Dr. Denys was then considering. With the greatest of respect, it defies common sense that Dr. Naji would pay an additional $200,000 for the clinic if he honestly believed that there was an enforceable ROFR in place at the time.

The statement Dr. Naji attributes to Mr. Isaacson

[78] Dr. Naji deposes Mr. Isaacson confirmed with him that Dr. Denys had given him an ROFR. That evidence purports to be based upon knowledge and belief. There are two problems with that evidence.

[79] One problem is that while I am aware that Rule 39.01(4) provides a permissive exception to the application of the hearsay rule to such evidence, that exception is subject to limitations. In this case Dr. Naji is saying that Mr. Isaacson said that Dr. Denys said that there was an ROFR. That evidence is clearly "double hearsay" tendered as proof of what Dr. Naji maintains Dr. Denys said. Accordingly the evidence does not come within the Rule 39.01(4) exception to the rule against hearsay evidence: see *Airst v. Airst*, [1999]

O.J. No. 5866 (C.A.), 1999 CarswellOnt 362 (C.A.), at para. 6. As a result I did not give that evidence any weight.

[80] The other problem is that Mr. Isaacson denies having made that statement.

The lack of specifics as to the ROFR

[81] Neither of Dr. Naji's affidavits offer any insight into precisely when the ROFR was granted, or the terms and conditions of the ROFR, or the consideration actually provided by Dr. Naji. As said above, there is only Doctor Naji's bald assertion as to an oral agreement having been reached.

Conclusions as to the viability of the plaintiffs' case

[82] In summary, the evidentiary record tends to support Dr. Denys' assertion that Dr. Naji acting as MDQA for the clinic was both a condition precedent and the consideration for the granting of an ROFR, and does not support Dr. Naji's assertion that Dr. Denys abandoned that condition and made an oral agreement to grant the ROFR apparently without consideration. If true, it necessarily follows that the failure of the parties to come to a meeting of the minds regarding the MDQA is fatal to Dr. Naji's claim to the existence of an enforceable ROFR.

[83] To be clear, that is a preliminary assessment of the merits, based on a less than complete evidentiary record. Accordingly, I am not making findings of fact in that regard. Those issues will ultimately be left to the trial judge who will have a full evidentiary record before her or him.

[84] I summarize with an observation from *RJR-MacDonald*, at pp. 337-38, that:

> The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case...Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

See also: *Sobeys Capital Inc. v. Sentinel (Sherbourne) Land Corp.*, 2014 ONSC 7090, at para. 20, citing Robert J. Sharpe, *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) at pages 2-29 to 2-31.

[85] In this case, notwithstanding the significant weakness in Dr. Naji's claim, the evidence falls short of establishing that the motion is either frivolous and/or vexatious. It follows that I must proceed to consider the second and third tests.

3) Irreparable Harm

[86] Irreparable harm is described as follows in *RJR- MacDonald*, at p. 341.

> 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision...where one party will suffer permanent market loss or irrevocable damage to its business reputation...or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined...The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration. [Citations omitted.]

[87] It is well-settled that evidence of irreparable harm must be clear and not speculative: see *Bell Canada*, at para. 38; *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 56, 96 O.A.C. 324 (Div. Ct.) at para. 14.

[88] At paragraph 36 of Dr. Naji's affidavit, sworn October 21, 2018, he identifies what he characterizes as irreparable harm. There he states:

> I have spent over five years building my practice in the business. The nature of the industry is such that my patients will continue their relationship with Windsor Sleep Disorder Clinic even if I am gone. Approximately 70-80% of my income is derived from my practice at Windsor sleep disorders clinic. If I am effectively expelled from the business, I will have to start my career all over again.

[89] Patterson J.'s endorsement reflects that proposition. He states that the "applicant has an active medical practice with the defendants and has been given a notice of termination effective December 11, 2018 which will require the applicant to start a new practice".

[90] I begin by agreeing, that result is potentially consistent with the concept of irreparable harm referred to in *RJR- MacDonald*.

[91] There are, however, several problems with the proposition that Dr. Naji will actually suffer the irreparable harm that he says he will.

[92] The first is that the harm described is nothing more than a bald assertion. As outlined, the evidence of irreparable harm must be clear and not speculative. As Allen J. noted in *International Relief Fund for the Afflicted and Needy (Canada) v. Canadian Imperial Bank of Commerce,* 2013 ONSC 4612, at para. 35, "[O]n a motion on a paper record the information is only as valuable as the underlying support for the information".

[93] When it comes to that paper record, "[a]ssumptions, speculations, hypotheticals, and arguable assertions unsupported by evidence carry no weight": see *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, at para. 31; *Dywidag Systems*

International, Canada Ltd. v. Garford Pty Ltd., 2010 FCA 232, at para. 14; *Stoney First Nation v. Shotclose,* 2011 FCA 232, at para. 48; and *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, at para. 12.

[94] The second and perhaps most important is that the third-party purchaser, Dr. Satyendra Sharma ("Dr. Sharma"), offered to honour Dr. Naji's Association agreement dated April 4, 2018, with the exception that the fee sharing amount be increased from 20% to 25%.

[95] There is consensus that the offer was committed to writing and sent to Dr. Naji's solicitor by Dr. Sharma's solicitor, and that Dr. Naji had not accepted.

[96] In other words, Dr. Sharma was prepared to offer an arrangement which would have avoided the very irreparable harm cited by Dr. Naji and relied upon by Patterson J. in reaching his decision. Dr. Naji refused that offer.

[97] I am aware that Dr. Naji's share of the overhead would have increased by 5%. However, taking Dr. Naji's case at its best, and presuming an ROFR actually exists, which I reiterate I have good reason to doubt, the gap between 20% and 25% could have been bridged by a judgment for damages. As said above, an injunction is not available where the appropriate remedy is damages.

[98] I am also aware that counsel for Dr. Naji expressed concerns as to the *bona fides* of Dr. Sharma. He suggested that Dr. Sharma could sign the agreement with Dr. Naji and then cancel it immediately after closing the sale transaction.

[99] I make the following observations as to that proposition. The first is that it is nothing more than speculation. The second is that Dr. Sharma offered a logical reason to honour the association agreement, that is, a belief that it would be beneficial for Dr. Naji to continue to treat patients for the sake of continuity. The third is that it defies common sense that Dr. Sharma would have insisted on an increase of 5% in Dr. Naji's share of the expenses if it was simply a trick. The fourth is that Dr. Naji would no doubt have had a cause of action if Dr. Sharma acted in such a high-handed fashion.

[100] After rejecting that offer, Dr. Naji made a different claim as to irreparable harm. In his affidavit, sworn October 26, 2018, Dr. Naji states that he will suffer irreparable harm because "the Sleep Clinic is quite unique". I have difficulty with this assertion for two reasons.

[101] The first and most obvious difficulty is the timing of the assertion. It was not until Dr. Sharma offered Dr. Naji an association agreement which addressed his original position as to irreparable harm that he saw fit to make this claim.

[102] The second difficulty is in relation to the quality of evidence supporting that proposition. While there is a description of the facility and its operation, there is no evidence as to why the clinic is unique. There is, for example, no evidence as to why Dr. Naji could not simply build another sleep clinic next door to the existing one. As said above, the evidence as to irreparable harm must be clear and not speculative.

[103] For all of these reasons, I find that the plaintiffs have not satisfied the onus upon them to demonstrate the sort of irreparable harm anticipated in *RJR-MacDonald*.

[104] Prior to leaving this issue, I am aware that defendants' counsel maintains that there could be no irreparable harm from the cancellation of the agreement between Naji PCorp. and Denys PCorp. because that agreement was subject to termination without notice for cause, or on 60 days of notice without cause. In other words, he argues that the potential loss of livelihood by Dr. Naji is not something new.

[105] I disagree with that proposition.

[106] Taking Dr. Naji's case at its best and presuming the existence of a valid ROFR, the exercise of that ROFR would have rendered the association agreement obsolete and also avoided any harm which could have resulted from the cancellation of that contract.

4) Balance of Convenience

a) Introduction

[107] The balance of convenience goes to the damage each party alleges it will suffer: see *RJR- MacDonald*, at p. 348.

b) The convenience of the plaintiffs

[108] From the standpoint of Dr. Naji, I find that in these very unique circumstances, paradoxically, the balance of convenience weighs in favour of dismissing his motion for injunction.

[109] On October 26, 2018, Dr. Naji deposed that he would continue with the litigation. Accordingly, there are two scenarios which would result in the very harm that Dr. Naji states that he seeks to avoid if the injunction is granted and the litigation continues.

[110] I begin with the observation that Dr. Denys has terminated Dr. Naji's association agreement according to the terms of that agreement. In other words, he was within his rights to do so.

[111] As a result, Dr. Naji will not have the right to work from that clinic as the litigation is ongoing if the injunction is granted.

[112] There are two adverse results to Dr. Naji as a result. One is that presuming the clinic continues to operate during the course of litigation, and presuming Dr. Naji's evidence as to his clients lack of loyalty to him is correct, he is at risk of losing his patients, especially if he is unsuccessful in the litigation, which for the reasons above I find quite likely. The other adverse result is that Dr. Naji would lose his livelihood from those patients while the litigation is ongoing.

[113] In addition, as of today, Dr. Denys continues to act is the MDQA of the clinic pursuant to the interim arrangement reached with the Ministry. In other words, the Ministry may be within its jurisdiction to revoke that interim agreement and stop making payments for work conducted through the clinic if it loses confidence in 197's ability to dispose of the clinic. In that case, the clinic would close and again Dr. Naji could lose his livelihood if the injunction is granted, even if he is ultimately successful in the litigation.

c) The convenience of the defendants

[114] From the standpoint of the defendants, if the injunction is granted the third-party purchaser will be in a position to either walk away from the sale transaction, or sue the defendants for specific performance and/or damages for the failure to close the transaction.

[115] Presuming the latter, the litigation will no doubt be lengthy. That is because the existence of the injunction would foreclose any opportunity for meaningful negotiations in litigation with Dr. Sharma until the litigation Dr. Naji is completed.

[116] In the meantime, I reiterate that the clinic could be without a MDQA. As said, the ministry may not allow Dr. Denys to continue to fulfil those duties. If the clinic remained without a MDQA it would potentially have to cease operations, and if so, Dr. Denys would lose his livelihood and his daughters would lose much of the value of their clinic.

[117] Further, the ability of the defendants in this action to comply with an order for specific performance and/or damages in the inevitable action from the third-party purchaser would be stifled.

d) Conclusions as to the balance of convenience

[118] In the very unique circumstances of this case, ironically, the balance of convenience test seems to favour dismissing the application for an injunction from the standpoint of both the plaintiffs and the defendants.

5) Conclusions

[119] In summary, I find that the plaintiffs have a very weak case, they have failed to demonstrate irreparable harm in the sense anticipated in *RJR-MacDonald*, and the balance of convenience favours dismissing the motion for injunction. As a result, I find it appropriate to do so.

C. ORDER

[120] For all of the above reasons:

THIS COURT ORDERS that the interim injunction granted by Patterson J. on October 22, 2018, is terminated;

THIS COURT ALSO ORDERS that the plaintiffs' request to continue the injunction is denied;

THIS COURT ALSO ORDERS that in the event that the parties are unable to agree on costs for this motion and the motion before Patterson J. within seven (7) days of the release of this decision, then Costs submissions shall be in writing on the following basis:

1) The defendants' counsel shall serve costs submissions and a "Cost Outline" as provided for in Rule 57.01(6) (using Form 57(b)) upon the plaintiffs' counsel within fourteen (14) days. Such written argument shall be no more than five (5) pages in length. In the event the foregoing is not complied with within that time period, the defendants shall be deemed to have waived their right to do so.

2) The plaintiffs' counsel shall have a further ten (10) days to provide a response to counsel for the defendants. Such response is to be no more than three (3) pages in length. In the event the foregoing is not complied with within that time period, the plaintiffs shall be deemed to have waived their right to do so.

3) Counsel for the defendants shall have five (5) further days to provide a reply to counsel for the plaintiffs. Such reply is to be no more than one (1) page in length. In the event the same is not complied with within that time period, the defendants shall be deemed to have waived their right to do so.

4) Once ***all*** of those steps have been completed, council for the defendants shall provide all the submissions to the court through Trial Co-ordination.

5) The costs submission shall be double-spaced and use a "Times New Roman" font no smaller than 12 pitch. All references to the length of submissions exclude Bills of Costs and Costs Outlines and any Offers to Settle.

"original signed and released by *Bondy J.*"

Justice Christopher M. Bondy

Released: November 1, 2018

CITATION: Naji v. Denys, 2018 ONSC 6568
COURT FILE NO.: CV-18-27019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Nizar Naji and Naji Medicine Professional Corporation

Plaintiffs

– and –

Allen Philip Denys, Denys Medicine Professional Corporation, 1974583 Ontario Inc., Jennifer Cruickshanks and Nicole Miller

Defendants

RULING ON MOTION FOR INJUNCTION

Bondy J.

Released: November 1, 2018

TAB 5

Abdullah v. Maziri, [2016] O.J. No. 1600

Ontario Judgments

Ontario Superior Court of Justice

R.J. Smith J.

Heard: February 29, 2016.

Judgment: March 30, 2016.

Court File No.: 16-67156

[2016] O.J. No. 1600 | 2016 ONSC 2168 | 264 A.C.W.S. (3d) 1023 | 52 M.P.L.R. (5th) 84 | 2016 CarswellOnt 4881

Between Abdullah Abdullah, Nawaf Elenezi, Asfaw Mekonen, Timothy Omotunde, Vikash Kumar, Botros Nakhle, Said Youssef Roukoz, Dawit Tegegne, Fezel Popal, Walid N. Salika, Taminderpal Singh Mokha, Georges Chamoun, Meshari Amir, Amrik Singh, Mohamud Mohamed Hassa, Michel Tarabie, Tanios Abou-Hamd, Muhammad Saood Khalid, Rafael Kamar, Ahmed Khandid, Hayder Abid Zeyd, Elias Karam, Getachew Ayele, Farid Haddad, Fadla Hamade, Ghassan Skaf, Unifor and Unifor Local 1688, Plaintiffs, and Ahmad Hashim Maziri, Abrham Wossenu Zewde, Steven Albert Maurice Anthony Leger, Colleen Marese Pemberton Nnaemeka, mazen Sabbagh, Georges Abou-Eid, Alireza Najaf Zadeh, Osamwonyi Abiokunla Owie, Sainthia Bisengimana, Christopher Amiana, Reynold Pierre-Louise, Mohammad Kazem Tohidi Shabestari, Genet Negash Bayable, Stella Riesom, Teklezghi Ghebremedhin Yohannes, Abdullahi Jam Ali, Mohamed Hamdan, Aya Hamed, Yassin A. Mouhoumed, Apollos Gustanar, Jane Doe and John Doe, Defendants

(70 paras.)

Case Summary

Civil litigation — Civil procedure — Injunctions — Circumstances when not granted — Considerations affecting grant — Balance of convenience — Irreparable injury — Sufficiency of damages in lieu of injunction — Motion by taxi drivers to enforce City bylaw licensing and governing taxicabs dismissed — Taxi drivers alleged that Uber drivers were breaching bylaw by operating business that unlawfully competed with taxi drivers — They claimed damages for economic torts — Taxi drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages if injunction were not granted — Balance of convenience did not favour granting of injunction.

Municipal law — Bylaws and resolutions — Enforcement of bylaws — Injunctions — Motion by taxi drivers to enforce City bylaw licensing and governing taxicabs dismissed — Taxi drivers alleged that Uber drivers were breaching bylaw by operating business that unlawfully competed with taxi drivers — They claimed damages for economic torts — Taxi drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages if injunction were not granted — Balance of convenience did not favour granting of injunction.

Transportation law — Carriers — Regulation — Taxis — Motion by taxi drivers to enforce City bylaw licensing and governing taxicabs dismissed — Taxi drivers alleged that Uber drivers were breaching bylaw by operating business that unlawfully competed with taxi drivers — They claimed damages for economic torts — Taxi drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages if injunction were not granted — Balance of convenience did not favour granting of injunction.

Transportation law — Proceedings — Practice and procedure — Injunctions — Motion by taxi drivers to enforce City bylaw licensing and governing taxicabs dismissed — Taxi drivers alleged that Uber drivers were breaching bylaw by operating business that unlawfully competed with taxi drivers — They claimed damages for economic torts — Taxi drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages if injunction were not granted — Balance of convenience did not favour granting of injunction.

Motion by taxi drivers to enforce a City of Ottawa bylaw licensing and governing taxicabs. The taxi drivers alleged that Uber drivers were breaching the bylaw by operating a business that unlawfully competed with the taxi drivers. They claimed damages for economic loss by unlawful means, unjust enrichment and unlawful act of civil conspiracy.

HELD: Motion dismissed.

There were serious issues to be tried with respect to whether the bylaw definition of "taxicab" applied to the Uber drivers and the claim for various economic torts. However, the taxi drivers did not show that they would suffer irreparable harm that could not be compensated by monetary damages if the injunction were not granted. There was a record of the financial details of every fare charged by a Uber driver. The claimed damages were very speculative. They were not supported by documentary evidence or expert analysis. The balance of convenience did not favour the granting of an injunction. The taxi drivers were acting in their own financial interest in a private law case; there were conflicting court decisions on whether the definition of "taxicab" in bylaws applied to Uber drivers; and the City would be receiving an expert report analyzing the impact of Uber and considering options for regulating it.

Statutes, Regulations and Rules Cited:

City of Calgary's Taxi By-law, s. 26

City of Edmonton's By-law,

City of Ottawa's By-law,

City of Toronto By-law,

Municipal Act, 2001, *S.O. 2001, c. 25, s. 440*

Municipal Government Act of Alberta, s. 554

Rules,

Counsel

Sean McGee and Alison McEwen, for the Plaintiffs.

Brian C. Elkin and Paul D. Mooney, for the Defendants.

REASONS FOR UBER INJUNCTION

R.J. SMITH J.

Overview

1 A number of licensed Ottawa taxicab drivers (the "taxicab drivers") and their union, Unifor and Unifor Local 1688 (the "Union") seek an injunction against 13 of the 20 named defendants plus John and Jane Doe, who are drivers for Uber (the "Uber drivers").

2 The taxicab drivers and their Union seek to enforce the City of Ottawa's By-Law (the "By-Law") licensing and governing taxicabs. Pursuant to s. 440 of the *Municipal Act*, 2001, S.O. 2001, c. 25 any contravention of a municipal by-law may be restrained at the instance of a tax payer or the municipality. The City of Ottawa is not seeking injunctive relief to enforce its taxi licensing By-Law. In this case, one of the plaintiff taxicab drivers has provided evidence that he is a tax payer.

3 The taxicab drivers and their Union do not bring their claim for an injunction only to restrain the alleged contravention of the taxicab licensing By-Law, but also to prevent further economic damage being caused to them by the Uber drivers' alleged unlawful operation of taxicabs in the City.

4 The Uber drivers submit that neither the Union nor the taxicab drivers will suffer irreparable harm if an injunction is not granted and also that the Court should allow the City to decide the policy it wishes to implement to address the new circumstances presented by Uber ride sharing services. A study on the options to deal with Uber is to be presented to the City on March 23, 2016 and the Uber drives submit the Court should not proceed to grant an injunction without this key evidence and the City should be allowed to regulate Uber's ride sharing services.

5 The Uber drivers submit that the following issues should be answered in the negative:

(a) Does the taxicab drivers' Union or do the taxicab drivers have standing to bring the application for an injunction against the Uber drivers?

(b) Is there a serious issue to be tried? Namely are the Uber drivers operating a "taxicab" as defined in the By-Law; and do the claims for economic torts against the Uber drivers raise a serious issue to be tried?

(c) Will the taxicab drivers or the Union suffer irreparable harm if an injunction is not granted? and

(d) Does the balance of convenience favour granting an injunction?

Factual Background

How Uber is structured

(1) The business known as Uber revolves around two related software applications for use on smartphones and other internet-enabled devices (the "Apps"). The Apps provide a digital platform that enables passengers ("Riders") to request ridesharing services from independent third-party Driver Partners.

(2) Uber uses two Apps: Riders use the Rider App to request rides, to track rides on a map on their smartphones, to facilitate immediate electronic payment for their rides, and to anonymously rate Driver Partners; Driver Partners use the Driver App to receive and respond to ride requests and to rate their Riders at the conclusion of each trip.

(3) Riders must satisfy certain requirements before they gain access to the Rider App. They must be at least 18 years old. The Rider must agree to user terms with Uber B.V., a Dutch entity. The terms set out the Rider's rights and obligations, including a limited licence from Uber B.V. to use the Rider App. The Rider must provide Uber B.V. with their name, phone number and email address. The Rider must also enter credit card payment information, which is securely stored by a third party. The Rider also requires an internet-enabled device.

(4) A Driver Partner can only access the Driver App after satisfying several safety and security measures. Specifically, Driver Partners must:

(a) Be 21 years of age or older;

(b) Possess a valid driver's licence;

(c) Provide proof of vehicle registration, vehicle insurance and eligibility to work in Canada;

(d) Pass background criminal and driver's abstract checks conducted by third-party screening companies; and

(e) Have and pass a safety inspection of their vehicle.

(5) If the requirements are satisfied, Driver Partners may conclude agreements with Rasier Operations B.V. ("Rasier"), another Dutch entity affiliated with Uber B.V., setting out the Driver Partners' rights and obligations when using the Driver App.

(6) A Driver Partner must keep their documents on file current; if they expire, the Driver Partner is automatically deactivated and unable to access the Driver App. The criminal background check is repeated annually. A single conviction at any point in time will result in disqualification as a Driver Partner. A valid safety inspection of the Driver Partner's vehicle is also required on an annual basis.

(7) The Apps are used to request rides as follows:

(a) A Rider opens the Rider App on his or her smartphone, enters the pickup location address, and presses a button in the Rider App to request a ride.

(b) The Rider App sends the trip request to data servers in California. The request is then automatically sent from the servers to the Driver Partner nearest to the pickup location.

(c) The Driver Partner has 15 seconds to accept the request in the Driver App. If the Driver Partner does not accept, the request is automatically sent to the next closest Driver Partner.

(d) Once the pickup request is accepted, the Rider App displays the Driver Partner's name and headshot, the vehicle's licence plate number, the make and model of the vehicle and the Driver Partner's overall "rating" (discussed below).

(e) The Rider can cancel the pickup at this time (without charge if within 5 minutes).

(f) The Rider is notified through the Rider App when the Driver Partner has arrived. The Rider can identify the vehicle by the licence plate number, and verify the identity of the Driver Partner against his or her photo, all as displayed on the Rider App.

(g) The trip begins when the Rider enters the vehicle and the Driver Partner presses a button in the Driver App. The Driver Partner then proceeds toward the requested destination.

(h) After the vehicle arrives at the requested destination, the Driver Partner taps the Driver App to indicate that the trip has concluded.

(i) After the ride, the Driver Partner and the Rider are asked to rate each other anonymously out of 5 stars; electronic payment is completed and the Rider is emailed a detailed receipt.

(j) Members of the public who have not agreed to Uber BV's Terms and Conditions, or who lack a sufficient internet-enabled device, cannot request a ride through the Rider App. No one can "street hail" a Driver Partner as one would a taxi. No one can approach a Driver Partner at a stand or telephone a dispatcher.

(k) The Rider App can be used in any of the cities around the world where Driver Partners operate.

6 Neither Uber B.V. nor Rasier are named as defendants to the plaintiffs' claim for damages or their motion for an injunction.

City of Ottawa's Taxi By-Law

7 Under the Taxi By-law, the City has enacted a vehicle-for-hire licensing regime that prohibits anyone from operating a vehicle as a taxi without, among other things:

(a) A valid taxi plate licence, accessible taxi plate licence, or limousine plate licence;

(b) A current taxicab driver licence;

(c) A current valid Province of Ontario motor vehicle permit issued for that motor vehicle;

(d) A valid inspection certificate;

(e) A taximeter in operation;

(f) A security camera installed in accordance with the Taxi By-law;

(g) A roof sign; and

(h) A certificate of insurance confirming that the taxi plate holder has obtained insurance coverage in accordance with the Taxi By-law.

8 In accordance with this authority to license businesses and its authority to enact by laws for the purposes of consumer protection, the economic and environmental well-being of the City, and the health, safety and well-being of people, Ottawa's licensing regime requires that among other things:

(a) Taxi drivers complete a training course;

(b) vehicles used as taxis pass mechanical inspections and be equipped with certain safety equipment;

(c) taxi owners and operators have comprehensive commercial insurance policies in place for the transportation of passengers for compensation; and

(d) the fares or rates charged for Taxi rides are in accordance with a fee schedule established by the City.

9 In or around October 2014, the defendants commenced operations as Uber drivers in the City of Ottawa. Uber sets the fee for the transportation, collects that fee from the passenger, and then provides money to the driver. That fee charged can be and has been lower than or higher than the rate allowed under the Taxi By-law.

10 Users request a vehicle using the Uber app and can only pay the fare to Uber by credit card. They cannot pay by cash or present a debit or credit card to the driver.

11 The plaintiffs allege that the Uber Drivers do not comply with the following provisions of the Taxi By law:

(a) They do not have a taxicab driver licence nor a taxicab plate licence;

(b) They have not completed the City's Taxicab Driver Education program;

(c) They are not required to obtain $2,000,000 of Commercial General Liability and Motor Vehicle Liability insurance with the City named as an additional insurer;

(d) They do not charge a fee calculated in accordance with the current tariff rate set by the City and do not use a sealed taxi meter;

(e) They do not display a taxicab driver identification card or have a roof sign on their vehicle.

(f) They do not obtain a valid vehicle inspection certificate;

(g) They do not have a fully functioning camera system.

City of Ottawa Actions

12 The Uber ridesharing App has been operational in Ottawa since October of 2014. Uber-like ridesharing companies have also been referred to as Transportation Network Companies ("TNCs").

13 Since March of 2015, the City has been engaged in a review of its options with regards to regulating TNCs such as the Uber ridesharing service. The City has retained KPMG to provide it with a report on its options, which include establishing a licensing category for the Uber ridesharing model. Recommendations from that report will be presented to City Council in the very near future for their consideration.

Alleged Delay

14 Notwithstanding that the Uber App ridesharing program has been operating in Ottawa since October of 2014, the plaintiffs' only issued their Statement of Claim on January 15, 2016 and issued their Notice of Motion seeking an injunction on January 18, 2016.

Number of Drivers

15 There are approximately 2600 licensed taxicab drivers in Ottawa and 1186 licensed taxicabs of which 187 are accessible. Uber estimates that there are approximately 1,000 Uber drivers in the Ottawa-Gatineau area, some of whom reside in the province of Quebec.

16 The plaintiffs have alleged that the Uber drivers are reducing the number of fares available to licensed taxicab drivers. Two individual taxicab drivers filed affidavits alleging that their revenue fell by at least 33 percent and 40 percent respectively following the introduction of Uber ridesharing program in Ottawa. However, these allegations are not supported by any financial records or any expert report providing an analysis of ridership in the taxi industry in Ottawa before and after the arrival of Uber.

17 The Respondents have filed a copy of a report containing an analysis of the effect of Uber-like transportation services in Mississauga, a city of 900,000 people. Uber commenced operating in Mississauga in the summer of 2012. The Mississauga study indicated that in 2014, the total dispatched trips for the eight taxi brokerages increased by 8.9 percent compared to 2013 even though the passenger total number of rides taken increased by a greater amount. In 2015, the total dispatched trips for the eight taxi brokerages decreased by 1.9 percent in comparison to 2014. The report indicates that the Uber ridesharing program has increased the pie.

Analysis

ISSUE #1 - Do the taxicab drivers or their Union have standing to bring an application for an injunction against the Uber drivers?

18 Section 440 of the *Municipal Act* reads as follows:

> Power to Restrain
>
> 440. If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board. 2006, c. 32, Sched. A, s. 184.

19 The Uber drivers submit that the taxicab drivers' Union does not have standing to enforce the City's By-law by way of injunction because it is not a tax payer. In *Grey-Bruce Snowmobile Trails Inc. v. Morris Estate* (1997), 35 O.R. (3d) 398 (C.A.), the Court of Appeal held that an individual who was not a ratepayer did not have standing to enforce a municipal By-law by an injunction. The Court of Appeal stated as follows: "the appellant is not a ratepayer and accordingly does not have standing to bring this action to restrain the defendants from violating By-law 1268". Based on the *Gray-Bruce* decision, I find the taxicab drivers' Union does not have standing to enforce the Taxi By-law by injunction.

20 The Union is an unincorporated association of individuals that does not own property and therefore does not have standing to enforce the By-law. Whether the Union has standing to sue for economic losses due to a possible future reduction in membership due to the activities of the Uber drivers does not need to be decided as one taxicab driver is a ratepayer. The issue was left undecided when the Ontario Court of Appeal overturned Pelletier J.'s decision in *Canadian Union of Postal Workers v. Quebecor Media*, 2016 ONCA 206, at para. 17.

21 The plaintiffs have provided evidence that one of the taxicab drivers is a tax payer and, therefore, I find that he has standing to bring the motion for an injunction under s. 440 of the *Municipal Act*.

22 The taxicab drivers and their Union have also made claims for economic damages caused by the alleged unlawful conduct of the Uber drivers breaching the City's Taxi By-law. They seek an injunction at common law to prevent further damages being caused to them. The issue of whether the Uber drivers' actions are unlawful will depend on whether the City's definition of "taxicab" in their licensing By-law applies to them.

23 In the *City of Toronto v. Uber Canada Inc.*, 2015 ONSC 3572, 126 O.R. (3d) 401, at para 14, Dunphy J. concluded that "the City has failed to demonstrate a breach by the respondents of its By-law". He dismissed the City's application for an injunction against Uber Canada Inc. The City of Toronto By-law defined a Limousine, Taxicab and a Limousine Service Company as follows:

> LIMOUSINE - Any automobile, other than a taxicab as defined by this chapter, used for hire for the conveyance of passengers in the City of Toronto, and formerly referred to in this chapter as a "livery cab."
>
> TAXICAB - An ambassador taxicab, a standard taxicab, a Toronto Taxicab and an accessible taxicab.
>
> LIMOUSINE SERVICE COMPANY - Any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation.

24 In the City of Toronto case, Dunphy J. held that a "taxicab", as defined in the By-law, was limited to the holders of any of the four categories of taxicab licences. Limousines included all other automobiles used for hire for the conveyance of passengers. Dunphy J. concluded that Uber Canada Inc. did not operate as a "Limousine Service Company" as Uber is not an entity that "accepts calls in any manner for booking, arranging or providing limousine transportation" and therefore did not meet the definition in the By-law. As a result, he dismissed the City's request for an injunction against Uber Canada Inc.

25 In *Edmonton ("City") v. Uber Canada Inc.*, 2015 ABQB 214, 19 Alta. L.R. (6th) 424, M.G. Crighton J. found that the City of Edmonton's By-law may have been drafted to accommodate a more static, paper and people driven environment which lagged behind the technological response to individual preferences and demands. He concluded that Uber Canada Inc. was *prima facie* in clear and continuing breach of the City's By-law. However, he found that Uber Canada Inc. was not a party to any licensing agreements between riders or drivers and did not own the servers that facilitated communication between the riders and drivers. As a result, he dismissed the City's motion for an injunction against Uber Canada Inc.

26 In *City of Calgary v. Gold* (20 November 2015), Calgary 1501-12242 (Alta. Q.B.), Poelman J. granted an injunction against approximately 50 Uber drivers named as defendants. In the Calgary case, the City was seeking to enforce its taxi licensing by-law pursuant to the provisions of s. 554 of the *Municipal Government Act of Alberta*.

27 Section 26 of the City of Calgary's Taxi By-law reads as follows:

> No person shall charge a fare or fee to carry passengers or offer to carry passengers for a fare or fee unless the Motor Vehicle used or to be used has a valid [taxi plate licence], [accessible taxi plate licence], or [limousine plate licence] joined to it

28 Poelman J. held that the City had presented evidence demonstrating that the named respondents had charged a fee to carry passengers and had therefore breached and were continuing to breach the City of Calgary's Taxi By-law. As a result, he granted the injunction in favour of the City against the Uber drivers.

29 The question of whether the Uber Drivers are included in the City of Ottawa's definition of "taxicab" drivers has certainly raised a serious issue to be decided given the conflicting decision in three different cities.

Disposition of Issue #1 (Standing)

30 I find that the plaintiff taxicab driver who is a ratepayer has standing to bring the motion for an injunction to enforce the City By-law.

Test for an Injunction

31 In *RJR Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 347-349, the Supreme Court set out the following three part test to obtain an injunction:

(a) Is there a serious issue to be tried?

(b) Will the moving party suffer irreparable harm if an injunction is refused? and

(c) Does the balance of convenience favour granting an injunction?

32 The plaintiffs submit that when a municipality is suing to enforce a By-law, proof of irreparable harm and the balance of convenience need to be considered; however, a strong *prima facie* case showing that the defendant is in clear breach of the By-law is the key consideration and the other two criteria are of secondary importance. They rely on the decisions of *Kamloops (City) v. Southern Sand and Gravel Co.* (1987), 43 D.L.R. (4th) 369 (B.C. S.C.), and *Hamilton (City) v. Loucks* (2003), 232 D.L.R. (4th) 362 (Ont. S.C.). These cases were all decided before *RJR MacDonald* and the motion before me is not brought by a municipality and so I find that the three part test for an injunction as set out in *RJR MacDonald* should be applied in this case.

33 At p. 341 of *RJR MacDonald*, the Supreme Court stated that irreparable harm refers to harm that cannot be quantified in monetary terms or that cannot be cured, usually because one party cannot collect damages from the other.

ISSUE #2 -- Is There a Serious Issue to be Tried?

34 The taxicab drivers allege that the Uber drivers are breaching the Taxi By-law by operating a business that unlawfully competes with them. They further allege that the Uber drivers are intentionally causing serious economic harm to them.

35 The Uber drivers submit that the plaintiffs have not raised a serious issue to be tried because the Uber drivers' vehicles are not "for hire" and therefore they are not operating a "taxicab" as defined in the By-law. Secondly they allege that the economic tort claims made against the approximately 13 Uber drivers are destined to fail and do not raise a serious issue to be tried.

36 In *Lyon v. Denscombes*, [1949] 1 All ER 977, at p. 979, the English Court of King's Bench contrasted the concepts of "for hire" or "plying for hire" with for "private hire"

> "...Private hire is distinct, in my opinion, from plying for hire, that is to say, using the car as a taxicab, standing in the street or driving about seeking passengers. It is private hire in the way that any private hire car is used, namely, by hiring the vehicle for a defined journey at a defined time.

37 In *Cogley v. Sherwood*, [1959] 2 Q.B. 311, at pp. 324-325 and 331, citing *Allen v. Tunbridge* (1871), L.R. 6 C.P. 481, at p. 485, the Court of Queen's Bench noted that a driver is "plying for hire" or "for hire" if he "invites the public to be conveyed".

38 In *Toronto (City) v. Chamilov*, [2001] O.J. No. 4549, at paras. 52 and 64, the Court found an unlicensed driver guilty of breaching the Toronto Taxi licensing By-law. The driver had been stationed at the Yorkdale mall with his roof light on, indicating his taxi was available to the public "for hire".

39 The plaintiffs submit that the cases cited by the Uber drivers refer to the "horse and buggy" days. They further submit that a plain reading of Ottawa's taxi licensing By-law leads to the conclusion that the Uber drivers are individuals who are using their motor vehicles to transport individuals and as such are using their vehicles "for hire" as defined in the Taxi Bay-law.

Claim for Economic Loss by Unlawful Means

40 The plaintiffs have claimed damages against the Uber drivers for a number of economic torts. The defendants submit that these claims constitute claims for pure economic loss, which are not recoverable at law.

41 In the case of *Al Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, the Supreme Court of Canada established the following test for the tort of economic loss by unlawful means:

(a) The defendant committed an unlawful act against a third party;

(b) The defendant must have intended to harm the plaintiff through the use of the unlawful means; and

(c) The plaintiff must have suffered economic harm.

42 It is unclear whether the defendant Uber drivers have committed an unlawful act against a third party. They are alleged to have transported individuals with their motor vehicles in breach of the City's taxi By-law, which maybe an unlawful act, but it is unclear that it is against a third party. The plaintiffs allege that the taxicab drivers, or the taxicab drivers whose taxi licence values have been reduced by the actions of the Uber drivers, are the third parties. Alternatively, they argue that the Uber drivers are entering into unlawful contracts with their passengers and their "unlawful act" is committed against the passengers who are the third parties.

Unjust Enrichment

43 The plaintiffs also claim damages against the Uber drivers for unjust enrichment. In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para 30, the Supreme Court set out three elements that must be proven to obtain this remedy; namely 1) an enrichment; 2) a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment

44 In *Reach MD Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003) 65 O.R. (3d) 30 (C.A.), the Ontario Court of Appeal held that this tort does not require that the defendants' predominant intention was to harm the plaintiffs but requires proof that their actions were in some measure directed against the plaintiffs, even though their predominant purpose was to advance their own interest and that of their members.

45 The plaintiffs rely on the Supreme Court decision of *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, for the proposition that an action for unjust enrichment can exist even when the transfer from the plaintiff to the defendant is indirect. The plaintiffs allege that the Uber drivers are unjustly enriched by unlawfully taking fares from customers who would otherwise have paid these fares to the licensed taxicabs drivers.

Unlawful Act of Civil Conspiracy

46 The defendants submit that the plaintiffs have not made any allegation that there was any agreement among the Uber drivers and as a result submit that there can be no conspiracy to do an unlawful act without such an agreement. The defendants submit that in addition there is no evidence that the alleged unlawful acts were "directed towards the taxicab drivers".

47 The plaintiffs rely on the decision of the Court of Appeal in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, which held that this tort may be made out where the defendants act in combination or concert by agreement or "with a common design". They allege that the Uber drivers have provided the Uber ridesharing service with a common design and have caused them damages.

Disposition of Serious Issue to be Tried

48 I should not attempt to decide at this point whether any of the plaintiffs' claims for economic torts will ultimately be successful when the matter goes to trial. However, I am satisfied that both the issues of whether the City's By-law definition of "taxicab" applies to the Uber drivers and the plaintiffs' claim for various economic torts raise serious issues to be tried. The plaintiffs' claims are neither frivolous nor vexatious.

ISSUE #3 -- Will the Taxicab Drivers or their Union suffer irreparable harm if an injunction is not granted?

49 To establish "irreparable harm", the plaintiffs must present "clear and not speculative" evidence that they will suffer irreparable harm in the absence of injunctive relief.

50 At p. 341 of *RJR MacDonald*, the Supreme Court stated that irreparable harm was "harm which either cannot be quantified in monetary terms or which cannot be cured."

51 Two of the plaintiffs have provided affidavit evidence making a general statement that their incomes have gone down by 30-40% since Uber commenced operations in Ottawa. These statements have not been supported by any financial statements or any other documentary evidence, or any expert analysis linking a decline in their income to the introduction of the Uber ridesharing services. I find that the taxicab drivers have speculated that they may lose their jobs and also the Union has speculated that it may lose future revenue from reduced membership. The taxicab licence holders also allege that the values of their taxi licences have fallen.

52 In *RJR MacDonald*, at p. 350, the Supreme Court of Canada stated as follows: "monetary loss of this nature will not usually amount to irreparable harm in private law cases." The monetary damages referred to in RJR were the

costs of complying with the regulations by immediately changing the cigarette packaging and then, if ultimately successful, changing it back. The taxicab drivers and their Union have claimed for monetary damages based on a number of alleged economic torts in this private law case which, following *RJR MacDonald*, would not usually amount to irreparable harm

53 In this case, 13 of the defendant Uber drivers have been identified as having driven their motor vehicles to transport passengers arranged through Uber B.V.. Uber B.V. and Rasier B.V. keep a record of the financial details of every fare charged by an Uber driver and so the exact amount of the fares received by each of the 13 identified Uber drivers are discoverable and capable of exact calculation. The amount of monetary damages they have caused can therefore be quantified in monetary terms.

54 In addition, only one taxicab driver has standing to enforce the By-law as a ratepayer and the City has chosen to study and review its Taxi licensing By-law rather than seeking an injunction to enforce it. The City will receive a report on this issue very shortly. The City will review this report and decide what policy it will adopt, and whether or not to amend the Taxi By-law to regulate or prohibit Uber and other similar ridesharing services.

55 The taxicab drivers and their Union have also delayed bringing their motion for an injunction for almost 15 months as Uber commenced operation in Ottawa in October of 2014. The plaintiffs' explanation is that they only discovered in November 2015 that the City would not move for an injunction and was studying the issue and as such, they submit that their delay is not a factor. I find that the taxicab drivers' delay in taking any action for injunctive relief for about 15 months after Uber's arrival in Ottawa is a factor which indicates that they were not and are not suffering irreparable harm that cannot be compensated by monetary damages, otherwise, they would have moved much sooner.

56 The Uber drivers have produced a report presented to the City of Mississauga showing that Uber's arrival in that City in 2012 increased the pie and did not unduly affect existing taxis. In 2014, the traditional taxi rides increased by 8.9% and decreased by 1.9% in 2015. This evidence was not objected to by the plaintiffs and the study did not relate to the City of Ottawa. The Mississauga study is also hearsay evidence and not from a Rule 53 qualified expert witness. As a result, the Mississauga study is given minimal weight and is only evidence that such a study was received by the City of Mississauga.

57 The fact that the City will shortly receive its own study, which is not in evidence before me, is also a factor when considering whether irreparable harm will be suffered if an injunction is not granted. The City's study from KPMG will analyse the economic impact of the arrival of Uber in the City of Ottawa on existing taxicab fares. The City will then decide what policy it will adopt based on evidence obtained from the study directly related to the City of Ottawa. This evidence, if properly before the Court, would be highly relevant to assist the Court in determining the issue of whether any irreparable harm is being caused.

58 The case before me is distinguishable from the *City of Calgary* case where the City brought the motion for an injunction as opposed to the individual taxicab drivers and their Union. The City also benefited from acting in the public interest especially where public health or safety is involved. Where actions clearly breach a By-law enacted in the public interest for public safety, irreparable harm may be inferred and the balance of convenience favours following the By-law. In this private law case, individual taxicab drivers are acting in their own financial interest and not in the public interest.

59 I am not satisfied that the plaintiffs have shown that they will suffer irreparable harm that cannot be compensated by monetary damages if an injunction is not granted for the following reasons: a) the plaintiff taxicab drivers are claiming economic damages that are easily quantified monetary terms, the amount of damages caused by the 13 identified Uber drivers would be relatively modest as the main damages to them would be caused by the Uber B.V. that operates the ride sharing program; b) the alleged losses being suffered are not supported by any documentary evidence or expert analysis and the damages claimed by the drivers are very speculative; c) only one plaintiff is a ratepayer with standing to enforce the City By-law by way of an injunction; and d) the City has decided

to obtain an expert report to analyse the data to determine the extent of the impact caused by the arrival of Uber drivers before deciding what approach they will take to regulate Uber ridesharing service.

Disposition of Issue #3 of Irreparable Harm

60 I find that the taxicab drivers and their Union have not shown that they will suffer irreparable harm that cannot be compensated by way of monetary damages if an injunction is not granted against the Uber drivers for the reasons given above.

ISSUE #4 -- Balance of Convenience

61 The City passed its Taxi By-law for the public benefit of providing safe taxicab transportation to residents of Ottawa. However, the City, who has the responsibility of ensuring that this public benefit is provided, has not sought injunctive relief, but rather has chosen to obtain an expert analysis of the economic impact and consider its policy options after receiving the expert analysis.

62 The taxicab drivers and their Union seeking this injunction are not acting in the public interest, but rather are claiming damages to their own financial interest and thus their position is given less weight than if it was a regulatory body acting in the public interest seeking to enforce its regulations or By-laws before the matters are decided at trial.

63 The taxicab drivers and their Union's delay of 15 months before seeking an injunction is also a factor which weighs against granting an injunction. Their delay indicates that irreparable harm was not being suffered by them that could not be cured by an award of monetary damages.

64 The fact that the City will shortly receive an expert report analysing the impact Uber is having on the taxicab drivers, and setting out the options available to the City is highly relevant evidence that is not before the Court. The City's decision not to seek injunctive relief but to obtain expert analysis and decide what policy it will follow on how to regulate Uber and other ride sharing programs in the City is a factor when considering the balance of convenience that weighs in favour of refusing to grant an injunction without this highly relevant evidence.

65 The taxicab drivers submit that the balance of convenience favours stopping the Uber drivers from continuing to operate unlawfully by breaching the Taxi By-law and favours granting an injunction. However this assumes a finding that the definition of "motor vehicle used for hire" applies to the Uber drivers. This issue has not been determined yet and given the conflicting decisions on motions for injunctions against Uber in the City of Toronto, and the City of Edmonton and as against the Uber drivers in the City of Calgary, where the claim for injunctive relief was made by the Cities, the outcome on this issue is not certain.

66 I find that the fact that the Uber drivers are not required to be covered with a reasonable amount of Commercial Liability Insurance is a flaw in the Uber ridesharing program. This flaw has a negative effect on the safety of the public when weighing the balance of convenience and is a factor in favour granting the injunction. However the plaintiffs are not acting in the public interest, but in their own financial interest and this factor would weigh more heavily in favour of the Municipality who has a responsibility for public safety.

Disposition on Balance of Convenience Issue

67 I find that the balance of convenience does not favour granting an injunction for the above reasons: namely, the taxicab drivers are acting in their own financial interest in a private law case and not in the public interest; there are conflicting court decisions on whether the definition of taxicab in By-laws applies to Uber drivers; the City will be receiving an expert report analysing the impact of Uber and considering options for regulating Uber, which is highly relevant evidence that is not before me.

Undertaking in Damages

68 I am satisfied that the undertakings of damages given at the hearing are sufficient.

Disposition of Motion

69 For the above reasons, the motion for an injunction by the plaintiffs is dismissed.

COSTS

70 The defendants shall have 15 days to make written submissions on costs and the plaintiffs shall have 15 days to respond.

R.J. SMITH J.

End of Document

TAB 6

Federal Court of Appeal Cour d'appel fédérale

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: **STRATAS J.A.**

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on October 5, 2012.

Order delivered at Ottawa, Ontario, on October 9, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: **STRATAS J.A.**

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] The applicant, Glooscap Heritage Society, is a registered charity under the *Income Tax Act*. The Minister has notified Glooscap that he will exercise his authority under the Act and revoke Glooscap's registration as a charity. Glooscap intends to challenge the revocation.

[2] Under the Act the revocation can take place before Glooscap can challenge it. This will be explained in more detail below.

[3] In this application, Glooscap seeks an order delaying the revocation until this Court hears its challenge.

[4] In order to delay the revocation, Glooscap must satisfy the Court that it has met the normal test for the granting of stays and injunctions: *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114 at paragraph 5. Glooscap must show it has an arguable case against the revocation, it will suffer irreparable harm if the revocation is allowed to happen, and the balance of convenience lies in its favour: *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[5] For the reasons set out below, Glooscap has not satisfied this test. Therefore, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity, with costs.

A. Preliminary matter

[6] Initially, Her Majesty the Queen was named as the respondent to this application. The parties agree that the correct respondent is the Minister of National Revenue. I agree and will so order. The style of cause on these reasons and my order dismissing Glooscap's application shall reflect this change.

B. Facts

(1) The legislative scheme

[7] When the Minister concludes that a charity's registration should be revoked, he issues a notice of intention to revoke it: *Income Tax Act*, subsection 168(1). The revocation only takes effect when notice of it is published in the *Canada Gazette*.

[8] Where the charity has not requested the revocation, the publication of the notice is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172.

[9] Any time before the Court determines the appeal, the Court may extend the 30 day period for non-publication of the notice of revocation. Before the appeal is brought, the extension may be granted on the basis of an application brought under Rule 300(*b*) of the *Federal Courts Rules*. After the appeal is brought, an extension may be granted by way of notice of motion within the appeal. See *International Charity Association Network (ICAN) v. Minister of National Revenue*, 2008 FCA 62 at paragraph 7.

(2) The basic facts of this case

[10] Since May 2005, Glooscap has been a registered charity under the Act.

[11] At that time, broadly stated, its objects were to research, study, exhibit, and publicize artifacts and evidence relating to the history of the Mi'kmaq First Nation in central Nova Scotia. In conjunction with the Central Nova Tourist Association, Glooscap operates the Glooscap Heritage Centre and Mi'kmaw Museum. The museum is located on the Millbrook First National reserve on the outskirts of Truro, Nova Scotia.

[12] Some of artifacts and exhibits in the museum come from charitable donations. But the bulk of the museum's artifacts and exhibits – some 80% – are on loan from another museum.

[13] The evidence filed before the Court suggests that the relationship between the tourist association and Glooscap – an aboriginal/non-aboriginal partnership in a tourism endeavour – is special and rare, and formed only after overcoming initial resistance. Putting aside Glooscap's involvement with the tax shelter, described below, the evidence filed before the Court demonstrates that Glooscap's activities are socially worthy and important to the community.

[14] But in this application, Glooscap's involvement with the tax shelter is central.

[15] The Minister alleges that from 2006 to 2011, Glooscap issued donation receipts in the following approximate totals: $166,000 (2006), $0 (2007), $11,590,000 (2008), $13,312,000

(2009), $37,131,000 (2010), $54,985,000 (2011). This shows a massive increase in donations since 2006 – ranging from 6,880% to over 33,000%.

[16] The Minister says this increase was due to Glooscap's involvement, starting in 2008, with an illegitimate tax shelter known as the Global Learning Gifting Initiative.

[17] In this regard, the Minister makes several allegations, largely on the basis of an audit it has conducted. On this application, it is not the role of the Court to determine whether these allegations are true. The Minister's allegations, to the extent they have a *prima facie* basis, are primarily relevant to the assessment of the public interest under the balance of convenience branch of the *RJR-Macdonald* test.

[18] The Minister's alleges that the illegitimate tax shelter worked in the following way:

- Each participant made a cash payment to Glooscap.

- Each participant then applied to become a capital beneficiary of the Global Learning Trust.

- The trust provided each participant with free courseware.

- Each participant donated the courseware to a registered charity that was participating in the tax shelter. In 2009 and 2010, participants donated the courseware to Glooscap.

- Each participant received an official donation receipt for the cash payment and the donated courseware.

- Although each participant purportedly donated the courseware at fair market value, Glooscap issued receipts for the courseware that were typically at least three times the amount of the cash payment the participant had made to Glooscap.

- Under this arrangement, Glooscap kept very little of the cash payments from participants. For example, in 2009, Glooscap retained 11.6% of the payments, with the promoter of the scheme receiving 88.4% of the payments.

[19] Following an audit, the Canada Revenue Agency concluded, among other things, that:

- Glooscap was not operating exclusively for charitable purposes as required under the Act, and instead was operating for the primary purpose of activities benefiting the tax shelter.

- Glooscap improperly issued receipts for cash and courseware that were not valid gifts under the Act.

[20] In an administrative fairness letter, the Canada Revenue Agency notified Glooscap of its concerns and invited Glooscap to respond. In a responding letter, Glooscap defended itself, urged that its registration as a charity not be revoked, and advised that it had terminated its relationship with the tax shelter.

[21] After some months, on July 17, 2012, the Canada Revenue Agency issued a Notice of Intention to revoke Glooscap's registration as a charity under the Act. Further, the Minister has told participants in the tax shelter their deductions arising from the scheme will be disallowed, and they will be reassessed for back taxes, interest and penalties.

[22] In the oral hearing of this application, Glooscap advised the Court that it has just filed an objection to the Minister's Notice of Intention.

[23] Assuming that the Canada Revenue Agency maintains its position, Glooscap will soon be able to challenge in this Court the Minister's planned – or, by then, actual – revocation of its registration as a charity. In the meantime, Glooscap wants this Court to stop the Minister from revoking its registration.

C. Analysis

(1) Arguable case

[24] On the first branch of the threefold test for a stay, Glooscap must establish that there will be a serious question to be tried when it challenges the Minister's position in this Court. Although it has not filed its objection to the Minister's Notice of Intention, it has filed its responding letter to the Minister's administrative fairness letter.

[25] The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). Glooscap need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at page 337.

[26] Given the low threshold for "arguable case," the Minister has conceded that Glooscap has met this branch of the *RJR-Macdonald* test.

(2) Irreparable harm

[27] Glooscap submits that if its registration as a charity is revoked, it will suffer irreparable harm. It points to reputational effects upon itself, the First Nation with which it is associated, the First Nation's business relationships, and business collaborations between aboriginal and non-aboriginal communities. It also says that potential donors to the museum will donate to other museums that can provide a donation receipt, and they will not lightly come back.

[28] Glooscap adds that under the irreparable harm branch of the test, the Court is to look at the nature of the harm – whether it can be remedied later – and not the quantity of harm.

[29] The Minister submits that the irreparable harm must be that of the moving party, here Glooscap. Harm to third parties may be considered under the balance of convenience branch of the test, but not under the irreparable harm branch of the test. The Minister also points to the general, unparticularized nature of the harm and the absence of proof of a real likelihood of harm.

[30] On the law governing irreparable harm and on the record before the Court, the Minister's submissions carry some force.

[31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*,

2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[32] The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[33] Finally, only harm suffered by the moving party qualifies under this branch of the test. As was said in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 128, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm." It is "the applicants' own interests" that fall to be considered under this branch of the test, not that of third parties: *RJR-MacDonald*, *supra* at page 341.

[34] In cases such as this, a modest modification of this principle has been made. The interests of those who are dependent on the registered charity may also be considered under this branch of the test: *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265 at paragraph 17.

[35] Glooscap has adduced evidence from very well-placed deponents: the executive director of the tourist association with which Glooscap is partnered, a multi-decade councillor with the Millbrook First Nation reserve, and the general manager of the museum. However, much of the evidence of harm given by these deponents consists of sweeping, unparticularized assertions and declarations that difficulties would arise that *might* result in actual harm.

[36] Without a better understanding of Glooscap's overall financial situation and fundraising ability, I cannot conclude that a loss of donations would result in any irreparable harm to it or its activities.

[37] Glooscap submits that revocation of its registration as a charity will cause harm to its relationships, particularly with non-aboriginal organizations, and these injuries are not capable of later remediation. However, its evidence goes no higher than to identify "jeopardy" or a risk to those relationships: see paragraphs 11 and 13 of the Mingo Affidavit.

[38] The Court does accept that Glooscap will suffer some reputational harm. However, as explained below, much of the reputational harm, especially in the donor community, will be caused not by the revocation of Glooscap's registration as a charity, but rather by the reassessment of the donors to the tax shelter.

[39] Ultimately fatal to Glooscap's application is the requirement that it establish irreparable harm that is *unavoidable*, *i.e.*, irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could

have avoided, but deliberately chose to accept: *Dywidag Systems International*, *supra* at paragraphs 14 and 16.

[40] In *Dywidag Systems International*, the irreparable harm was said to be the disclosure of confidential documents. Often the release of confidential documents causes irreparable harm. But in Dywidag, this irreparable harm was avoidable: months earlier, Dywidag was invited to agree upon a confidentiality order protecting the documents, but it did nothing.

[41] In this case, Glooscap knew about the sizeable advantages of registered charitable status: exemption from income tax and the ability to issue receipts for donations received. It was warned at an early stage that it might lose its advantageous charitable status if it associated with this tax shelter. Part of that risk is the very thing that has now materialized – the revocation of its charitable status before it can challenge the revocation in this Court. Warnings about involvement with this tax shelter came from the Canada Revenue Agency (two emails and a meeting), Glooscap's own lawyer (two letters) and its own auditor. Glooscap's auditor resigned, at least in part over the issue. There were also warnings that involvement in the tax shelter would require an amendment to Glooscap's objects and the approval of the Canada Revenue Agency. Yet, knowing of the risks, Glooscap chose to continue its association with the tax shelter, and in fact renewed its association in 2009.

[42] Glooscap submits that it exercised good faith throughout. In support of that submission, among other things, Glooscap points to confirmatory testimony given on cross-examination of a representative of the Canada Revenue Agency. That may be so, but the fact remains that at an early

stage Glooscap knew of the risk of the very harm that has eventuated here and it chose to run that risk.

[43] If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(3) Balance of convenience

[44] Were it necessary to proceed to this branch of the test, this Court would have found that the balance of convenience lies against the granting of relief to Glooscap.

[45] This Court recognizes the high significance and importance of the aboriginal/non-aboriginal partnership in this case between Glooscap and the tourist association, especially when viewed against the regrettable, often abysmal, sometimes unspeakable events surrounding Canada's history of aboriginal/non-aboriginal relations: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward,* vol. 1 (Ottawa: Canada Communication Group Publishing, 1996).

[46] As mentioned in paragraph 37 above, the evidence offered by Glooscap falls short of establishing a real likelihood that this partnership will fail or that the broader aboriginal/non-aboriginal relationship will suffer if Glooscap's charitable status is revoked. That being said, the evidence does describe a risk – albeit undefined, abstract and perhaps speculative – of that happening.

[47] The Court also accepts that if Glooscap's registration as a charity is revoked, the reputations of it and perhaps those associated with it will suffer, with possible, undefined, perhaps speculative detrimental effects on their businesses and activities.

[48] However, one would expect that the Minister's reassessment of all of Glooscap's donors who participated in the tax shelter will cause negative news to spread through all of the donor community, if not the wider community. This will happen regardless of whether the Court grants Glooscap the relief it seeks in this application.

[49] Glooscap's evidence falls short of establishing that the museum will fail, or that its educational mission will be detrimentally affected. No financial information has been given that would allow such a finding to be made.

[50] Putting aside the donations involving the tax shelter, Glooscap has received only $19,775 in total donations during 2007-2011, and no evidence has been provided suggesting that the loss of this level of donation will cause any significant harm.

[51] On the Minister's side, is the public interest in enforcement – a matter deserving of significant weight in this case. The Minister's allegations in support of revocation of Glooscap's registration as a charity are supported, on a *prima facie* basis, by the conclusions of the audit that appears in the record before the Court. Therefore, the public interest in enforcement, as contemplated by the Act, is in play.

[52] Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paragraph 9; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 12.

[53] The weight to be accorded to that public interest, already significant, is driven upward by the sizeable amounts said to be in issue in this case: $116,999,482 given in receipts to participants in the tax shelter in 2008-2011, in circumstances where valid non-tax shelter donations over the same period totalled only $19,775. It is also driven up by Glooscap's decision to involve itself in the tax shelter despite the clear warnings it received.

[54] In assessing and weighing the public interest considerations in this case against the considerations offered by Glooscap, I can do no better than to adopt the words of my colleague, Sharlow J.A., in *International Charity Association Network*, *supra* at paragraph 12 (2008 FCA 62):

> The Minister takes the position, properly in my view, that the public has a legitimate interest in the integrity of the charitable sector. It is reasonable for the Minister to attempt to safeguard that integrity by carefully scrutinizing tax shelter schemes involving charitable donations of property and, where there are reasonable grounds to believe that the property has been overvalued, by taking appropriate corrective action. In the circumstances of this case, the Minister's factual allegations, while untested, are sufficiently serious to outweigh any advantage [the charity] might derive from an order deferring the revocation of its registration as a charity.

D. Disposition

[55] For the foregoing reasons, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity. The Minister shall have his costs of the application.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-12
STYLE OF CAUSE:	Glooscap Heritage Society v. The Minister of National Revenue
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 5, 2012
REASONS FOR ORDER BY:	Stratas J.A.
DATED:	October 9, 2012

APPEARANCES:

Bruce S. Russell, Q.C.	FOR THE APPLICANT
Rosemary Fincham April Tate	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper Halifax, Nova Scotia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

TAB 7

CITATION: Thompson v. BFI Canada Inc., 2014 ONSC 3726
COURT FILE NO.: 913/13
DATE: 2014/07/03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Donald Thompson and Thompson's Orchards Ltd.	)	T. Corbett, for the Plaintiffs
Plaintiffs	)	
- and -	)	
BFI Canada Inc. and Ridge (Chatham) Holdings G.P. Inc.	)	D. Foulds and K. Southwell, for the Defendants
Defendants	)	
	)	**HEARD:** June 6, 2014

A.J. Goodman J.

REASONS FOR JUDGMENT

[1] The plaintiffs are the owners and operators of a long-standing farming business, including a retail apple market located near Chatham, Ontario. The plaintiffs seek an interim or interlocutory injunction to restrain the defendants from constructing or expanding berms on the lands along Charing Cross Road and Allison Line adjacent to the defendants' property extending towards the apple farm business.

Background

[2] The plaintiff, Donald Thompson ("Thompson") and Elizabeth Thompson are son and mother and are the descendants of the Thompson family who have lived at the farm since 1881. Thompson, through his company, Thompson's Orchards Ltd., operates the fruit farming operation and the retail apple market on Charing Cross Road just south of Allison Line.

[3] Many customers who purchase products from the apple market come from Chatham driving south on Charing Cross Road.

[4] The defendant, BFI Canada Inc. ("BFI"), is a limited partner in the Ridge (Chatham) Holdings limited partnership ("Ridge LP"). A landfill (the" Ridge Landfill") is owned and operated by the general partner Ridge LP. In 2011, BFI represented to the plaintiffs, as well as the Ministry of the Environment ("MOE") that it owns and operates the Ridge Landfill and BFI was the "proponent" under the *Environmental Assessment Act*, ("EAA").

[5] The Ridge Landfill is a waste disposal facility operating near Blenheim, Ontario. The Ridge Landfill has operated since 1983, when it obtained a Certificate of Approval, as required under Ontario's *Environmental Protection Act*. Currently, the Ridge Landfill is operated pursuant to an environmental compliance approval (the "Ridge ECA"), which permits Ridge LP to operate a waste disposal facility on a specific 262 hectare site.

[6] BFI owns property located adjacent to the Ridge Landfill, which lands are the subject of this motion ("the lands"). The lands do not form part of the Ridge Landfill nor are they subject to the Ridge ECA or to any prior approvals relating to the landfill. No waste disposal operations are being

conducted on the lands and no approval to conduct waste disposal operations on the lands has been sought or obtained.

[7] In 1997, the original owners, Browning-Ferris, submitted an environmental assessment (the "1997 Environmental Assessment") in support of a large expansion of the landfill by which, among other things, the western boundary of the Ridge Landfill would extend west to Charing Cross Road. The expansion contemplated that the southern boundary of the Ridge Landfill, adjacent to Charing Cross Road, would be extended south to the abandoned Chesapeake and Ohio Railway Line. The proposed southern boundary extension maintained over a kilometre of separation between the southern boundary of the proposed expanded landfill and Thompsons' retail farm market along Charing Cross Road. Prior to the 1999 expansion of the Ridge Landfill, the distance between the southern and western boundaries of the landfill and Charing Cross Road acted or could be considered as a buffer (the "Buffer Lands"). According to Thompson, customers for the market were either unaware of or unconcerned about the proximity of the Ridge Landfill to the market.

[8] The 1997 Environmental Assessment was predicated on a planning period of 20 years for landfilling at the Ridge Landfill, which commenced in 1999. A very small part of the environmental assessment addressed the potential impact on the apple market. In 1999, Browning-Ferris began constructing berms along Charing Cross Road.

[9] In the course of the environmental assessment process relating to the 1998 Expansion Application, Browning-Ferris entered into an agreement with the Thompsons, ("the Thompson Agreement") which established a

process at the time by which claims regarding the impact of the expansion on the Thompsons' farming and market operations would be determined.

[10] BFI was not a party to the Thompson Agreement and BFI did not negotiate with the Thompsons in relation to the Agreement. BFI had no involvement with the Ridge Landfill at that time.

[11] As a result of the construction of berms, there was an immediate impact on the farm market business. Almost 50% of the market business was lost. Thompson claimed that customers saw the berms and realized that the landfill was near the farm market. Browning-Ferris denied that the 1999 berms had any impact on the farm market. Consequently, the issue of this impact and potential compensation went to arbitration.

[12] A 2003 arbitration decision concluded that the planned expansion of the Ridge Landfill had caused and would in the future cause damage to the retail apple market business. The arbitration determined that entire loss of the retail farm market business was caused, not by nuisance effects from the expanded landfill, such as odour or dust, but by the perception of the customers of the retail farm market that the proximity of the landfill made the plaintiffs' retail farm market an undesirable place to purchase fresh farm produce. The arbitrator concluded that the planned expansion of the Ridge Landfill had caused damage to the retail apple market business but not to the Thompsons' farming and wholesale market operations.

[13] Following an appeal relating to the quantum of damage caused to the apple market, a 2006 decision of the Ontario Superior Court of Justice ordered Browning-Ferris pay the Thompsons the sum of $1,451,650.82

plus interest and costs as compensation for the market's past and projected future losses resulting from the expansion of the Ridge Landfill.

[14] Although further approvals and amendments to approvals have been granted since the 1999 expansion, none of these approvals or amendments expanded the boundaries or the area approved for use for landfilling within the site.

[15] In 2011, BFI sought approval under the EAA in order to increase the tonnage of waste that could be received, on a daily basis, at the landfill. Thompson disagreed because the tonnage increase would result in a significant intensification of use by the defendants, according to the process established under the EAA. Thompson opposed BFI's Fill Rate Modification Application and sought to have the matter referred for further study. In opposing the plaintiffs' submission to elevate the tonnage increase for further study, BFI submitted to the MOE that the proposed tonnage increase would have no impact on the plaintiffs' business because the landfill site was limited by the 1998 expansion.

[16] Specifically, the MOE denied Thompson's request for further study, conditional on BFI filing acceptable mitigation and monitoring plans, to which BFI complied. The MOE concluded that the tonnage increase would not lead to "increased visibility of the landfill" because no change was proposed to the volume, footprint or profile currently approved for the landfill. The MOE granted approval for the requested increase in the daily and annual waste limit for the site (the "2012 Fill Rate Approval").

[17] In the fall of 2012, BFI began to construct landscaped hills ("the berms") on the lands. These berms were to be constructed in six phases. Phase

one and the first part of phase two were completed in the fall of 2013 and the balance of phase two was scheduled to begin in June 2014.

[18] The Municipality of Chatham-Kent reviewed BFI's plans for construction and confirmed that BFI did not require any municipal approvals or amendments to construct the berms. The ECA does not permit stockpiling elsewhere, and specifically does not permit stockpiling on the buffer lands, whether the stockpile is created by building hills or the new berms. At the same time, the MOE confirmed that construction of the berms on the subject lands is not an activity requiring regulatory intervention.

[19] In July 2013, BFI claimed to have made Thompson aware of its intentions to continue construction of phase two scheduled to commence in the spring of 2014. Thompson submits that BFI purposefully kept their intentions with regards to the new berms secret. On April 1, 2014, BFI confirmed with Thompson's counsel that they intended to continue construction of the berms in early June 2014. On May 27, 2014, less than one week before the scheduled resumption of construction, Thompson moved for an injunction to restrain construction of these berms.

Positions of the Parties

[20] Thompson submits that Ridge ECA does not approve the new berms and specifically does not permit construction of berms on the buffer lands. The new berms will be and are being created by stockpiling soil excavated from the landfilling cells from within the landfill. Thompson alleges that the new berms constitute an expansion of the landfill beyond the approved site. The new berms will place the face of the landfill immediately adjacent to the plaintiffs' firm retail market and within the foreground of visual impacts as identified in the 1997 Environmental Assessment. The new berms will

all but eliminate the buffer lands, an essential component of the Thompson agreement and representations made to the regulatory authorities.

[21] Thompson submits that the 1998 Agreement either expressly, or by necessary implication, obliged Browning-Ferris to proceed with the expansion consistently with the environmental assessment. Further, the 1998 Agreement imposes an obligation of good faith and fair dealing on the parties bound by it. It is submitted that the purpose of the 1998 Agreement was to determine the degree of impact of the landfill expansion on the plaintiffs' market. BFI is breaching the obligation to act in good faith by extending that landfill profile next door to the market. BFI is bound by the 1998 Agreement because the EAA prohibits carrying on operations inconsistent with the approved environmental assessment or changing the undertaking after receiving approval. It is submitted that under the EPA, BFI cannot use, operate, establish, alter, enlarge or extend the landfill except in accordance with the ECA, which incorporates the environmental assessment, which, in turn, incorporates the 1998 Agreement. Alternatively, Thompson argues the concept of novation; in that the defendants are bound by the 1998 Agreement, in place of Browning-Ferris. BFI is not in a position to disagree with the arbitrator's decision as a collateral attack on the award.

[22] Thompson submits that there is no absence of privity to avoid BFI's obligations under the 1998 Agreement. The principled exception to the privity rule applies and the benefits of the 1998 Agreement must pass to the plaintiffs. Further, the "conditional benefit and burden principle" applies to bind the defendants since BFI took the benefit of the 1998 Agreement, and must therefore accept the direct obligations associated with it. It is submitted that the "conditional principle" is to be distinguished from the

"pure benefit and burden principle", by which contractual burdens may be imposed on contracting parties, even though the burden is independent of the benefit.

[23] Thompson submits that the elements of the tort of negligent misrepresentation have been made out. A duty of care was established by the proximate relationship of the plaintiffs and defendants; including BFI's inaccurate representations in that the landfill would operate consistently with the 1997 Environmental Assessment, particularly as it related to the proximity of the plaintiffs' market. BFI paid no attention to the impact of the construction of the new berms and the plaintiffs have reasonably relied on the continuing representations that the landfill would be operated in compliance with the environmental assessment.

[24] Thompson argues that BFI obtained the approval for the tonnage increase in 2011 representing that there would be no change to the landfill's footprint or profile that would affect the market. The defendants represented that there was still a "substantial woodlot" between the landfill and the market and that the "presence of the landfill site" would not be altered, such that there would be no impact on the market. The MOE adopted the defendants' submission and permitted the tonnage increase because it would not lead to increased visibility of the landfill from the market. Thus, BFI deliberately kept their intentions to build the new berms secret and mislead the authorities. Thompson adds that he only learned of the new berms when construction commenced in October 2012. The action commenced on May 16, 2013. The plaintiffs sought to hold discoveries as quickly as possible and that they wanted document discovery and examinations conducted before any berms construction resumed. BFI delayed producing

documentation and did not divulge the timing for berms construction until after they finally provided their documents in March 2014.

[25] Thompson submits that the construction of these berms will cause irreparable harm and the balance of convenience favours the plaintiff in that the new berms are intended to be constructed in phases. It is alleged that the new berms are stockpiles of excavated soils. As 50% of the market's business was lost in 1999 because of the construction of the berms (not because of landfilling behind the berms), the impact of these new berms on the market, logically, must be the same. Thompson submits that the resulting damage will be difficult to quantify and could readily destroy the apple market business. However new information is becoming available that suggests that the new berms could have a significant impact on the plaintiffs' retail fruit farming.

[26] BFI submits that the MOE takes the position that if the new berms were built on the approved landfill site, then an amendment to the ECA would be required. However, the MOE specifically advised that no ECA or amendment to the existing ECA is required to build the new berms on the buffer lands. The fact that Thompson disagrees with the MOE decision is not a valid reason to grant an injunction.

[27] BFI submits that they are not parties to the 1998 Agreement and therefore not bound by it. BFI further disputes the plaintiffs' claim that they have any liability associated with the 1998 Agreement or that it is binding on them, and that their actions violated that agreement, by breaching a term, either express or implied, requiring that the landfill would operate in accordance with the 1997 Environmental Assessment.

[28] BFI disputes that there is an implicit or explicit obligation of good faith required the defendants have regard to the plaintiffs' concerns about the effect of the proximity and operations of the landfill on the market or any liability associated with the imposition of the duty of care arising out of a series of representations that the landfill would be operated consistently with the 1997 Environmental Assessment. BFI vigorously disputes, albeit concedes that at best, there may be a potential action in nuisance that can be remedied by an award of damages.

[29] BFI submits that Thompson has not demonstrated any irreparable harm that cannot be otherwise compensated by an award of damages and that the balance of convenience favours the defendants.

Legal Principles

[30] The test to be met for the granting of an interim or interlocutory injunction has been set out by the Supreme Court of Canada in its seminal case of *RJR MacDonald Inc. v. Canada (Attorney General),* 1 S.C.R. 311. The moving party must demonstrate:

a. that there is a serious issue to be tried;

b. that the moving party will suffer irreparable harm if the injunction is not granted; and

c. that the balance of convenience favours the granting of the injunction.

Analysis

[31] While there may be an issue as to ultimate ownership and related responsibility for the Ridge Landfill, for all intents and purposes, in this motion BFI admits that it is the proper party and operates the site.

[32] Counsel for Thompson submits that this court ought to apply a purposive analysis of the criteria and assess their collective impact: *Morguard Corp. v. Inn Vest Properties Ottawa GP Ltd.*, 2012 ONSC 80. I am not persuaded that the approach proffered by plaintiffs' counsel is authoritative. Nonetheless, I need not delve into whether the "traditional" methodology to the *RJR MacDonald* criteria ought to be imposed or whether I may consider a more holistic or collective view of the evidence, as I am confident that my conclusion would be similar with adoption of either approach in my assessment of the issues.

Serious issue to be tried

[33] The Supreme Court directed that, generally, the standard to be applied when considering whether there is a serious question to be tried is not an onerous one. The judge must make a preliminary assessment of the merits of the case in order to determine whether the application is either vexatious or frivolous.

[34] Thompson and BFI are in a sufficient relationship of proximity to justify imposition of the common law duty of care. BFI is aware of Thompson's concerns about the expansion of the landfill profile and the new berms construction towards the farm market. BFI was undoubtedly aware of the arbitration proceedings when they acquired the landfill. There are no policy reasons why a duty of care ought not to be recognized.

[35] The plaintiffs' claim is for the most part premised on economic loss. Other than the category of negligent misrepresentation, discussed below, there is no established category of negligence for this loss. However, where the proposed duty of care is analogous as a recognized category imposing a duty of care for economic loss, the duty of care is established without the

need to proceed to the second stage policy analysis for duty of care. Thompson submits that the duty in this case is analogous to the duty in negligent misrepresentation.

[36] The first three of Thompson's four claims rely on the premise that the construction of the berms violates the Ridge ECA. At this stage, this claim is somewhat tenuous because the constructions of these berms do not appear to violate the Ridge ECA or the 1997 Environmental Assessment. The lands on which the berms are being constructed are not subject to the Ridge ECA or the Environmental Assessment. According to the evidence, the berms are not being constructed on the Ridge Landfill site. They are being constructed on lands entirely distinct from, although adjacent to, the Ridge Landfill. I accept that the MOE has clearly stated that these berms are not part of the landfill operation and do not constitute an expansion of the Ridge Landfill, and are not regulated by any environmental approvals relating to the site. I note that the plaintiffs have stated that they disagree with the MOE's decision not to intervene in relation to the construction of the berms and have asserted that the berms are part of the landfill operation and constitute an expansion of the landfill beyond the approved site.

[37] In Thompson's factum there is considerable emphasis on provisions relating to stockpiling of soil and berm construction that are contained in the Operations and Development Report prepared as part of the 1998 Expansion Application process ("the Report"). However, these provisions clearly relate exclusively to activities being carried out on the landfill site. They do not purport to restrain, restrict, or otherwise direct activities that are not being carried out on the site. In particular, language permitting clean soil to be stockpiled on the site and

specifying where such stockpiling shall occur cannot be interpreted as prohibiting clean soil from being placed on lands which do not form part of the site; language directing where, and in what manner, berms will be constructed on the site cannot be reasonably interpreted as prohibiting berms from being constructed on lands which do not form part of the site. Nothing in the Report states or implies that it is intended to have application to lands other than the Ridge Landfill.

[38] In my view, it is speculation to assert that BFI is constructing the new berms for the purpose of a future expansion of the Ridge Landfill. BFI has made no application for such an expansion. In any event, were BFI to apply to expand the Ridge Landfill, it would be required to do so in compliance with the *Environmental Protection Act*. Thompson would have the same opportunity to participate fully in the application process. Moreover, Thompson's assertion that these berms are being constructed with the fill from the Ridge Landfill is entirely without foundation.

[39] For the purpose of this motion, I am satisfied that BFI is not bound by the Thompson Agreement. As noted above, BFI was not a party to Thompson Agreement, and BFI had no interest in the Ridge Landfill at the time of the Thompson Agreement, the Expansion Application, or the 1999 Expansion Approval. I am not persuaded by Thompson's argument on the application of contract law and related obligations of the parties. As noted by Cronk J.A. in the Ontario Court of Appeal case of *Brown v Belleville (City)*, 2013 ONCA 148 at para 77, "[t]he common law doctrine of privity of contract, an established principle of contract law, stands for the proposition that no one but the parties to a contract can be bound by it or entitled under it".

[40] On a plain reading of the Thompson Agreement, it is also clear that the agreement does not impose any generalized duty of good faith or care on either the signatories to the Thompson Agreement and particularly on the successor-in-title, BFI. The Thompson Agreement did not release any broader claims or impose any broader obligations on the signatories.

[41] It is true that the EAA provides that the defendants cannot operate the landfill in a manner inconsistent with a condition imposed by the Minister or that if the proponent "wishes to change an undertaking after receiving approval to proceed with it, the proposed change to the undertaking shall be deemed to be an undertaking for the purposes" of the EAA. However, I am not convinced that BFI must undergo another environmental assessment, whether reinforced by the incorporation of the 1997 Environmental Assessment into the ECA for the landfill or not.

[42] BFI has never represented to anyone that it would not construct the berms on the lands. Thompson's claims in this regard are vague, but they appear to amount to an allegation that BFI was negligent by not conducting a new environmental assessment before beginning construction of the berms. Respectfully, I disagree with this assertion.

[43] In my view, Thompson's strongest suit is in a claim for nuisance. Nuisance may take two different forms: allegations of physical injury to property; or substantial interference with use or enjoyment of property, often called "amenity nuisance". Here, the plaintiffs allege that the berms will cause substantial interference with use or enjoyment of the market.

[44] The "substantial interference" concept is a two-part test; and the interference must be both substantial and unreasonable. "Substantial"

interference is interference that is not trivial and amounts to more than a slight annoyance or trifling interference. The potential of significant economic impact on the market satisfies the "substantial" test.

[45] A substantial interference is one that "substantially alter[s] the nature of the claimant's property itself" or interferes "to a significant extent with the actual use being made of the property". As the Supreme Court has stated, substantial nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'".

[46] The reasonableness of the interference by the defendant is assessed by balancing the competing factors, including the nature of the interference and the character of the surrounding area. In the context of this case, it is important to note that even if BFI's use of this property complies with municipal and regulatory, a requirement that does not resolve the issue of nuisance. The issue is whether, in the circumstances, the harm or interference is unreasonable and substantial, and while the fact that damage has not yet occurred and is only prospective, does not bar the claim for injunctive relief. The categories of nuisance are not closed and are subject to some flexibility in order to reflect societal changes. A defendant can be liable for unreasonable interference. A plaintiff's economic loss in nuisance can be based upon loss of business caused by the impact of the defendant's activity on third parties.

[47] Thompson's claim in nuisance is the only claim not predicated on the assertion that BFI is in violation of the Ridge ECA, including the 1997 Environmental Assessment. Thompson alleges that the construction of the

new berms has caused and will cause a substantial interference with the plaintiffs' use or enjoyment of their land. In order to prove this kind of nuisance, the plaintiffs must prove that the construction of the berms has caused interference that is both substantial and unreasonable.

[48] While it may be left for another day as to whether the berms will substantially alter the plaintiffs' use of their property, the berms are not an expansion of the Ridge Landfill. On the evidence, it seems that the berms have no potential to emit odour, attract birds, or disperse litter. Indeed, it is equally plausible that these berms will likely mitigate the potential for such impacts from the existing landfill operations and present a landscaped barrier, screening the Ridge Landfill from the general public, including the retail apple market's potential customers.

[49] I agree with BFI that Thompson's theory of nuisance is based on a series of tenuous assumptions in that the apple market customers may assume that the new berms are associated with the Ridge Landfill; or that these customers may believe that the Ridge Landfill is moving closer to the market; or that these customers may believe that the quality of the apples will be affected if the Ridge Landfill moves closer to the market; and, that these customers may be less inclined to patronize the apple market as a result.

[50] Each of these tenuous assumptions is premised on the concept of a public stigma. Various courts have repeatedly held that mere unfounded concern of this nature cannot found a successful claim in nuisance. The historical and seminal case on stigma is *Shuttleworth v. Vancouver General Hospital,* [1927] B.C.J. No. 71 (Sup. Ct.). In *Shuttleworth*, the plaintiff sought a *quia timet* injunction to restrain the establishment of an infectious

diseases hospital in his neighborhood. One of the origins for the plaintiff's nuisance claim was the perceived danger of infection to members of the plaintiff's household from being in close proximity to the hospital. The court accepted that the members of the household and other neighbours entertained a real fear of being infected and even that this was a fear that was shared by people in general. However, the court held that the plaintiff must go further and prove not only widespread belief that there was a risk, but also that such belief was well-founded in fact.

[51] In the Ontario Court of Appeal case of *Smith v. Inco*, 2011 ONCA 628, the plaintiffs claimed that *Inco* was liable in nuisance because nickel and other chemicals had been emitted and had subsequently settled on nearby properties. Although the nickel did not pose any health risk, the plaintiffs claimed that widespread fears of such a health risk had reduced their property values. Ultimately, the court held that such a truly held but unfounded concern cannot ground an action in nuisance. At para. 59, the court stated that allowing such a nuisance claim would "extend the tort of private nuisance beyond claims based on substantial actual injury to another's land to claims based on concerns, no matter when they develop and no matter how valid, that there may have been substantial, actual injury caused to another's land."

[52] While *Smith* was heard in the context of an allegation of physical injury to property, and not in the context of substantial interference with property, the appellate court's statements about allowing a nuisance claim based on unfounded concerns are instructive.

[53] In their factum, the plaintiffs cite *16313700 Ontario Inc. v. 805352 Ontario Inc.* 2012 ONSC 2271, *Nor-Video Services Ltd. v. Ontario Hydro*, [1978]

O.J. No. 3287 (H.C.) and *Antrim Truck Centre Ltd v. Ontario*), 2013 SCC 13 for the propositions that:

a. a flexible approach to nuisance is required;

b. a defendant can be liable in nuisance for unreasonable interference with a business interest; and

c. a plaintiff can recover damages for economic loss caused by the defendant in relation to third parties.

[54] These propositions are valid, although, each case can be distinguished. For example, in *163 Ontario*, the plaintiff filed expert evidence which demonstrated that the fears which had been raised about the activities which they sought to enjoin were well-founded. No such evidence or anything approaching cogent and reliable evidence has been filed by the Thompson in this motion. It is also noteworthy that, in *163 Ontario*, the court ultimately dismissed the plaintiffs' claim and granted summary judgment for the defendants on the basis that the claim in nuisance did not raise a genuine issue requiring a trial.

[55] Even if Thompson succeeds in proving that the apple market customers have a real fear that the new berms indicate greater likelihood that the apples will be tainted by the Ridge Landfill; the plaintiffs face a substantial evidential burden to substantiate such a fear is well-founded in fact. The Ridge Landfill operations *per se*, are not moving closer to the apple market or the farming operations, and the new berms do not present any increase in risk that apples will be otherwise tainted.

[56] I am entirely mindful that I am not trying this action. Indeed, perception and stigma is difficult, albeit not impossible to substantiate. While I have

expressed some trepidation about the issues to be tried, for this motion, I accept Thompson's position that this action involves a serious question to be tried in a claim for nuisance. That being said, at this juncture, I agree with Mr. Foulds that the evidence proffered for this motion just barely meets the threshold in establishing a serious issue to be tried. Whether the extent and nature of the duty owed to the plaintiff as well as the relief sought for damages is properly a matter for trial, Thompson has satisfied the first branch of the *RJR-MacDonald* test.

Irreparable Harm

[57] In *RJR-MacDonald*, the Supreme Court of Canada had defined "irreparable harm" as the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss; or irrevocable damage to its business reputation. An injunction is an extraordinary remedy that should only be issued to restrain a clear breach of legal obligations.

[58] To succeed on an application for an interlocutory injunction, the moving party must establish that it would, unless the injunction is granted, suffer irreparable harm. The moving party must show that a refusal to grant the relief sought would so adversely affect its own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the motion, *RJR-Macdonald,* at para. 63.

[59] It is important to note that in order to establish irreparable harm the moving party's evidence must be clear and not speculative. Absent clear evidence

that irreparable harm will result, an interlocutory injunction should not issue. *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.*, 1994 CarswellOnt 700 (F.C.T.D.) at para. 118.

[60] An assertion that a plaintiff is likely to suffer irreparable harm is insufficient to warrant the granting of an interlocutory injunction. It is necessary for the evidence to support a finding that the defendant would suffer irreparable harm. The onus is on the party seeking an injunction to place sufficient financial and other evidence before the court on which such a finding can be made.

[61] Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Irreparable harm is more than merely harm which is difficult to quantify. Instead, it is well established that irreparable harm is not made out simply because damages may be difficult to quantify. The plaintiffs must prove that the alleged harm cannot be quantified in monetary terms. As Epstein J. noted in *754223 Ontario Ltd v. R-M Trust Co.*, [1997] O.J. No. 282 (Gen. Div.) at para. 40: "Irreparable harm cannot be founded upon mere speculation. This evidence must be sufficient to support a finding that the moving party would suffer such harm not that it is merely likely."

[62] Frankly, Thompson's evidence in support of irreparable harm is not very compelling. Thompson argues that the new berms eliminate the land buffers and that there is no reason to suspect that what happened in 1999 will not happen again. Aside from references to the 1998-1999 Assessments, I do not have reliable evidence to support the plaintiffs' position. While the arbitrator found that the construction of berms in 1999

destroyed 50% of the market's business, I am not persuaded that the arbitration and the facts that existed at that time suffice as evidence sufficient to substantiate irreparable harm at this juncture.

[63] Overall, Thompson has not adduced reliable evidence that the construction of the berms has to date caused or will in the future cause harm to the plaintiffs, much less irreparable harm. In fact, Thompson's own records show that in 2013, following the completion of approximately 700 metres of berms, the apple market had its best sales results to date. Even if construction of the new berms were to cause harm to the apple market, Thompson's own experience following a past expansion of the Ridge Landfill demonstrates that such damages can be ascertained and compensated with an award of monetary damages.

[64] Moreover, the statement of claim makes it clear that the plaintiffs believe they can be compensated by money. Thompson is seeking $3 million in damages. In particular, para. 85 of the statement of claim explicitly seeks damages, as a remedy for the nuisance allegedly caused by the new berms. As mentioned, a monetary award was sufficient to compensate the plaintiffs for their losses, to the tune of $1.4 million. As a previous monetary award was a sufficient remedy, there is every reason to believe that such an award, if successful at trial, would also be an appropriate remedy for any harm that may be caused by the construction of the berms.

[65] BFI began constructing the berms on the lands in the fall of 2012. These berms are seeded with grass and will be landscaped. The photographs presented in the affidavits depict that the berms are set back a considerable distance from the road at a gradual slope.

[66] No complaint was made with respect to the completed Phase 1 construction. Although Thompson asserts that the construction of the new berms has already caused damage, the plaintiffs have adduced no evidence whatsoever that this is truly the case. Given that this motion can be viewed as a *quia timet* injunction, the evidentiary burden on the plaintiffs is even higher. In addition to proving that the plaintiffs will suffer irreparable harm if the injunction is not granted, Thompson must also prove that the harm is imminent and that there is a very high degree of probability or a strong probability almost amounting to moral certainty that the apprehended mischief will, in fact, arise. Again, the evidence before me falls short in that regard.

[67] Without being overly repetitive, the plaintiffs' evidence in support of the relief sought for this motion is based on conjecture. Various and repeated references to the arbitration proceedings and findings are not convincing. Thompson has produced only one unaudited financial statement, which is from 2012. Significantly, Thompson chose to leave out of their materials more recent records of sales for the apple market which demonstrates that, far from the berms presenting an "actual and real danger", the apple market appears to have had significant success.

[68] Based on the plaintiffs' sales records for the apple market, it is apparent that in 2013, after the berms had been constructed along Charing Cross Road to a point less than 300 metres from the front door of the market, the company had its best sales year ever. In that year, the apple market achieved cash sales of $142,680.12. Thompson's own evidence is that the apple market's customers travel from the Chatham, along Charing Cross Road and past the Ridge Landfill site and the newly constructed

berms. These sales figures suggest that the construction of the berms has not had a negative impact on the retail business.

[69] I am not satisfied that the current expansion or the berms proposed to be under construction will cause customers to become aware or more aware of the existence of the Ridge Landfill or that, as a result, those customers will be less likely to patronize the apple market. I conclude that Thompson has failed to discharge his burden to demonstrate irreparable harm.

Balance of Convenience

[70] There are numerous factors that must be considered in addressing this prong of the *RJR-MacDonald* test. In *Parker v Canadian Tire Corp*, [1998] O.J. No. 1720 (Gen. Div.), Sharpe J. canvassed a scenario in which delay in bringing the injunction motion was a strong factor weighing against granting an injunction. At para 15 , the learned jurist held:

> I would add two further discretionary factors which also favour the defendants in denying the injunction. The first is the question of delay or laches. The plaintiff has known since October of the defendant's intention not to renew the contract. As noted, this action was not commenced until April 8th, only days before the termination of April 13th. The action was commenced on a Wednesday of the week which included Good Friday, and the termination date was Easter Monday, when the courts are closed. The matter first came before the court on April 9th. In my view the delay has not been adequately explained. Counsel submitted that it was the plaintiffs' hope that matters would be worked out as they had in the past. However, there is no evidence of any efforts in that regard, certainly not at or near the time the action was commenced. There is no evidence that any suggestion was made to the defendant that the plaintiff would have access to the courts. As a result, the defendant was faced with a last minute application and in a situation where the defendant would suffer prejudice as arrangements were in place for the takeover of the store by another Dealer. In my view the delay here is a strong factor which runs against the entitlement to injunctive relief.

[71] I am satisfied that the plaintiffs have known since July 2013 that construction of the berms would resume in the spring of 2014 and would continue down Charing Cross Road in the direction of their market. BFI never provided any assurances that they would halt or otherwise alter its plans in relation to the berms. On April 1, 2014, BFI's counsel expressly advised that BFI intended to resume construction of the berms in June.

[72] Although the plaintiffs have been aware of BFI's intentions for almost a year and, while both counsel for the parties have specifically communicated about the scheduled commencement of construction and the potential of an injunction, Thompson chose to wait to bring this motion on a date returnable less than a week before construction was scheduled to begin. I am not satisfied with the plaintiffs' explanation for the delay in bringing this motion. I can only surmise that it was brought at the last minute to gain strategic advantage and cause some prejudice to BFI in relation to the scheduled commencement of construction.

[73] Delay on the part of the moving party is a factor that the court will consider in determining whether the moving party has satisfied the requirement to show irreparable harm. If the moving party, in fact, was suffering irreparable harm, then it should move for injunctive relief expeditiously. A plaintiff who is entitled to an injunction may lose that right on account of delay in asserting the claim as the nature of injunctive relief begs for a plaintiff to proceed with dispatch. I find that such is the case here.

[73] In my opinion, if the requested injunction is granted, BFI will effectively be forced to cease all berm construction, as they will be unable to begin construction in any of the other planned berms locations. This moratorium

on construction would substantially delay the planned construction of the berms, perhaps for several years until the ultimate hearing of this action.

[74] While a permanent injunction may be the preferable remedy in cases in where a nuisance is proven, I have considered all of the issues including, but not limited to, the adequacy of damages, and that nuisance is alleged. On balance, I am satisfied that the balance of convenience weighs in favour of BFI.

Conclusion

[75] Thompson has failed to establish that they will suffer and will continue to suffer greater harm if an injunction is not granted. In my opinion, any detrimental consequences damages flowing from BFI's actions can be remedied by an appropriate award of damages. Given the absence of any evidence of irreparable harm, the plaintiffs' delay in bringing this motion, and their tenuous cause of action in nuisance or otherwise, I find that Thompson cannot meet the burden required to obtain the extraordinary remedy of an interim or interlocutory injunction. For all of the aforementioned reasons, the plaintiffs have ailed to demonstrate that they have met the test for interim or interlocutory injunctive relief.

[76] Therefore, the motion for an interim or interlocutory injunction is dismissed.

[77] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). BFI shall file their costs submissions within 15 days of the date of this judgment. Thompson may file his costs submissions within 15 days of the receipt of the respondent's materials. BFI may file a reply within 10 days thereafter.

[78] I wish to express my gratitude to counsel for their helpful submissions and comprehensive arguments expressed through their respective materials.

"Justice A. J. Goodman"

Justice A. J. Goodman

Date: July 3, 2014

CITATION: Thompson v. BFI Canada Inc., 2014 ONSC 3726
COURT FILE NO.: 913/13
DATE: 2014/07/03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Donald Thompson and Thompson's Orchards Ltd

Plaintiffs

- and –

BFI Canada Inc. and Ridge (Chatham) Holdings G.P. Inc.

Defendants

REASONS FOR JUDGMENT

A.J. Goodman J.

Released: July 3, 2014

TAB 8

134 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM10-17-000; Order No. 745]

Demand Response Compensation in Organized Wholesale Energy Markets

(Issued March 15, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) amends its regulations under the Federal Power Act to ensure that when a demand response resource participating in an organized wholesale energy market administered by a Regional Transmission Organization (RTO) or Independent System Operator (ISO) has the capability to balance supply and demand as an alternative to a generation resource and when dispatch of that demand response resource is cost-effective as determined by the net benefits test described in this rule, that demand response resource must be compensated for the service it provides to the energy market at the market price for energy, referred to as the locational marginal price (LMP). This approach for compensating demand response resources helps to ensure the competitiveness of organized wholesale energy markets and remove barriers to the participation of demand response resources, thus ensuring just and reasonable wholesale rates.

EFFECTIVE DATE: This Final Rule will become effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Dates for compliance and other required filings are provided in the Final Rule.

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SUPPLEMENTARY INFORMATION:

134 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Demand Response Compensation in Organized Wholesale Energy Markets — Docket No. RM10-17-000

ORDER NO. 745

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(Issued March 15, 2011)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Demand Response Compensation in Organized Wholesale Energy Markets — Docket No. RM10-17-000

FINAL RULE

ORDER NO. 745

(Issued March 15, 2011)

I. Introduction

1. This Final Rule addresses compensation for demand response in Regional Transmission Organization (RTO) and Independent System Operator (ISO) organized wholesale energy markets, i.e., the day-ahead and real-time energy markets. As the Commission has previously recognized, a market functions effectively only when both supply and demand can meaningfully participate. The Commission, in the Notice of Proposed Rulemaking (NOPR) issued in this proceeding on March 18, 2010, proposed a remedy to concerns that current compensation levels inhibited meaningful demand-side participation.[1] After nearly 3,800 pages of comments, a subsequent technical conference, and the opportunity for additional comment, we now take final action.

[1] Demand Response Compensation in Organized Wholesale Energy Markets, Notice of Proposed Rulemaking, 75 FR 15362 (Mar. 29, 2010), FERC Stats. & Regs. ¶ 32,656 (2010) (NOPR).

2. We conclude that when a demand response[2] resource[3] participating in an organized wholesale energy market[4] administered by an RTO or ISO has the capability to balance supply and demand as an alternative to a generation resource and when dispatch of that demand response resource is cost-effective as determined by the net benefits test described herein, that demand response resource must be compensated for the service it provides to the energy market at the market price for energy, referred to as the locational marginal price (LMP).[5] The Commission finds that this approach to compensation for

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[2] Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR 35.28(b)(4) (2010).

[3] Demand response resource means a resource capable of providing demand response. 18 CFR 35.28(b)(5).

[4]The requirements of this final rule apply only to a demand response resource participating in a day-ahead or real-time energy market administered by an RTO or ISO. Thus, this Final Rule does not apply to compensation for demand response under programs that RTOs and ISOs administer for reliability or emergency conditions, such as, for instance, Midwest ISO's Emergency Demand Response, NYISO's Emergency Demand Response Program, and PJM's Emergency Load Response Program. This Final Rule also does not apply to compensation in ancillary services markets, which the Commission has addressed elsewhere. See, e.g., Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719).

[5] LMP refers to the price calculated by the ISO or RTO at particular locations or electrical nodes or zones within the ISO or RTO footprint and is used as the market price to compensate generators. There are variations in the way that RTOs and ISOs calculate LMP; however, each method establishes the marginal value of resources in that market. Nothing in this Final Rule is intended to change RTO and ISO methods for calculating LMP.

demand response resources is necessary to ensure that rates are just and reasonable in the organized wholesale energy markets. Consistent with this finding, this Final Rule adds section 35.28(g)(1)(v) to the Commission's regulations to establish a specific compensation approach for demand response resources participating in the organized wholesale energy markets administered by RTOs and ISOs. The Commission is not requiring the use of this compensation approach when demand response resources do not satisfy the capability and cost-effectiveness conditions noted above.[6]

3. This cost-effectiveness condition, as determined by the net benefits test described herein, recognizes that, depending on the change in LMP relative to the size of the energy market, dispatching demand response resources may result in an increased cost per unit ($/MWh) to the remaining wholesale load associated with the decreased amount of load paying the bill. This is the case because customers are billed for energy based on the units, MWh, of electricity consumed. We refer to this potential result as the billing unit effect of dispatching demand response. By contrast, dispatching generation resources does not produce this billing unit effect because it does not result in a decrease of load. To address this billing unit effect, the Commission in this Final Rule requires the use of the net benefits test described herein to ensure that the overall benefit of the reduced

[6] The Commission's findings in this Final Rule do not preclude the Commission from determining that other approaches to compensation would be acceptable when these conditions are not met.

LMP that results from dispatching demand response resources exceeds the cost of dispatching and paying LMP to those resources. When the net benefits test described herein is satisfied and the demand response resource clears in the RTO's or ISO's economic dispatch, the demand response resource is a cost-effective alternative to generation resources for balancing supply and demand.

4. To implement the net benefits test described herein, we direct each RTO and ISO to develop a mechanism as an approximation to determine a price level at which the dispatch of demand response resources will be cost-effective. The RTO or ISO should determine, based on historical data as a starting point and updated for changes in relevant supply conditions such as changes in fuel prices and generator unit availability, the monthly threshold price corresponding to the point along the supply stack beyond which the overall benefit from the reduced LMP resulting from dispatching demand response resources exceeds the cost of dispatching and paying LMP to those resources. This price level is to be updated monthly, by each ISO or RTO, as the historic data and relevant supply conditions change.[7]

[7] In its compliance filing an RTO or ISO may attempt to show, in whole or in part, how its proposed or existing practices are consistent with or superior to the requirements of this Final Rule.

5. This Final Rule also sets forth a method for allocating the costs of demand response payments among all customers who benefit from the lower LMP resulting from the demand response.

6. The tariff changes needed to implement the compensation approach required in this Final Rule, including the net benefits test, measurement and verification explanation and proposed changes, and the cost allocation mechanism must be made on or before July 22, 2011. All tariff changes directed herein should be submitted as compliance filings pursuant to this Final Rule, not pursuant to section 205 of the Federal Power Act (FPA).[8] Accordingly, each RTO's or ISO's compliance filing to this Final Rule will become effective prospectively from the date of the Commission order addressing that filing, and not within 60 days of submission.

7. In addition, we believe that integrating a determination of the cost-effectiveness of demand response resources into the dispatch of the ISOs and RTOs may be more precise than the monthly price threshold and, therefore, provide the greatest opportunity for load to benefit from participation of demand response in the organized wholesale energy market administered by an RTO or ISO. However, we acknowledge the position of several of the RTOs and ISOs that modification of their dispatch algorithms to incorporate the costs related to demand response may be difficult in the near term. In

[8] 16 U.S.C. 824d (2006).

light of those concerns, we require each RTO and ISO to undertake a study examining the requirements for and impacts of implementing a dynamic approach which incorporates the billing unit effect in the dispatch algorithm to determine when paying demand response resources the LMP results in net benefits to customers in both the day-ahead and real-time energy markets. The Commission directs each RTO and ISO to file the results of this study with the Commission on or before September 21, 2012.[9]

II. Background

8. Effective wholesale competition protects customers by, among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies.[10] Improving the competitiveness of organized wholesale energy markets is therefore integral to the Commission fulfilling its statutory mandate under the FPA to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.[11]

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[9] We note that this report is for informational purposes only and will neither be noticed nor require Commission action.

[10] See, e.g., Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281, at P 1 (2008) (Order No. 719); see also Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at P 1 (1999), order on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607, 348 U.S. App. D.C. 205 (D.C. Cir. 2001).

[11] 16 U.S.C. 824d (2006); Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

9. As the Commission recognized in Order No. 719, active participation by customers in the form of demand response in organized wholesale energy markets helps to increase competition in those markets.[12] Demand response, whereby customers reduce electricity consumption from normal usage levels in response to price signals, can generally occur in two ways: (1) customers reduce demand by responding to retail rates that are based on wholesale prices (sometimes called "price-responsive demand"); and (2) customers provide demand response that acts as a resource in organized wholesale energy markets to balance supply and demand. While a number of states and utilities are pursuing retail-level price-responsive demand initiatives based on dynamic and time-differentiated retail prices and utility investments in demand response enabling technologies, these are state efforts, and, thus, are not the subject of this proceeding. Our focus here is on customers or aggregators of retail customers providing, through bids or self-schedules, demand response that acts as a resource in organized wholesale energy markets.

10. As the Commission stated in Order No. 719,[13] and emphasized in the NOPR,[14] there are several ways in which demand response in organized wholesale energy markets

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[12] See Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 48.

[13] Wholesale Competition in Regions with Organized Electric Markets, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, at P 48 (2009).

[14] NOPR, FERC Stats. & Regs. ¶ 32,656 at P 4.

can help improve the functioning and competitiveness of those markets. First, when bid directly into the wholesale market, demand response can facilitate RTOs and ISOs in balancing supply and demand, and thereby, help produce just and reasonable energy prices.[15] This is because customers who choose to respond will signal to the RTO or ISO and energy market their willingness to reduce demand on the grid which may result in reduced dispatch of higher-priced resources to satisfy load.[16] Second, demand response can mitigate generator market power.[17] This is because the more demand response that sees and responds to higher market prices, the greater the competition, and the more downward pressure it places on generator bidding strategies by increasing the risk to a supplier that it will not be dispatched if it bids a price that is too high.[18] Third, demand

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[15] For example, a study conducted by PJM, which simulated the effect of demand response on prices, demonstrated that a modest three percent load reduction in the 100 highest peak hours corresponds to a price decline of six to 12 percent. ISO-RTO Council Report, Harnessing the Power of Demand How RTOs and ISOs Are Integrating Demand Response into Wholesale Electricity Markets, found at http://www.isorto.org/atf/cf/%7B5B4E85C6-7EAC-40A0-8DC3-003829518EBD%7D/IRC_DR_Report_101607.pdf.

[16] Id. ("Demand response tends to flatten an area's load profile, which in turn may reduce the need to construct and use more costly resources during periods of high demand; the overall effect is to lower the average cost of producing energy.").

[17] See Comments of NYISO's Independent Market Monitor filed in Docket No. ER09-1142-000, May 15, 2009 (Demand response "contributes to reliability in the short-term, resource adequacy in the long-term, reduces price volatility and other market costs, and mitigates supplier market power.").

[18] Id.

response has the potential to support system reliability and address resource adequacy[19] and resource management challenges surrounding the unexpected loss of generation. This is because demand response resources can provide quick balancing of the electricity grid.[20]

11. Congress has recognized the importance of demand response by enacting national policy requiring its facilitation.[21] Consistent with that policy, the Commission has undertaken several reforms to support competitive wholesale energy markets by removing barriers to participation of demand response resources. For example, in Order No. 890, the Commission modified the pro forma Open Access Transmission Tariff to

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[19] See ISO-RTO Council Report, Harnessing the Power of Demand How RTOs and ISOs Are Integrating Demand Response into Wholesale Electricity Markets at 4, found at http://www.isorto.org/atf/cf/%7B5B4E85C6-7EAC-40A0-8DC3-003829518EBD%7D/IRC_DR_Report_101607.pdf ("Demand response contributes to maintaining system reliability. Lower electric load when supply is especially tight reduces the likelihood of load shedding. Improvements in reliability mean that many circumstances that otherwise result in forced outages and rolling blackouts are averted, resulting in substantial financial savings . . . .").

[20] For instance, in ERCOT, on February 26, 2008, through a combination of a sudden loss of thermal generation, drop in power supplied by wind generators, and a quicker-than-expected ramping up of demand, ERCOT found itself short of reserves. The system operator called on all demand response resources, and 1200 MW of Load acting as Resource (LaaRs) responded quickly, bringing ERCOT back into balance. OAK RIDGE NAT'L LAB., NAT'L RENEWABLE ENERGY LAB., TECH. REP. NREL/TP-500-43373, ERCOT EVENT ON FEB. 26, 2008: LESSONS LEARNED (JUL. 2008).

[21] See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 965 (2005) ("It is the policy of the United States that . . . unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets shall be eliminated.").

allow non-generation resources, including demand response resources, to be used in the provision of certain ancillary services where appropriate on a comparable basis to service provided by generation resources.[22] Order No. 890-A further required transmission providers to develop transmission planning processes that treat all resources, including demand response, on a comparable basis.[23]

12. In Order No. 719, the Commission required RTOs and ISOs to, among other things, accept bids from demand response resources in their markets for certain ancillary services on a basis comparable to other resources.[24] The Commission also required each RTO and ISO "to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage,"[25] for purposes of encouraging existing generation and demand resources to continue to be relied upon during an operating reserve shortage, and encouraging entry of new generation and demand resources.[26]

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[22] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 887-88 (2007), order on reh'g, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), order on reh'g and clarification, Order No. 890-B, 123 FERC ¶ 61,299 (2008), order on reh'g, Order No. 890-C, 126 FERC ¶ 61,228 (2009), order on clarification, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[23] Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 216.

[24] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47-49.

[25] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 194.

[26] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 247.

13. Additionally, in recent years several RTOs and ISOs have instituted various types of demand response programs. While some of these programs are administered for reliability and emergency conditions, other programs allow wholesale customers, qualifying large retail customers, and aggregators of retail customers to participate directly in the day-ahead and real-time energy markets, certain ancillary service markets and capacity markets.[27]

14. To date, the Commission has allowed each RTO and ISO to develop its own compensation methodologies for demand response resources participating in its day-ahead and real-time energy markets. As a result, the levels of compensation for demand response vary significantly among RTOs and ISOs.[28] For example, PJM Interconnection, L.L.C. (PJM) pays the LMP minus the generation and transmission portions of the retail

[27] Other demand response programs allow demand response to be used as a capacity resource and as a resource during system emergencies or permit the use of demand response for synchronized reserves and regulation service. See, e.g., PJM Interconnection, L.L.C., 117 FERC ¶ 61,331 (2006); Devon Power LLC, 115 FERC ¶ 61,340, order on reh'g, 117 FERC ¶ 61,133 (2006), appeal pending sub nom. Maine Pub. Utils. Comm'n v. FERC, No. 06-1403 (D.C. Cir. 2007); New York Indep. Sys. Operator, Inc., 95 FERC ¶ 61,136 (2001); NSTAR Services Co. v. New England Power Pool, 95 FERC ¶ 61,250 (2001); New England Power Pool and ISO New England, Inc., 100 FERC ¶ 61,287, order on reh'g, 101 FERC ¶ 61,344 (2002), order on reh'g, 103 FERC ¶ 61,304, order on reh'g, 105 FERC ¶ 61,211 (2003); PJM Interconnection, L.L.C., 99 FERC ¶ 61,227 (2002); California Independent System Operator Corp., 132 FERC ¶ 61,045 (2010).

[28] See New England, Inc., Docket No. ER09-1051-000; ISO New England, Inc., Docket No. ER08-830-000; Midwest Indep. Transmission Sys. Operator, Inc., Docket No. ER09-1049-000.

rate.[29] ISO New England Inc. (ISO-NE) and New York Independent System Operator, Inc. (NYISO) pay LMP when prices exceed a threshold level, with the levels differing between the RTOs.[30] The Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) demand response programs[31] pay LMP for demand response resources in the day-ahead and real-time energy markets.[32] The California Independent System Operator Corporation (CAISO) pays LMP at pricing nodes, or sub-load aggregation points (Sub-LAP) in its Proxy Demand Resource program that allows qualifying

[29] See sections 3.3A.4 and 3.3A.5 (Market Settlements in the Real-Time and Day-Ahead Energy Markets) of the Appendix to Attachment K of the PJM Tariff.

[30] For example, under ISO-NE's Real-Time Price Response Program, the minimum bid is $100/MWh and a demand response resource is paid the higher of LMP or $100/MWh. For the Day-Ahead Load Response Program, the minimum offer level is calculated on a monthly basis and is the Forward Reserve Fuel Index ($/MMBtu) multiplied by an effective heat rate of 11.37 MMBtu/MWh. The maximum offer level is $1,000/MWh. See sections III.E.2.1 and III.E.3.2 of Appendix E of the ISO New England Transmission, Markets and Services Tariff. NYISO implements a day-ahead demand response program by which resources bid into the market at a minimum of $75/MWh and can get paid the LMP. See section 4.2.2.9 ("Day-Ahead Bids from Demand Reduction Providers to Supply Energy from Demand Reductions") of NYISO's Market Services Tariff.

[31] Midwest ISO FERC Electric Tariff characterizes Demand Response Resources (DRR) as either DRR-Type I or DRR-Type II. DRR-Type I are capable of supplying a specific quantity of energy or contingency reserve through physical load interruption. DRR-Type II are capable of supplying energy and/or operating reserves over a dispatchable range. See sections 39.2.5A and 40.2.5 of the Tariff.

[32] See Charges and Payments for Purchases and Sales for Demand Response Resources. Midwest ISO FERC Electric Tariff, section 39.3.2C.

resources to provide day-ahead and real-time energy.[33] CAISO also provides for demand response resources to participate in its Participating Load program, which enables certain resources to provide curtailable demand in the CAISO market. CAISO pays nodal real-time LMP for its Participating Load program. The Southwest Power Pool, Inc. (SPP) has filed revisions to its tariff to facilitate demand response in the Energy Imbalance Service Market.[34]

III. Procedural History

15. As noted above, the Commission issued the NOPR in this proceeding on March 18, 2010.[35] The NOPR proposed to require RTOs and ISOs to pay the LMP in all hours for demand reductions made in response to price signals. The Commission sought

[33] See section 11.2.1.1 IFM Payments for Supply of Energy, CAISO FERC Electric Tariff. CAISO notes that for a Proxy Demand Resource that is made up of aggregated loads, the Resource is paid the weighted average of the LMPs of each pricing node where the underlying aggregate loads reside. See CAISO, 132 FERC ¶ 61,045, at P 26 n.14 (2010).

[34] The Commission has directed SPP to report on ways it can incorporate demand response into its imbalance market. Southwest Power Pool, Inc., 128 FERC ¶ 61,085 (2009). As of September 1, 2010, SPP has submitted seven informational status reports regarding its efforts to address issues related to demand response resources. In orders addressing SPP's compliance with Order No. 719, the Commission also directed SPP to make another compliance filing addressing demand response participation in its organized markets. Southwest Power Pool, Inc., 129 FERC ¶ 61,163, at P 51 (2009). On May 19, 2010, SPP submitted revisions to its Open Access Transmission Tariff in Docket Nos. ER09-1050-004 and ER09-748-002 to comply with the Commission's requirements established in Order Nos. 719 and 719-A. These filings are pending before the Commission.

[35] NOPR, FERC Stats. & Regs. ¶ 32,656.

comments on the compensation proposal and, in particular, on the comparability of generation and demand response resources; alternative approaches to compensating demand response in organized wholesale energy markets; whether payment of LMP should apply in all hours, and, if not, any criteria that should be used for establishing hours when LMP should apply; and whether to allow for regional variations concerning approaches to demand response compensation.[36]

16. After receiving the first round of comments, the Commission issued a Supplemental Notice of Proposed Rulemaking and Notice of Technical Conference (Supplemental NOPR) in this proceeding on August 2, 2010.[37] The Supplemental NOPR sought additional comment on: whether the Commission should adopt a net benefits test for determining when to compensate demand response providers, and, if so, what, if any, requirements should apply to the methods for determining net benefits; and what, if any, requirements should apply to how the costs of demand response are allocated. The Commission further directed Staff to hold a technical conference focused on these two issues, which occurred on September 13, 2010.[38]

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[36] See Appendix for a list of commenters.

[37] Supplemental Notice of Proposed Rulemaking and Notice of Technical Conference, 75 FR 47499 (Aug. 6, 2010), 132 FERC ¶ 61,094 (2010) (Supplemental NOPR).

[38] See Notice of Technical Conference (Aug. 27, 2010).

IV. Discussion

17. Based upon the record in this proceeding, the Commission herein requires greater uniformity in compensating demand response resources participating in organized wholesale energy markets. This Final Rule also addresses the allocation of costs resulting from the commitment of demand response, directing that such costs be allocated among those customers who benefit from the lower LMP resulting from the demand response.

A. Compensation Level

1. NOPR Proposal

18. The NOPR proposed to require RTOs and ISOs to pay the LMP in all hours for demand reductions made in response to price signals. The NOPR sought to provide comparable compensation to generation and demand response providers, based on the premise that both resources provide a comparable service to RTOs and ISOs for purposes of balancing supply and demand and maintaining a reliable electricity grid.[39] Also as stated in the NOPR, the proposed compensation level was designed to allow more demand response resources to cover their investment costs in demand response-related technology (such as advanced metering) and thereby facilitate their ability to participate in organized wholesale energy markets.[40] The Commission sought comments on the

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[39] NOPR, FERC Stats. & Regs. ¶ 32,656 at P 15.

[40] Id. at P 16.

compensation proposal and, in particular, on the comparability of generation and demand response resources; alternative approaches to compensating demand response in organized wholesale energy markets; whether payment of LMP should apply in all hours, and, if not, any criteria that should be used for establishing hours when LMP should apply; and whether to allow for regional variations concerning approaches to demand response compensation.

19. In the Supplemental NOPR, the Commission sought additional comments and directed staff to hold a technical conference regarding various net benefits tests. In particular, the Commission sought comment on: whether the Commission should adopt a net benefits test applicable in all or only some hours and what the criteria of any such test would be; how to define net benefits; what costs demand response providers and load serving entities incur and whether they should be included in a net benefits test; whether any net benefits methodology adopted should be the same for all RTOs and ISOs; proposed methodologies for implementing a net benefits test and the advantages and limitations of any proposed methodologies.[41] The September 13, 2010 Technical Conference included an eleven-member panel discussion of net benefits tests representing

[41] Supplemental NOPR, 132 FERC ¶ 61,094 at P 8-9.

a wide range of interests and viewpoints.[42] The Commission subsequently received additional written comments addressing these issues.

2. Comments

a) Capability of Demand Response and Generation Resources to Balance Energy Markets

20. Various commenters address the comparability of demand response and generation resources for purposes of compensation in the organized wholesale energy markets. To begin, numerous commenters address the physical or functional comparability of demand response and generation, agreeing that an increment of generation is comparable to a decrement of load for purposes of balancing supply and demand in the day-ahead and real-time energy markets.[43] Equating generation and demand response resources, Dr. Alfred E. Kahn states:

> [Demand response] is in all essential respects economically equivalent to supply response . . . [so] economic efficiency requires . . . that it should be rewarded with the same LMP that clears the market. Since [demand response] is actually—and not merely metaphorically—equivalent to supply response, economic efficiency requires that it be regarded and rewarded, equivalently, as a resource proffered to system operators, and be treated equivalently to generation in competitive power markets. That is,

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[42] See Sept. 13, 2010 Tr.

[43] DR Supporters Aug. 30, 2010 Comments (Kahn Affidavit at 2); Verso May 13, 2010 Comments at 3-4; Occidental May 13, 2010 Comments at 11; Viridity June 18, 2010 Comments at 5.

> all resources—energy saved equivalently to energy supplied— . . . should receive the same market-clearing LMP in remuneration.[44]

Indeed, some commenters believe that, from a physical standpoint, demand response can provide superior services to generation, such as providing a quick response in meeting system requirements and service without having to construct major new facilities.[45] Occidental asserts that the fungibility of demand response and generation output creates greater operational flexibility that, in turn, offers RTOs and ISOs multiple options to solve system issues both in energy and ancillary service markets, and that the fungible nature of demand response and generation supports comparable compensation for each as proposed in the NOPR.[46]

21. Viridity states that attempts to distinguish the physical characteristics of generation and demand response ignore bid-based security-constrained economic dispatch as the foundation for LMP and are based on the assumption that the value of load management on the grid is limited to periods when the system is stressed, i.e., traditional "super peak shaving." Viridity states that, while these arguments might have been valid 15 years ago, today competitive markets can offer proactively-managed load control and comparable and non-discriminatory treatment of load-based energy resources.

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[44] DR Supporters August 30, 2010 Reply Comments (Kahn Affidavit at 2 (footnote omitted)).

[45] Verso May 13, 2010 Comments at 3-4; Alcoa May 13, 2010 Comments at 9.

[46] Occidental May 13, 2010 Comments at 11.

Therefore, Viridity asserts that all resources should be paid LMP if the grid operator accepts their bid to achieve grid balance.[47]

22. At the same time, other commenters argue that generation and demand response are not physically equivalent, pointing out that demand response reduces consumption, whereas generators serve consumption.[48] They argue that a MW reduction in demand does not turn on the lights.[49] EPSA adds that a load reduction does not provide electrons to any other load and, instead, allows the marginal electron to serve a different customer.[50] Some commenters assert that a power system can function solely and reliably on generating plants and without any reliance on demand response, while the system cannot rely exclusively on demand response because demand response by itself cannot keep the lights on. Ultimately, some commenters point out, megawatts produced by generators need to be placed on the system in order for power to flow.[51] Battelle additionally argues that a reduction in consumption is not exactly the same as an increase

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[47] Viridity June 18, 2010 Comments at 5.

[48] ISO-NE May 13, 2010 Comments at 3.

[49] See, e.g., APPA May 13, 2010 Comments at 12; Capital Power May 13, 2010 Comments at 2.

[50] EPSA May 13, 2010 Comments at 72.

[51] See, e.g., PSEG May 13, 2010 Comments at 8.

in production, because elastic demand often comes with attendant future consequences, such as rebound, by virtue of substitution in time.[52]

23. Some commenters who argue that the physical characteristics of demand response are not comparable to generation frame their arguments in terms of the ability of the system operator to call on demand response and generation resources to provide balancing energy. They argue that generation resources provide superior service to demand response providers, positing that demand response is not intended for long periods of balancing needs,[53] and that, moreover, contracts with demand response providers limit the number of hours and times a customer may be called upon to curtail. For example, ODEC asserts that the degree of physical comparability depends on the extent to which demand response resources can be dispatched similar to a generator.[54] Calpine adds that traditional generators provide system support features that demand response cannot, such as ancillary services including governor response or reactive power voltage support, which are necessary for reliable operation of the electric system.[55]

24. Numerous commenters also address the comparability of demand response and generation in economic terms. For example, EEI states that, in finance terms, the demand

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[52] Battelle May 13, 2010 Comments at 3.

[53] AEP May 13, 2010 Comments at 7-8.

[54] ODEC May 13, 2010 Comments at 12.

[55] Calpine May 13, 2010 Comments at 4-5.

response product is, unlike generation, essentially an unexercised call option on spot market energy, and the value of that option is well-established in finance theory as the value of the resource (LMP) minus the "strike price," which EEI contends in this case is the retail tariff rate.[56] EEI and like-minded commenters support, therefore, alternative compensation for demand response to equal LMP minus the generation (or G) component of the retail rate.[57] They posit that payment of LMP without an offset for some portion of the retail rate does not send the proper economic signal to providers of demand response, because it fails to take into account the retail rate savings associated with demand response, and thereby overcompensates the demand response provider. As described by Dr. William W. Hogan on behalf of EPSA, this is sometimes called a double-payment for demand reductions, because demand response providers would "receive" both the cost

[56] EEI May 13, 2010 Comments at 4-5. See also Robert L. Borlick May 13, 2010 Comments at 4. Mr. Borlick argues that the correct price is LMP minus the Marginal Foregone Retail Rate (MFRR), describing the economically efficient price that should be paid to a demand response provider as "its offer price minus the price in its retail tariff at which it would have purchased the curtailed energy." Mr. Borlick asserts that this amount accurately represents the forgone opportunity costs that result when a demand response provider reduces its load. Id.

[57] See May 13, 2010 Comments of: APPPA; AEP; The Brattle Group; Calpine; ConEd; Consumers Energy; CPG; Detroit Edison; Direct Energy; Dominion; Duke Energy; Edison Mission; EEI; EPSA; Exelon; FTC; GDF; NYISO on behalf of the ISO RTO Council; ICC; IPPNY; Indicated New York TOs; IPA; ISO-NE; Midwest TDUs; Mirant; Midwest ISO TOs; NEPGA; NYISO; ODEC; OMS; PJM; PJM IMM; P3; Potomac Economics; PG&E; Ohio Commission; Robert L. Borlick; Roy Shanker; and RRI Energy.

savings from not consuming an increment of electricity at a particular price, plus an LMP payment for not consuming that same increment of electricity.[58] Viewing LMP as a double-payment, these commenters argue that paying LMP will result in more demand response than is economically efficient.[59] For example, Dr. Hogan states that paying LMP might motivate a company to shut down even though the benefits of consuming electricity outweigh the cost at LMP.[60] Indeed, P3 argues that compensation in excess of LMP-G is unjust and unreasonable, because such a payment level imposes costs on customers that are not commensurate with benefits received.[61]

25. ISO-NE argues that paying full LMP to demand response providers without taking into account the bill savings produced by demand response provides a significant financial incentive to dispatch demand response with marginal costs exceeding LMPs. By dispatching higher-cost demand response, ISO-NE asserts, lower-cost generation

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[58] See Attachment to Answer of EPSA, Providing Incentives for Efficient Demand Response, Dr. William W. Hogan, Oct. 29, 2009, submitted in Docket No. EL09-68-000.

[59] EPSA May 13, 2010 Comments at 23. See also May 13, 2010 Comments of APPA at 13; FTC at 9; Midwest TDUs at 14; Mirant at 2; New York Commission at 5; PJM at 6; PSEG at 5; and Potomac Economics at 6-8.

[60] Attachment to Answer of EPSA, Providing Incentives for Efficient Demand Response, Dr. William W. Hogan, Oct. 29, 2009, submitted in Docket No. EL09-68-000. In Dr. Hogan's view, supply should produce when the price of electricity exceeds its cost of production and demand should decline to consume when the costs in terms of convenience of delaying use are less than the price of electricity.

[61] P3 June 14, 2010 Comments at 2, 7-8.

resources are displaced.[62] At the same time, ISO-NE argues, generation is not dispatched and paid for only when the generation reduces LMP—generation is dispatched and paid for when it is cost-effective.[63]

26. Dr. Hogan further disputes arguments equating a MW of energy supplied to a MW of energy saved on economic grounds. Dr. Hogan draws a distinction between reselling something that one has purchased, and selling something that one would have purchased without actually purchasing it. Dr. Hogan argues that from the perspective of economic efficiency and welfare maximization, the aggregate effect of demand response is a wash producing no economic net benefit. Dr. Hogan asserts that Commission policy citing the benefits of price reduction in support of demand response compensation would amount to no less than an application of regulatory authority to enforce a buyers' cartel. He states that the Commission has been vigilant and aggressive in preventing buyers and sellers from engaging in market manipulation to influence prices, and it would be fundamentally inconsistent for the Commission to design demand response compensation policies that coordinate and enforce such price manipulation.

27. Dr. Hogan argues that the ideal and economically efficient solution regarding demand response compensation is to implement retail real-time pricing at the LMP,

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[62] ISO-NE May 13, 2010 Comments at 3-4.

[63] Id. at 28.

thereby eliminating the need for demand response programs. Realizing that this is unattainable at the present time, Dr. Hogan goes on to propose a next-best solution, which he believes is to pay demand response compensation in the amount of LMP-G, or some amount that simulates explicit contract demand response (such as "buy-the-baseline" approach discussed below). These options, he argues, more than paying LMP, better support notions of comparability between demand response resources and generation.[64]

28. The New York Commission, however, argues that requiring payment of LMP-G would result in an administrative burden of tracking retail rates for the multiple utilities, ESCOs and power authorities and create undue confusion for retail customers and administrative difficulties for state commissions and ISOs and RTOs.[65]

29. Consistent with Dr. Hogan's arguments, some commenters assert that demand response providers should actually own or pay for electricity prior to, what commenters characterize as, an effective reselling of the electricity back to the market in the form of demand response. For example, these commenters suggest that the demand response provider purchase the power in the day-ahead market and resell it in the real-time

[64] Hogan Affidavit, ISO RTO Council May 13, 2010 Comments at 5.

[65] New York Commission May 13, 2010 Comments at 8.

markets.[66] EPSA argues that there must be some purchase requirement or representative offset to allow a demand response provider to "sell" a commodity that it owns to the ISO or RTO.[67] EPSA argues that such a requirement would send an efficient price signal, reduce incentives for gaming the system, and help address difficulties with measurement and verification of a demand reduction. EPSA highlights an ISO-NE IMM recommendation that, if the Commission permits LMP payment, it should also adopt a "buy-the-baseline" approach requiring demand response resources to purchase an expected amount of energy consumption in the day-ahead energy market and subsequently sell any demand reduction from that level in the real-time market.[68]

30. Viridity, on the other hand, argues that forcing customers to buy and then resell electricity will lead to too little demand response and that adopting a "buy-the-baseline" approach would constitute an inappropriate exercise of Commission authority to effectively force parties into contracts. Viridity and DR Supporters state that any characterization of demand response as a purchase and then resale of energy is erroneous[69] and based on the flawed assumption that demand response resources are

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[66] See, e.g., ISO-NE IMM May 13, 2010 Comments at 4-5; Midwest ISO TOs May 13, 2010 Comments at 14; PJM May 13, 2010 Comments at 5; and Duke Energy May 13, 2010 Comments at 2.

[67] EPSA June 30, 2010 Comments at 3.

[68] EPSA June 30, 2010 Comments at 23.

[69] Viridity Energy June 18, 2010 Comments at 25.

reselling energy. They state that the description of demand response as a reselling of energy has been correctly rejected by the Commission in EnergyConnect, where the Commission stated that it was establishing a policy of treating demand response as a service rather than a purchase and sale of electric energy.[70]

31. DR Supporters further argues that, despite claims to the contrary, paying full LMP to demand response providers does not constitute a subsidy for demand response any more than the remunerations of generators for the power that they sell. As Dr. Kahn states:

> Does this plan involve double compensation, as [Dr.] Hogan asserts, at the expense of power generators—of successful bidders promising to induce efficient demand curtailment and of consumers induced to practice it? Certainly not: the decrease in the revenue of the generators is (and consequent savings by consumers are) matched by the savings in their (marginal) costs of generating that power; the successful bidders for the opportunity to induce that consumer response are compensated for the costs of those efforts by the pool, whose (marginal) costs they save by assisting consumers to reduce their purchases.[71]

32. Viridity further disputes Dr. Hogan's argument that payment of LMP for demand response will distort an otherwise optimal market. Viridity posits that such arguments ignore dislocations in the wholesale power markets, the existence of market power that must be mitigated, imperfect information available to customers, barriers to entry and

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[70] DR Supporters Aug. 30, 2010 Reply Comments at 10 (citing EnergyConnect, Inc., 130 FERC ¶ 61,031 at P 30-31 (2010)).

[71] DR Supporters Aug. 30, 2010 Reply Comments, Kahn Affidavit at 10.

uneconomic resources dispatched to fulfill must-run requirements.[72] Viridity further states that Dr. Hogan's arguments fail to acknowledge the limits of the Commission's jurisdiction and widespread dislocations and distortions in virtually all economic aspects of relevant energy markets (including fuels, facilities, pricing, environmental attributes, information and participation) and fail to account for any market benefits of demand response.[73] Finally, Viridity argues that Dr. Hogan's arguments fail to reflect the many complex interactions between price, equipment operational requirements, and customer processes, which point to a complex demand response decision.[74]

33. In addition to physical and economic comparability, some commenters contrast the environmental effects of generation and demand response resources. EDF notes that current market prices fail to internalize environmental externalities – including toxic air pollution, greenhouse gas pollution, and land and water use impacts – and other social costs. EDF asserts that the social impact of these environmental externalities is especially acute at peak times, positing that generation sources used for marginal supply at such times ("peaker plants") are among the oldest, dirtiest, and most inefficient in the

[72] Viridity June 18, 2010 Comments at 13 ("Importantly, Dr. Hogan (and others) in opposing the proposed rulemaking fails to acknowledge the limits of the Commission's jurisdiction, and wide spread dislocations and distortions in virtually all economic aspects of relevant energy markets (including fuels, facilities, pricing, environmental attributes, information and participation)." (Affidavit of John C. Tysseling, Ph.D.)).

[73] Viridity Reply Comments at 13.

[74] Viridity Reply Comments at 14.

also argue that similar penalty structures should apply to demand response resources as apply to generation, and that demand response participation must be subject to market monitoring.[80] Calpine adds that to the extent demand response resources are used and treated on par with generators for purposes of compensation, they should be subject to the same performance testing, penalties, and other similar requirements as generators.[81]

36. Some commenters address the comparability of demand response providers and generators in terms of maintaining system reliability. PIO argues that reductions in consumption provide additional reliability.[82] According to the NEMA, North American Electric Reliability Corporation (NERC) standards suggest that, from a reliability perspective, load reductions are equivalent or even superior to generator increases for balancing purposes. For example, while specific to the Western Interconnection, BAL-002-WECC-1 lists interruptible load as comparable to generation deployable within 10 minutes.[83] EPSA maintains that demand response resources are not full substitutes based on the nature of their participation and the rules applicable to each resource in the energy

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[80] Id.

[81] Calpine May 13, 2010 Comments at 5.

[82] PIO May 13, 2010 Comments at 8.

[83] NEMA May 13, 2010 Comments at 2.

markets, pointing out, for example, that, unlike generators, demand response providers are not subject to regional and NERC mandatory reliability standards.[84]

37. On the other hand, PSEG argues that a MW of demand response does not make the same contribution towards system reliability as a MW of generation, because demand response committed as a capacity resource is only required to perform for a limited number of times over the peak period. PSEG refers to PJM's capacity market, for example, in which demand response only has to perform 10 times during the entire summer peak period, and then only for six hours per response. In contrast, PSEG argues, generators are available for dispatch, 24 hours a day, 365 days per year, except for a small percentage of time for forced and planned outages. PSEG further asserts that additional reliability standards - applicable to generating facilities, but not to demand response - increase the relative reliability value of generating resources to the system.[85]

b) Appropriateness of a Net Benefits Test

38. Some commenters assert that demand response providers should be paid LMP only when the benefits of demand response compensation outweigh the energy market costs to consumers of paying demand response resources, i.e., when cost-effective, as

[84] EPSA May 13, 2010 Comments at 7.

[85] PSEG May 13, 2010 Comments at 8.

determined by some type of net benefits or cost-effectiveness test.[86] They maintain that paying LMP for demand response in all hours, including off-peak hours, might not result in net benefits to customers, because the payments might be substantially more than the savings created by reducing the clearing price at that time.[87] According to these commenters, net benefits are most likely to be positive and greatest when the supply curve is steepest, which typically occurs in highest-cost, peak hours.[88] They argue that experience to date has shown positive benefits from demand response as a peak system resource, and that, during peak periods, the positive economics of demand response are generally very clear and a cost-benefit analysis may not be needed.[89] Furthermore, some commenters suggest that limiting the hours in which demand response resources are paid

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[86] See generally May 13, 2010 Comments of NYSCPB; NECA; Capital Power; NECPUC; Maryland Commission; New York Commission; NSTAR; National Grid; NE Public Systems.

[87] Capital Power May 13, 2010 Comments at 5; P3 May 13, 2010 Comments at 5.

[88] NECPUC May 13, 2010 Comments at 13; see also Sept. 13, 2010 Tr. 13:6-19 (Mr. Keene); Maryland Commission May 13, 2010 Comments at 4-5.

[89] See, e.g., ACEEE Oct. 13, 2010 Comments 3-4. See also National Grid May 13, 2010 Comments at 4-5; NSTAR Electric Company (NSTAR) May 14, 2010 Comments at 3; Maryland Commission May 13, 2010 Comments, submitting Analysis of Load Payments and Expenditures under Different Demand Response Compensation Schemes at 10-11 (discussing PJM analysis showing that paying demand response providers LMP for all hours after compensating LSEs for lost revenues would not benefit customers in general but that positive economic benefits results when demand response providers receive LMP during at least the top 100 hours (the highest priced energy hours)).

LMP could help establish better baselines for measuring whether a demand response provider has, in fact, responded.[90]

39. Some commenters who oppose paying LMP in all hours for demand response also suggest various approaches, including net benefits tests, for determining when LMP should apply. The stated purpose of any of these tests would be to determine the point at which the incremental payment for demand response equals the incremental benefit of the reduction in load; payment of LMP would apply only up to that point.[91]

40. Opposition to use of a net benefits test comes from several directions. Numerous commenters, primarily industrial consumers and some consumer advocates, argue that a net benefits test will reduce competition,[92] have a "chilling effect" on the development of demand response,[93] and be costly and complex to implement.[94] Some commenters

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[90] See, e.g., CDWR May 13, 2010 Comments at 11; National Grid May 13, 2010 Comments at 8; ISO-NE May 13, 2010 Comments at 34; ACEEE Oct. 13, 2010 Comments 4. But see ISO-NE May 13, 2010 Comments at 32-33 (contending that no baseline estimation methodology that relies upon historical customer meter data can accurately and reliably estimate an individual customer's normal energy usage pattern if that customer responds frequently to price signals).

[91] NECAA May 13, 2010 Comments at 11; NYSCPB May 13, 2010 Comments at 5; National Grid May 13, 2010 Comments at 4-5.

[92] Viridity Oct. 13, 2010 Comments at 14.

[93] NAPP Oct. 13, 2010 Comments at 2.

[94] Viridity Oct. 13, 2010 Comments at 14; NAPP Oct. 13, 2010 Comments at 3; AMP Oct. 13, 2010 Comments at 4; CAISO Oct. 13, 2010 Comments at 5 and 16.

further state that no net benefits test is needed because the merit-order bid stack and market clearing function in a wholesale market, by definition, assures that the benefits to the system of demand response exceed the costs, and that the resource that clears is the lowest cost resource; otherwise, demand response would not dispatch ahead of competing alternatives.[95]

41. Another set of commenters argues that a net benefits test is unnecessary and inappropriate for different reasons.[96] These commenters assert that a net benefits test would be very costly and difficult to implement, that RTOs and ISOs cannot implement a net benefits test,[97] and that such a test is unnecessary with the economically efficient compensation level for demand response resources.[98] According to Andy Ott of PJM, "[t]he implicit assumption in developing a benefits test for purposes of compensation would be that you could actually determine individual customers, whether they benefitted

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[95] EDF Oct. 13, 2010 Comments at 2; Viridity Oct. 13, 2010 Comments at 10; ELCON Oct. 13, 2010 Comments at 3.

[96] See, e.g., Oct. 13, 2010 Comments of: Midwest TDUs at 4-5; NEPGA at 8, NJBPU at 2-3; NAPP at 2-3; P3; SPP at 3-4; SDG&E, SoCal Edison, and PG&E at 4-6; Viridity Energy at 2; ELCON at 2; AMP at 2; CDWR at 1, 4-5; CAISO at 4, 15; Detroit Edison at 2; Smart Grid Coalition at 2; Duke Energy at 2; EDF at 2; FTC at 1; EPSA at 4; Indicated New York TOs at 3; Midwest ISO at 9; Steel Manufacturers Ass'n at 3.

[97] P3 Oct. 13, 2010 Comments at 5.

[98] Sept. 13, 2010 Tr. 155:21-24 (Mr. Robinson); Sept. 13, 2010 Tr. 141-42 (Mr. Centolella); Dr. Hogan Sept. 13, 2010 Comments at 5; Sept. 13, 2010 Tr. 60 (Dr. Shanker); Sept. 13, 2010 Tr. 27 (Mr. Newton); SDG&E May 13, 2010 Comments at 4.

or not. That type of analysis would be very costly to implement."[99] Midwest ISO TOs further assert that it would be difficult to prescribe by regulation the hours in which demand response provides net benefits because system conditions and load patterns change across seasons and over time.[100] NEPGA argues that compensating demand response resources at LMP whenever a reduction in consumption suppresses energy prices enough to provide net benefits to load is neither just and reasonable, nor in the public interest.[101] NEPGA states that the Commission recognized in Amaranth Advisors[102] that, if prices are suppressed below competitive, market levels, society as a whole is worse off. According to NEPGA, the goal is to get the right price—the economically efficient price produced by competitive markets.

42. NYISO posits that a rule mandating payment of LMP-G avoids the need to develop a net benefits test. NYISO further states, however, that if the Commission decides to move forward with LMP for demand response, it should craft a net benefits test that minimizes any opportunities for distorting market prices or exploiting market inefficiencies. Citing support for Dr. Hogan's arguments, NYISO states that "a net benefits test should ensure that the demand response program does not have negative net

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[99] Sept. 13, 2010 Tr. 19 (Mr. Ott).

[100] Midwest ISO TOs May 13, 2010 Comments at 16.

[101] NEPGA June 21, 2010 Comments at 1-2.

[102] 120 FERC ¶ 61,085 (2007).

benefits compared to no program at all. The criterion to apply would focus on the bid-cost savings of generation and load, with the load bids adjusted for the effects of avoidance of the retail rate."[103]

c) Standardization or Regional Variations in Compensation

43. With regard to potential regional variations for compensation mechanisms across RTO and ISO markets, many commenters, mostly those in support of the NOPR's proposed compensation level, endorse standardization.[104] Some parties, primarily industrial customers and some customer advocates, argue that, regardless of location, both demand response providers and generators provide a comparable service in terms of balancing supply and demand, as discussed above, and therefore should be comparably compensated at the LMP.[105] They argue that fair, non-discriminatory markets must adapt and eliminate barriers to entry to the use and incorporation of traditional and non-

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[103] NYISO Oct. 13, 2010 Comments at 3-4.

[104] See May 13, 2010 Comments of: ArcelorMittal; Alcoa; ACENY; ACC; AFPA; CDWR; Mayor Bloomberg; Consert; CDRI; CPower; DR Supporters; Derstine's; Durgin; Electricity Committee; ELCON; Electrodynamics; ECS; EnerNOC; ICUB; IECA; IECPA; Irving Forest; Joint Consumers; Limington; Madison Paper; Massachusetts AG; NEMA; National Energy; National League of Cities; NJBPU; NAPP; Occidental; Okemo; Partners; Pennsylvania Department of Environment; Pennsylvania Commission; Rep. Chris Ross; Precision; PRLC; Raritan ; SDEG, SoCal; PG&E; Schneider; Governor O'Malley; Steel Manufacturers Ass'n; Verso; Viridity; Virginia Committee; Wal-Mart; Waterville.

[105] See, e.g., Steel Manufacturers Ass'n May 13, 2010 Comments at 12; NEMA May 13, 2010 Comments at 5.

traditional resources—where non-traditional resources include actively-managed demand—in the dispatch and management of the electric system.[106] They further posit that the lack of a unified policy itself represents a regulatory barrier to demand response,[107] and that a consistent set of rules reduces the costs and complexities of demand response participation and facilitates training and transfer of personnel across regions.[108] To that end, many commenters argue that adopting a unified approach to demand response compensation at the LMP, as opposed to allowing regional variation including payment of something less than LMP, is necessary to overcome the barriers to entry of demand response providers.[109] Reciting the many benefits of demand reductions in energy use, these commenters support a compensation level that will provide a catalyst for private sector engagement in improved energy management practices. Viridity argues that the near absence of demand response participating in energy markets is powerful empirical proof that current, varying levels of compensation are inadequate—especially

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[106] Steel Manufacturers Ass'n May 13, 2010 Comments at 12.

[107] PIO May 13, 2010 Comments at 9; DR Supporters Aug. 30, 2010 Comments at 6-7.

[108] See, e.g., Alcoa May 13, 2010 Comments at 13.

[109] NECPUC May 13, 2010 Comments at 4; NYISO May 13, 2010 Comments at 16.

in markets that start with a market-based level of compensation and then reduce it by the generation portion of a customer's retail rate (LMP – G).[110]

44. Other commenters caution against standardizing the compensation level for demand response, pointing to regional differences in market structure, state regulatory environment, and resource mix.[111]

3. Commission Determination

45. The Commission acknowledges the diverging opinions of commenters regarding the appropriate level of compensation for demand response resources. As discussed above, commenters are split on this issue, with some in favor of paying the LMP for demand reductions in the day-ahead and real-time energy markets in all hours, others arguing that paying the LMP for demand reductions under any conditions will result in over-compensation or distortions in incentives to reduce consumption, and still others arguing that paying the LMP for demand reductions is only appropriate when it is reasonably certain to be cost-effective.

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[110] Viridity Energy May 13, 2010 Comments at 4.

[111] See, e.g., May 13, 2010 Comments of: ConEd at 3-4; Consumers Energy at 2; California Commission at 9; CMEEC at 2-3, 14-15; Detroit Edison at 3-5; Dominion at 8; Duke Energy at 4; EPSA at 6; Hess at 4; Indicated New York TOs at 3; Maryland Commission at 5; Midwest TDUs at 2, 6; Midwest ISO TOs at 16; National Grid at 5-6; 11-12; New York Commission at 4, 11; NCPA at 3; NYISO at 2-3; ODEC at 27; PJM at 5-6; SPP at 1.

46. In the face of these diverging opinions, the Commission observes that, as the courts have recognized, "'issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.'"[112] We also observe that, in making such judgments, the Commission is not limited to textbook economic analysis of the markets subject to our jurisdiction, but also may account for the practical realities of how those markets operate.[113]

47. As discussed further below, the Commission agrees with commenters who support payment of LMP under conditions when it is cost-effective to do so, as determined by the net benefits test described herein.[114] We have previously accepted a variety of ISO and RTO proposals for compensation for demand response resources participating in

[112] Elec. Consumers Res. Council v. FERC, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (quoting Pub. Util. Comm'n of the State of Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001)); see also Town of Norwood v. FERC, 962 F.2d 20, 22 (D.C. Cir. 1992).

[113] See Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 872 (D.C. Cir. 1993) ("It is the FERC's established policy to consider equitable factors in designing rates, and to allow for phasing in of changes where appropriate. . . . It is hardly arbitrary or capricious so to temper the dictates of theory by reference to their consequences in practice."); Vermont Dep't of Pub. Serv. v. FERC, 817 F.2d 127, 135 (D.C. Cir. 1987) ("Indeed, 'the congressional grant of authority to the agency indicates that the agency's interpretation typically will be enhanced by technical knowledge.'" (quoting Nat'l Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1570 (D.C. Cir. 1987))); Columbia Gas Transmission Corp. v. FERC, 750 F.2d 105, 112 (D.C. Cir. 1984) ("the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest").

[114] See generally May 13, 2010 Comments of NYSCPB; NECA; Capital Power; NECPUC; Maryland Commission; New York Commission; NSTAR; National Grid; NE Public Systems.

organized wholesale energy markets. We find, based on the record here that, when a demand response resource has the capability to balance supply and demand as an alternative to a generation resource, and when dispatching and paying LMP to that demand response resource is shown to be cost-effective as determined by the net benefits test described herein, payment by an RTO or ISO of compensation other than the LMP is unjust and unreasonable. When these conditions are met, we find that payment of LMP to these resources will result in just and reasonable rates for ratepayers.[115] As stated in the NOPR, we believe paying demand response resources the LMP will compensate those resources in a manner that reflects the marginal value of the resource to each RTO and ISO.[116]

48. The Commission emphasizes that these findings reflect a recognition that it is appropriate to require compensation at the LMP for the service provided by demand response resources participating in the organized wholesale energy markets only when two conditions are met:

- The first condition is that the demand response resource has the capability to provide the service , i.e., the demand response resource must be able to displace a

[115] The Commission's findings in this Final Rule do not preclude the Commission from determining that other approaches to compensation would be acceptable when these conditions are not met.

[116] NOPR at P 12.

generation resource in a manner that serves the RTO or ISO in balancing supply and demand.

- The second condition is that the payment of LMP for the provision of the service by the demand response resource must be cost-effective, as determined by the net benefits test described herein.

49. With respect to the first, capability-related condition, we note that a power system must be operated so that there is real-time balance of generation and load, supply and demand. An RTO or ISO dispatches just the amount of generation needed to match expected load at any given moment in time. The system can also be balanced through the reduction of demand.[117] Both can have the same effect of balancing supply and demand at the margin either by increasing supply or by decreasing demand.

50. With respect to the second cost-effectiveness condition, the record leads us to alter the proposal set forth in the NOPR in this proceeding. As various commenters explain, dispatching demand response resources may result in an increased cost per unit to load

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[117] Andrew L. Ott Sept. 13, 2010 Statement at 1.

> Economic and Capacity-based demand response clearly provides benefits to regional grid operation and the wholesale market operation. . . . These demand resources provide benefits by providing valuable alternatives to PJM in maintaining operational reliability and in promoting efficient market operations.

Id. at 1; see also CDRI May 13, 2010 Comments at 10; CDWR May 13, 2010 Comments at 5; NJPBU May 13, 2010 Comments at 2.

associated with the decreased amount of load paying the bill, depending on the change in LMP relative to the size of the energy market. As stated above, this is the billing unit effect of dispatching demand response resources.[118] However, when reductions in LMP from implementing demand response results in a reduction in the total amount consumers pay for resources that is greater than the money spent acquiring those demand response resources at LMP, such a payment is a cost-effective purchase from the customers' standpoint.[119] In comparison, when wholesale energy market customers pay a reduced price attributable to demand response that does not reduce total costs to customers more than the costs of paying LMP to the demand response dispatched, customers suffer a net loss. Implementation of the net benefits test described herein will allow each RTO or ISO to distinguish between these situations.

51. This billing unit effect and the net benefits test through which it is addressed herein, warrant more detailed discussion. In the organized wholesale energy markets, the economic dispatch organizes offers from lowest to highest bid in order to balance supply

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[118] As stated above, dispatching generation resources does not produce this billing unit effect because it does not result in a decrease of load.

[119] As a simple example, assume a market of 100 MW, with a current LMP of $50/MWh without demand response, and an LMP of $40/MWh if 5 MW of demand response were dispatched. Total payments to generators and load would be $4,000 with demand response compared to the previous $5,000. Even though, the reduced LMP is now being paid by less load, only 95 MW compared to 100 MW, the price paid by each remaining customer would decrease from $50/MWh to $42.11/MWh ($4,000/95). Therefore, the payment of LMP to demand resources is cost-effective.

and demand, taking into account other parameters such as requirements for a generator to operate at a minimum level of output or minimum amount of time, reserve requirements and so forth. With dispatch of a demand response resource, the load also goes down, that is, the level of remaining load falls. However, the "supply" of resources deployed—which includes both generation and demand response—does not fall. The total costs to the system for these resources must then be allocated among the reduced quantity of remaining load.

52. In the absence of the net benefits test described herein, the RTO's or ISO's economic dispatch ordinarily would select demand response when it is the incremental resource with the lowest bid. However, if the next unit of generation is not sufficiently more expensive than the demand response resource, the decrease in LMP multiplied by the remaining load would not be greater than the costs of dispatching the demand response resource. In this situation, dispatching the demand response resource would result in a higher price to remaining customers than the dispatch of the next unit of generation in the bid stack. While the demand response resource appears cost competitive in the dispatch order, selection of the demand response resource increases the total cost per unit to remaining load, and it would not be cost-effective to dispatch the demand response resource.

53. For this reason, the billing unit effect associated with dispatch of a demand response resource in an energy market must be taken into account in the economic comparison of the energy bids of generation resources and demand response resources. Therefore, rather than requiring compensation at LMP in all hours, the Commission requires the use of the net benefits test described herein to ensure that the overall benefit of the reduced LMP that results from dispatching demand response resources exceeds the cost of dispatching those resources. When the above-noted conditions of capability and of cost-effectiveness are met, it follows that demand response resources that clear in the day-ahead and real-time energy markets should receive the LMP for services provided, as do generation resources. LMP represents the marginal value of an increase in supply or a reduction in consumption at each node within an ISO or RTO, i.e., LMP reflects the marginal value of the last unit of resources necessary to balance supply and demand. Indeed, LMP has been the primary mechanism for compensating generation resources clearing in the organized wholesale energy markets since their formation. [120]

54. The Commission finds that demand response resources that clear in the day-ahead and real-time energy markets should receive the same market-clearing LMP as compensation in the organized wholesale energy markets when those resources meet the conditions established here as a cost-effective alternative to the next highest-bid

[120] See DR Supporters Aug. 30, 2010 Reply Comments (Kahn Affidavit at 2 (footnote omitted)).

generation resources for purposes of balancing the energy market. We discuss below the comments filed on these issues.

55. Some commenters dispute that the foregone consumption of energy by demand response resources performs the service of balancing supply and demand in the energy market as would energy supplied by generators in the day-ahead and real-time energy markets, arguing that it is inappropriate to pay electric consumers to not consume.[121] The Commission disagrees. Generation and load must be balanced by the RTOs and ISOs when clearing the day-ahead and real-time energy markets, and such balancing can be accomplished by changes in either supply or demand. The Commission finds that in the organized wholesale energy markets demand response can balance supply and demand as can generation.

56. Commenters that oppose this finding do not adequately recognize a distinctive and perhaps unique characteristic of the electric industry. The electric industry requires instantaneous balancing of supply and demand at all times to maintain reliability. It is in this context that the Commission finds that demand response can balance supply and demand as can generation when dispatched, in the organized wholesale energy markets.

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[121] See, e.g., ISO-NE May 13, 2010 Comments at 3; APPA May 13, 2010 Comments at 12; Capital Power May 13, 2010 Comments at 2; EPSA May 13, 2010 Comments at 72.

57. Due to a variety of factors, demand responsiveness to price changes is relatively inelastic in the electric industry and does not play as significant a role in setting the wholesale energy market price as in other industries. The Commission has recognized that barriers remain to demand response participation in organized wholesale energy markets. For example, in Order No. 719, the Commission stated:

> [D]espite previous Commission and RTO and ISO efforts to facilitate demand response, regulatory and technological barriers to demand response participation persist, thereby limiting the benefits that would otherwise result. A market functions effectively only when both supply and demand can meaningfully participate, and barriers to demand response limit the meaningful participation of demand in electricity markets.[122]

Barriers to demand response participation at the wholesale level identified by commenters include the lack of a direct connection between wholesale and retail prices,[123] lack of dynamic retail prices (retail prices that vary with changes in marginal wholesale costs), the lack of real-time information sharing, and the lack of market incentives to invest in enabling technologies that would allow electric customers and

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[122] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 83 (citing Federal Energy Regulatory Commission Staff, A National Assessment of Demand Response Potential (June 2009), found at http://www.ferc.gov/legal/staff-refports/06-09-demand-response.pdf; Barriers to Demand Side Response in PJM (2009)). In compliance filings submitted by RTOs and ISOs and their market monitors pursuant to Order No. 719, as well as in responsive pleadings, parties have mentioned additional barriers, such as the inability of demand response resources to set LMP, minimum size requirements, and others.

[123] See, e.g., Monitoring Analytics May 13, 2010 Comments at 4-6.

aggregators of retail customers to see and respond to changes in marginal costs of providing electric service as those costs change. For example, Dr. Kahn states:

> These circumstances—specifically, the fact that pass-through of the LMP is costly and (perhaps) politically infeasible, the possibly prohibitive cost of the metering necessary to charge each ultimate user, moment-by-moment, the often dramatic changes in true marginal costs for each—can justify direct payment at full LMP to distributors and ultimate customers who promise to guarantee their immediate response to such increases in true marginal costs of supplying them.[124]

Furthermore, EnerNOC states:

> On a more fundamental level, the inadequate compensation mechanisms in place today in wholesale energy markets fail to induce sufficient investment in demand response resource infrastructure and expertise that could lead to adequate levels of demand response procurement. Without sufficient investment in the development of demand response, demand response resources simply cannot be procured because they do not yet exist as resources. Such investment will not occur so long as compensation undervalues demand response resources.[125]

58. The Commission concludes that paying LMP can address the identified barriers to potential demand response providers.

59. Removing barriers to demand response will lead to increased levels of investment in and thereby participation of demand response resources (and help limit potential

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[124] DR Supporters Sept. 16, 2009 Comments filed in Docket No. EL-09-68-000 (Kahn Affidavit at 6). See also id. at 4 (Customers offering to reduce consumption should be induced "to behave as they would if market mechanisms alone were capable of rewarding them directly for efficient economizing.").

[125] EnerNOC May 13, 2010 Comments at 4; see also Alcoa May 13, 2010 Comments at 4; Viridity May 13, 2010 Comments at 5-6.

generator market power), moving prices closer to the levels that would result if all demand could respond to the marginal cost of energy. To that end, the Commission emphasizes that removing barriers to demand response participation is not the same as giving preferential treatment to demand response providers; rather, it facilitates greater competition, with the markets themselves determining the appropriate mix of resources, which may include both generation and demand response, needed by the RTO and ISO to balance supply and demand based on relative bids in the energy markets. In other words, while the level of compensation provided to each resource affects its willingness and ability to participate in the energy market, ultimately the markets themselves will determine the level of generation and demand response resources needed for purposes of balancing the electricity grid.[126]

60. Another issue raised by a number of commenters, largely representing generators, is whether a lower payment based on LMP-G is the economically-efficient price that sends the proper price signal to a potential demand response provider. These commenters argue that, by not consuming energy, demand response providers already effectively receive "G," the retail rate that they do not need to pay. They therefore contend that demand response providers will be overcompensated unless "G" is deducted from

[126] Generation and demand response resources have the potential to earn other revenues through bilateral arrangements, capacity markets where they exist, and ancillary services.

payments made by the RTO or ISO for service in the wholesale energy market, resulting in a payment of LMP-G. These commenters suggest that payment of LMP-G will result in a price signal to demand response providers equivalent to the LMP (i.e., (LMP - G) + G). Similarly, some commenters argue that paying demand response resources the LMP will lead to a wholesale electricity price that is not economically efficient.[127]

61. The Commission disagrees with commenters who contend that demand response resources should be paid LMP-G in all hours. First, as discussed above, demand response resources participating in the organized wholesale energy markets can be cost-effective, as determined by the net benefits test described herein, for balancing supply and demand and, in those circumstances, it follows that the demand response resource should also receive compensation at LMP. Second, such comments largely rely on arguments about economic efficiency, analogizing to incentives for individual generators to bid their marginal cost. These arguments fail to acknowledge the market imperfections caused by the existing barriers to demand response, also discussed above. In Order No. 719, the Commission found that allowing demand response to bid into organized wholesale energy markets "expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability."[128]

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[127] See NEPGA June 21, 2010 Comments at 1-2.

[128] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 154.

Furthermore, Dr. Kahn argues that paying demand response LMP sets "up an arrangement that treats proffered reductions in demand on a competitive par with positive supplies; but the one is no more a [case of overcompensation] than the other: the one delivers electric power to users at marginal costs—the other—reductions in cost—both at competitively-determined levels."[129]

62. Several other considerations also support this Commission conclusion. In the absence of market power concerns, the Commission does not inquire into the costs or benefits of production for the individual resources participating as supply resources in the organized wholesale electricity markets and will not here, as requested by some commenters, single out demand response resources for adjustments to compensation. The Commission has long held that payment of LMP to supply resources clearing in the day-ahead and real-time energy markets encourages "more efficient supply and demand decisions in both the short run and long run,"[130] notwithstanding the particular costs of production of individual resources. Commenters have not justified why it would be appropriate for the Commission to continue to apply this approach to generation resources yet depart from this approach for demand response resources.

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[129] DR Supporters Aug. 30, 2010 Reply Comments (Kahn Affidavit at 9-10).

[130] See New England Power Pool, 101 FERC ¶ 61,344, at P 35 (2002).

63. In addition, we agree with the New York Commission that given the differences in retail rate structures across RTO footprints and even within individual states, requiring ISOs and RTOs to incorporate such disparate retail rates into wholesale payments to wholesale demand response providers would, even though perhaps feasible, create practical difficulties for a number of parties, including state commissions and ISOs and RTOs. Moreover, incorporating such rates could result in customer uncertainty as to the prevailing wholesale rate.

64. Some arguments advocating paying LMP-G rather than LMP are based on an assumption that demand response resources need to purchase the energy in day-ahead markets or by other means and then "resell" the energy to the market in the form of demand response. However, as the Commission previously stated in EnergyConnect, the Commission does not view demand response as a resale of energy back into the energy market. [131] Instead, as the Commission also explained in EnergyConnect and in Order No. 719-A, the Commission asserts jurisdiction with respect to demand response in organized wholesale energy markets because of the effect of demand response and related RTO and ISO market rules on Commission-jurisdictional rates. [132]

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[131] See EnergyConnect, 130 FERC ¶ 61,031 at P 32.

[132] Id.; see also Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, at P 47.

65. With regard to the "buyers' cartel" argument, the Commission disagrees that market rules establishing circumstances in which particular resources can participate and receive the LMP represents cooperative price setting. RTOs and ISOs evaluate the bids from generation and demand response resources to establish the order of dispatch which secures the most economical supplies needed, consistent with the reliability constraints imposed on the system. Imposing a cost-effectiveness condition does not convert this unit commitment process by the RTO or ISO into collusion among bidders, whether generation or demand response. Furthermore, the market rules administering such a program would be approved by this Commission and demand response resources would be subject to Commission-approved rules, just like any other participants in the organized wholesale energy markets. In addition, arguments that the subject of this proceeding is equivalent to the types of market manipulation investigated in Amaranth and ETP are groundless and without merit. In Amaranth, the trader was accused of engaging in a fraudulent scheme with scienter in connection with a jurisdictional transaction. Here, there is no such allegation, merely speculation that the Commission is somehow facilitating coordination of demand- side bidders in order to lower prices.

66. Some commenters argue that demand response providers and generators should both be compensated at the market clearing price only if both are subject to the same market participation rules, penalty structures, testing requirements, and market monitoring provisions. The ISOs and RTOs already consider how to ensure

comparability between demand response and generation in terms of market rules.[133] The Commission agrees that as a general matter demand response providers and generators should be subject to comparable rules that reflect the characteristics of the resource, and expect ISOs and RTOs to continue their evaluation of their existing rules in light of this Final Rule and make appropriate filings with the Commission.

67. Some commenters argue that the Commission should not impose a single pricing rule due to differences in market structure, state regulatory environment, and resource mix among the ISOs and RTOs. While such differences may exist, the commenters have not shown why such differences warrant a different compensation level among the ISOs and RTOs. As discussed above, regardless of the resource mix or the state regulatory environment, demand response, which satisfies the net benefits test described herein and can balance the system, is a cost-effective alternative to generation in the organized wholesale energy markets, and payment of LMP represents the marginal value of a decrease in demand.

[133] See PJM Interconnection, L.L.C., 129 FERC ¶ 61,081 (2009).

B. Implementation of a Net Benefits Test

1. Comments

68. In response to questions that the Commission posed in the Supplemental NOPR, some commenters advocate a net benefits trigger based on a particular price threshold.[134] The NYISO currently has a static bid threshold of $75/MWh in its day-ahead demand response program.[135]

69. However, other commenters assert that using a static threshold based on historical data misses the changes that occur within electricity markets across seasons and years, and that it is erroneous to assume that all demand response occurring above a certain threshold price (for instance, at the very highest loads or highest priced hours) will result in lower costs to wholesale customers and that demand response is not cost-effective at

[134] For example, National Grid states that the threshold could be triggered by a particular price on the supply offer curve at which the additional cost of paying LMP to demand response resources is most likely to be outweighed by LMP reductions in the wholesale energy market as a result of the demand reductions produced by these resources. National Grid May 13, 2010 Comments at 6. Those in favor of a price threshold include National Grid (but allow the ISO or RTO to identify threshold based on analysis); NE Public Systems; NECPUC; ISO-NE (minimum offer price based on fixed heat rate, times a fuel price index); New York Commission (supports ISO-NE's heat rate indexed price threshold).

[135] NYISO implements a day-ahead demand response program by which resources bid into the market at a minimum of $75/MWh and can get paid the LMP. See section 4.2.2.9 ("Day-Ahead Bids from Demand Reduction Providers to Supply Energy from Demand Reductions") of NYISO's Market Services Tariff.

prices below the static threshold price.[136] They argue that a static threshold offer price cannot easily adjust with changing energy market prices which may result in inefficient dispatch of demand resources, excluding demand response participation in hours when demand response can provide beneficial savings and including demand response participation in hours when there are no beneficial savings.[137] The New York Commission supports a dynamic, rather than a static bid threshold, arguing that, while a static bid threshold helps prevent demand response providers from gaming the system by seeking compensation for reducing electricity consumption for reasons other than market prices, it can also limit participation in a demand response program because prices might not exceed the threshold on a consistent basis.[138]

70. In a similar vein, some commenters suggest utilizing a dynamic bid threshold for determining when LMP payment would apply.[139] For example, NECPUC favors use of a dynamic mechanism such as a price threshold based on a preset heat rate of marginal

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[136] Sept. 13, 2010 Tr. 52-53 (Mr. Peterson); Massachusetts AG Oct. 13, 2010 Comments at 23.

[137] Massachusetts AG Oct. 13, 2010 Comments (attachment, Demand Response Potential in ISO New England's Day-Ahead Energy Market, Synapse Energy Economics, Inc. Oct. 11, 2010 at 9). See generally, NECPUC May 13, 2010 Comments at 18.

[138] Id.

[139] National Grid May 13, 2010 Comments at 6; New York Commission May 13, 2010 Comments at 10; Viridity May 13, 2010 Comments at 24. See generally NECPUC, New York Commission; ISO-NE; NSTAR; ACEEE; and NYSCPB Oct. 13, 2010 Comments.

generation and fuel price, like that currently used in New England's Day-Ahead Load Response Program (DALRP),[140] for the ISO-NE control area.[141] National Grid suggests a trigger, determined by each ISO or RTO, using a particular price on the supply offer curve at which the additional cost of paying LMP to demand resources is most likely to be outweighed by LMP reductions in the wholesale energy market as a result of the demand reductions.[142]

71. Still other commenters urge compensating demand response during an ISO- or RTO-defined period of critical high-cost hours in which it is cost-effective to pay LMP. These commenters argue that the effect of demand response on the market clearing price is greatest during a limited number of hours during the year.[143] Therefore, identifying the hours in which to pay LMP to demand response resources could be used as a cost-effective net benefits test with potential savings for ratepayers. According to PJM,

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[140] The DALRP establishes a minimum offer price by approximating the variable cost component, in the form of a fuel cost, of a hypothetical peaking unit sufficiently high enough in the supply stack to ensure net benefits. On a monthly basis, this minimum offer price is reset to reflect the product of an appropriate fuel price index and a proxy heat rate. See NECPUC Oct. 13, 2010 Comments at 15.

[141] NECPUC Oct. 13, 2010 Comments at 14-16; NECPUC May 13, 2010 Comments at 17.

[142] Id. at 5-6.

[143] Maryland Commission May 13, 2010 Comments at 4-5; see generally NSTAR, ACEEE and NYSCPB Oct. 13, 2010 Comments.

further analysis is needed to ascertain the critical high-cost hours in which it will be cost-effective to pay full LMP for demand response.[144]

72. The Consumer Demand Response Initiative (CDRI) proposes a mechanism for determining what demand response resources are cost-effective in any hour.[145] This dispatch algorithm tests whether the money necessary to compensate demand response is less than the cost savings due to the decreased market-clearing price resulting from implementing demand response. In a sense, it is a dynamic cost/benefit analysis built into the dispatch algorithm. This cost/benefit analysis accounts for the billing unit effect. The billing unit effect occurs when demand response resources are dispatched to balance the system; the associated reduction in load results in fewer MWh of realized load (demand) paying for the sum of generator and demand response resource MWh, so load pays an effective rate which is greater than the LMP set to procure resources. Some commenters assert that if the Commission finds that a net benefits test is needed, it should

[144] Maryland Commission May 13, 2010 Comments at 4 n.9.

[145] The approach submitted by CDRI was developed for implementation in the ISO-NE day-ahead energy market. The discussion here is generalized to be applicable to any energy market that uses security-constrained economic dispatch to select the least-cost resources and establish a market-clearing price.

require organized wholesale energy market operators to implement a proposal similar to that submitted by CDRI.[146]

73. Under the proposal submitted by CDRI, the demand response bids are part of the supply stack to which a security-constrained economic dispatch process is applied. All demand response bids that result in a lower price to customers, including consideration of the reduced number of billing units, are selected while those bids that raise the price, as compared to selecting the next generation bid in the supply stack, are not. This dispatch algorithm, as proposed, would be used by the ISO or RTO to determine a revised LMP that would be charged to load. The revised LMP creates a surplus (or over-collection) of revenue for the ISO or RTO that is then distributed to the LSEs through a settlement algorithm with the goal of holding LSEs harmless.[147]

74. During the September 2010 Technical Conference, Dr. Ethier of ISO-NE stated that a dynamic net benefits test done on an hourly basis that examines the effect of the demand response resource on LMPs, similar to that proposed by CDRI, would become

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[146] PIO July 27, 2010 Comments at 6; Massachusetts AG Oct. 13, 2010 Comments at 11; Viridity Oct. 13, 2010 Comments at 2. See CDRI May 13, 2010 Comments for a full description of the algorithms.

[147] CDRI May 13, 2010 Comments Attachment B at 18. CDRI states that the dispatch and settlement algorithms "could be employed to evaluate dispatch and assure customer benefits, without being employed to perform allocations and settlements." CDRI Oct. 13, 2010 Comments at 4.

very complicated to implement and require essentially an iterative process.[148] Dr. Ethier states that the ISO would have to run the dispatch model to formulate a base LMP with no demand response and then re-run it with demand response in the market; however those two iterations alone do not "cover the whole waterfront" in terms of the possible iterations required. According to Dr. Ethier, the ISO could dispatch too much demand response the first time, or if the ISO first rejected dispatching demand response, it may need to go back and dispatch smaller amounts of demand response to determine what would happen to the LMPs. Dr. Ethier stated that it is unclear where the ISO would stop the iteration of testing the impact on LMPs of dispatching demand response.[149] Andy Ott of PJM also stated during the technical conference that implementing a net benefits test would entail an iterative process that would be costly and difficult, if the RTO could even do it.[150]

75. Other commenters do not support the use of a net benefits test, but state that if one is adopted it should be based on general principles that RTOs and ISOs must apply to their systems in determining when LMP payments will apply.[151] A few commenters

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[148] Sept. 13, 2010 Tr. 80-81 (Dr. Ethier).

[149] Id.

[150] Sept. 13, 2010 Tr. 82:16-21 (Mr. Ott).

[151] See generally AEP, Midwest ISO, Occidental, NYISO, Constellation Oct. 13, 2010 Comments.

articulated specific criteria to be used in a net benefits test.[152] AEP believes that the objective of an incentive payment for demand response resources on the basis of broad market benefits can be achieved through a review of the costs and benefits of individual providers. Constellation states that any net benefits test should be based on the difference between the value consumers receive from energy and the cost of energy production.[153]

76. ISO-NE argues that a net benefits test should be based on economic efficiency, the sum of producer and consumer surplus, which suggests that demand response incentives ought to be provided to encourage demand reductions when the cost of energy production exceeds the value of consumption, and to encourage usage when the cost of energy production is less than the value of consumption. ISO-NE further states that a net benefits test that focuses solely on consumer savings ignores the value lost by consumers when energy consumption levels are reduced in response to incentive payments. ISO-NE posits that any variant of a LMP payment should be limited to a very small number of

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[152] See, e.g., Midwest ISO October 13, 2010 Comments at 9-14 and Table 1 (setting forth comprehensive list of benefits and costs of demand response by type of market participants); Occidental October 13, 2010 Comments at 4-5 (any net benefits test must take into consideration offsetting variables, such as higher LMPs in the subsequent periods where demand rebound increases market price, and capacity market price effects); AEP October 13, 2010 Comments at 3-4 (AEP does not recommend the use of a societal benefits component (i.e., health, environment, or employment efforts)).

[153] Constellation October 13, 2010 Comments at 3-4.

high-priced hours to minimize the economic distortions and avoid significant administrative complexities.[154]

77. A few commenters state that policies affecting energy prices will also impact capacity prices because generation owners with fixed costs must raise capacity price offers to remain financially viable at lower energy prices.[155] ISO-NE and Pepco argue, therefore, that the Commission should adopt a net benefits test that considers the impact of demand response compensation on both energy and capacity markets.[156] According to ISO-NE, when considering capacity market impacts under full-LMP compensation, long-term increases in capacity prices in response to suppressed LMPs offset consumer savings and leaves consumers worse off over time.[157] Robert Weishaar of the DR Supporters argues that properly compensating demand response should flatten the load profile and decrease the forecast of load projections, which would reduce capacity clearing prices.[158] Donald Sipe of CDRI adds that to the extent that scarcity revenues are

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[154] ISO-NE Oct. 13, 2010 Comments at 4-5 and 21.

[155] See, e.g., Sept. 13, 2010 Tr. 94:13-22 (Dr. Shanker); Sept. 13, 2010 Tr. 98:4-24 (Mr. Peterson); Sept. 13, 2010 Tr. 99:2-7 (Mr. Sunderhauf); ISO-NE Oct. 13, 2010 Comments at 5.

[156] Sept. 13, 2010 Tr. 99:1-24 (Mr. Sunderhauf); ISO-NE Oct. 13, 2010 Comments at 5.

[157] ISO-NE Oct. 13, 2010 Comments at 6.

[158] Sept. 13, 2010 Tr. 103-104 (Mr. Weishaar).

not sufficient, capacity markets are designed to ensure that a generator's capital costs are recovered; in a forward market that looks ahead as load adjusts, one can see whether a resource is performing or not. For purposes of long-run reliability, he argues, as long as compensation is in the amount that is necessary to induce new investment and reflects market value, the argument that demand response in the bid stack will push out generators is only true if generators are higher priced than the consumer resources that are brought by demand response.[159]

2. Commission Determination

78. For the reasons discussed previously, the Commission is requiring each RTO and ISO to implement the net benefits test described herein to determine whether a demand response resource is cost-effective. More specifically, the Commission is adopting two distinct requirements with respect to the net benefits test. While we find that the integration of the billing unit effect into the RTO/ISO dispatch processes has the potential to more precisely identify when demand response resources are cost-effective, we also recognize and understand the position of several of the RTOs and ISOs that modification of their dispatch algorithms may be difficult in the near term. Given these technical difficulties, we will require to RTOs and ISO to perform (1) the net benefits test described below to determine on a monthly basis under which conditions it is cost-

[159] Sept. 13, 2010 Tr. 106:16-24 (Mr. Sipe).

effective to pay full LMP to demand resources; [160] and (2) a study of the feasibility of developing a mechanism for determining the cost-effective dispatch of demand resources.

79. First we direct each RTO and ISO to undertake an analysis on a monthly basis, based on historical data and the RTO's or ISO's previous year's supply curve, to identify a price threshold to estimate where customer net benefits, as defined herein, would occur. The RTO or ISO should determine the threshold price corresponding to the point along the supply stack for each month beyond which the benefit to load from the reduced LMP resulting from dispatching demand response resources exceeds the increased cost to load associated with the billing unit effect, and update the calculation monthly. The ISOs and RTOs are to determine monthly threshold prices based on historical data. The threshold prices would be updated monthly as new data becomes available and posted on the RTO web site. For example, the RTO should conduct an analysis of supply curves for January through December 2010 to be used as a starting point to establish threshold prices for 2011. Those numbers would be updated monthly during 2011 for significant changes in resource availability and fuel prices, with the process repeated monthly to reflect that

[160] There will be inherent differences in the supply curves determined by each RTO and ISO under the net benefits test required herein due to decisions the RTOs and ISOs must make based on supply data for their regions, the mathematical methods each RTO and ISO chooses to use for smoothing the supply curves, the certainty of changes in supply due to outages in each region, local generation heat rates, and the choice of relevant fuel price indices.

month's data from the previous year.[161] The supply curve analysis should be updated monthly, by the 15th day of the preceeding month in advance of the effective date, to allow demand response providers as well as other market participants to plan, while still reflecting current supply conditions.[162]

80. Based on historical evidence and analysis submitted in this proceeding, the threshold point along the supply stack for each month will fall in the area where the supply curve becomes inelastic, rather than the extreme steep portion at the peak or in the flat portion of the supply curve.[163] In other words, LMP will be paid to demand response resources during periods when the nature of the supply curve is such that small decreases

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[161] The ISOs and RTOs are to select a representative supply curve for the study month, smooth the supply curve using numerical methods, and find the price/quantity pair above which a one megawatt reduction in quantity that is paid LMP would result in a larger percentage decrease in price than the corresponding percentage decrease in quantity (billing units). Beyond that point, a reduction in quantity everywhere along an upward sloping supply curve would be cost-effective.

[162] Thus, the test is to determine where: (Delta LMP x MWh consumed) > (LMPNEW x DR); where LMPNEW is the market clearing price after demand response (DR) is dispatched and Delta LMP is the price before DR is dispatched minus the market clearing price after DR is dispatched.

[163] Supply elasticity is defined as the percentage change in quantity supplied divided by the percentage change in price. When the elasticity is less than or equal to one, supply is considered inelastic. So, for example, in the inelastic portion of the supply curve, a reduction in quantity supplied by one percent will result in more than a one percent decrease in price. Using the terms related to demand response compensation, the billing unit effect (percentage change in quantity supplied) will be more than offset by lower LMP (percentage change in price), thus resulting in lower prices for wholesale load.

in generation being called to serve load will result in price decreases sufficient to offset the billing unit effect. The Massachusetts AG noted that the actual supply stack has locally flat and steep sections at all bid prices. We recognize that the threshold price approach we adopt here may result in instances both when demand response is not paid the LMP but would be cost-effective and when demand response is paid the LMP but is not cost-effective. We accept this result given the apparent computational difficulty of adopting a dynamic approach that incorporates the billing unit effect in the dispatch algorithms at this time.[164]

81. We direct each RTO and ISO to file its analysis as supporting documentation to the accompanying tariff revisions with the Commission on or before July 22, 2011, along with proposed tariff revisions necessary to comply with this Final Rule. The filing should include the data, analytical methods and the actual supply curves used to determine the monthly threshold prices for the last 12 months to show how the RTO or ISO would calculate the curves.[165] The Commission-approved net benefits test methodology must be posted on the RTO or ISO's website, with supporting documentation. The RTO or ISO must also post the price threshold levels that would have been in effect in the previous 12 months. In addition, when the net benefits test

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[164] See supra note 114.

[165] See supra P 6.

becomes effective, the supply curve analysis for the historic month that corresponds to the effective month should be updated for current fuel prices, unit availabilities, and any other significant changes to historic supply curve and posted on the RTO website (for example, the supply curve analysis for the March price threshold would be posted in mid-February). Finally, the supply curve analyses for all months should be updated and posted on the RTO website if a significant change to the composition or slope of the historic monthly curves occurs, such as extended outages or retirements not previously reflected.

82. Some commenters argue that that there would be no need for a net benefits test if demand response resources were paid LMP-G, while others argue that use of a net benefits test otherwise undermines our decision to compensate demand response resources at the LMP. As stated above, the Commission finds that when a demand response resource participating in an organized wholesale energy market is capable of balancing supply and demand in the energy market and is cost-effective, as determined by the net benefits test described herein, that demand response resource should receive the same compensation, the LMP, as a generation resource when dispatched. We see no reason to reduce that compensation simply to avoid the use of the net benefits test that will ensure benefits to load.

83. Nearly every participant in the net benefits panel at the September 13, 2010 Technical Conference agreed that it would be counterproductive to defer to the RTO or

ISO stakeholder process to determine when demand response provides net benefits without explicit guidance from the Commission.[166] We believe that this result, and the guidance provided in this Final Rule will provide for timely improvements to RTO and ISO market pricing for demand response resources participating in organized wholesale energy markets.

84. In addition to requiring each RTO and ISO to construct the net benefits test described herein, the Commission also imposes a second requirement for each RTO and ISO to undertake a study, examining the requirements for and impacts of implementing a dynamic approach to determine when paying demand response resources LMP results in net benefits to customers. We believe that integration of the billing unit effect into RTO and ISO dispatch algorithms holds promise for more accurately integrating demand resources on a dynamic basis into the dispatch of the RTOs and ISOs. In theory, this could help ensure that the cost-effective level of demand response resources is dispatched or scheduled into the organized wholesale energy markets. Given the potential of software enhancements to determine the amount of cost-effective demand response resources purchased in the day-ahead and real- time energy markets, we believe that it

[166] "[G]etting this decision resolved is an impediment to all the other stuff we want to do with price response to demand, and DR generally in our market . . . so until we get through this, we're not going to make much progress . . . the implication of that is if you send something back that leaves a lot of room for debate, it's going to be a while on all those other things." Testimony of Robert Ethier, Vice President, Market Design, ISO-NE, Sept. 13, 2010 Tr. at 136.

would be useful for the Commission to know more about the feasibility of and requirements for implementing improvements to the existing dispatch algorithms. Therefore, we will require each RTO and ISO to undertake a study, either individually or collectively, examining the requirements for, costs of, and impacts of implementing a dynamic net benefits approach to the dispatch of demand resources that takes into account the billing unit effect in the economic dispatch in both the day-ahead and real-time energy markets, and to file the results of their study with the Commission on or before September 21, 2012.

85. ISO-NE and Pepco suggest that the net benefits test also consider the impact of demand response compensation on both energy and capacity markets. However, this Final Rule is focused only on organized wholesale energy markets, not capacity markets.[167] Given the differences in capacity markets among the ISOs and RTOs, the record in this proceeding provides neither a reasonable basis for including capacity market effects in net benefits calculations in the energy markets, nor have ISO-NE and Pepco provided a methodology for taking such effects into account. Indeed, in some

[167] Additionally, the arguments presented for focusing on the effect of demand response compensation in wholesale energy markets on capacity markets were not convincing – that decreases in energy market revenues by generators will be recouped in the form of increased capacity prices. First, they fail to consider how the increased participation by demand resources could actually increase potential suppliers in the capacity markets by reducing barriers to demand resources, which would tend to drive capacity prices down. Second, they did not examine the way in which capacity markets already may take into account energy revenues.

cases, the capacity markets already reflect energy and ancillary service revenue in determining capacity prices.

C. Measurement and Verification

1. NOPR Proposal

86. In the NOPR, the Commission explained that demand response curtailment is a reduction in actual load as compared to the demand response provider's expected level of electricity consumption.[168] The NOPR did not address measurement and verification of demand response.

87. Each RTO and ISO with a demand response program has procedures for the measurement and verification of demand response. These procedures include techniques to establish a customer baseline for each demand response participant. This customer baseline then becomes the basis for measuring the quantity of demand response delivered to the wholesale market. Customer baselines are often based on historic load information, such as an average of five of the last ten comparable days' hourly load profile. Techniques vary among RTOs and ISOs and most have several techniques that may be allowed, depending on the demand response provider's characteristics.[169]

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[168] Demand Response Compensation in Organized Wholesale Energy Markets, FERC Stats. & Regs. ¶ 32,656, at P 1 (2010).

[169] See, e.g., ISO/RTO Council, North American Wholesale Electricity Demand Response 2010 Comparison, under the tab for "Performance Evaluation Methods"

(continued...)

2. Comments

88. Commenters assert that the integrity of a demand response program is heavily dependent on measurement and verification.[170] Some commenters raise the issue that paying LMP in all hours presents a significant challenge to the accurate measurement and verification of demand response.[171] ISO-NE argues that when a market participant schedules demand reductions for many consecutive days, baselines may become stale—no longer reflecting a customer's "normal" electricity usage.[172] ISO-NE goes on to argue that "it is necessary to limit the number of hours or days that a demand resource could clear in the energy market so that the customer's 'normal' load can be estimated" to avoid the potential for manipulation.[173] In the context of the Commission's proposal to pay demand response the LMP in all hours, ISO-NE goes on to advocate requiring

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(http://www.isorto.org/atf/cf/%7B5b4e85c6-7eac-40a0-8dc3-003829518ebd%7D/IRC%20DR%20M&V%20STANDARDS%20IMPLEMENTATION%20COMPARISON%20(20100524).XLS).

[170] Illinois CUB May 14, 2010 Comments at 16-17; Joint Consumers May 13, 2010 Comments at 12; P3 May 12, 2010 Comments at 38; Westar May 13, 2010 Comments at 3.

[171] See, e.g., ISO-NE May 13, 2010 Comments at 32.

[172] Id.

[173] ISO-NE May 13, 2010 Comments at 34. ISO-NE identifies several practices that, in its view, might be deployed by a demand responder to receive payment when it has not, in fact, responded to price. ISO-NE states that observations of such behavior in the Fall of 2007 led it to limit the hours demand response offers could clear the market. Citing ISO New England Inc., Docket No. ER08-538-000 (February 5, 2008 filing). ISO-NE May 13, 2010 Comments at 32-34.

demand response to establish baselines by purchasing energy in the day-ahead market as a way to overcome its concerns with statistical baseline methods.[174] ISO-NE IMM makes similar arguments and recommendations.[175] Westar also appears to support this approach.[176]

89. Similarly, CPower notes that with some baseline methods, paying LMP in all hours could reward demand responders for any shift in demand from the baseline, not just shifting load from high LMP hours to low LMP hours, or could simply shift load from day-to-day in different hours to affect the calculation of actual curtailment, which it labels "checkerboarding." However, CPower believes that the capability of consumption management to shed or shift load for many hours is well into the future, and perhaps not a current concern. CPower also believes that baseline standards along with market monitoring will develop to meet these concerns.[177]

90. ISO-NE IMM asserts that "[if] the Commission adopts any proposal that permits the use of an administrative baseline it should explicitly state that any demand reductions offered into Commission-jurisdictional markets that are not genuine, even if they are the

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[174] Id.

[175] ISO-NE IMM May 13, 2010 Comments at 9-13 and Attachment A.

[176] Westar May 13, 2010 Comments at 3.

[177] CPower May 13, 2010 Comments at 4-5.

result of 'normal' activity . . . may be violations of the Commission's anti-manipulation rules and subject to penalties thereunder."[178]

91. Noting the ongoing efforts by the industry and the North American Energy Standards Board (NAESB) on measurement and verification, EnerNOC takes the view that resolution of customer baseline issues should not delay the issuance of this Final Rule.[179]

92. Finally, some commenters assert that measurement and verification methods should not be standardized, but left to the RTOs and ISOs to reflect the unique features of their individual energy, ancillary services, and capacity markets.[180]

3. Commission Determination

93. The Commission agrees with commenters who assert that measurement and verification are critical to the integrity and success of demand response programs. Without a determination of a demand response provider's expected use of power, the ISOs and RTOs cannot determine whether that provider has in fact reduced its energy

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[178] ISO-NE IMM May 13, 2010 Comments at 14 (footnotes omitted) (ISO-NE MMU also notes that "[i]n assessing whether demand reductions are genuine, allowance should be made for non-performance analogous to a generator's forced outage.").

[179] EnerNOC, Inc. May 13, 2010 Comments at 4.

[180] ECS May 13, 2010 Comments at 3; Indicated New York TOs May 13, 2010 Comments at 2-3; Midwest ISO May 13, 2010 Comments at 17, 21; National Grid May 13, 2010 Comments at 11-12; NSTAR May 14, 2010 Comments at 9; PPL May 13, 2010 Comments at 4.

usage when paid to do so. Towards that end, all the RTOs and ISOs already have measurement and verification protocols for their demand response programs.[181] In addition, we have adopted Phase I standards for measurement and verification published by the North American Energy Standards Board, [182] and have recognized the potential benefits of the continuing NAESB effort to craft Phase II standards with more substantive and consistent wholesale standards for measurement and verification.[183]

94. A number of commenters maintain that compensating demand response resources at the LMP during all hours could make determining baselines for demand response providers exceedingly difficult. However, the impact of our adopting the net benefits test described herein is that the LMP will not be paid to demand response resources in all hours. Accordingly, implementation of this Final Rule would not appear to prevent the determination of appropriate baselines. Nonetheless, we direct ISOs and RTOs to review their current requirements in light of the changes in this Final Rule and develop appropriate revisions and modifications, if necessary, to ensure that their baselines remain accurate and that they can verify that demand response resources have performed. Specifically, we direct each RTO and ISO to include as part of the compliance filing

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[181] See, e.g., PJM Interconnection, L.L.C., 123 FERC ¶ 61,257 (2008).

[182] Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 131 FERC ¶ 61,022 (2010).

[183] Id., at P 32-34.

required herein, an explanation of how its measurement and verification protocols will continue to ensure that appropriate baselines are set, and that demand response will continue to be adequately measured and verified as necessary to ensure the performance of each demand response resource. If necessary, each RTO and ISO should propose any changes needed to ensure that measurement and verification of demand response will adequately capture the performance (or non-performance) of each participating demand response market participant to be consistent with the requirements of this Final Rule.

95. Finally, we agree with ISO-NE IMM that demand reductions that are not genuine may be violations of the Commission's anti-manipulation rules.[184] Allegations of such behavior will continue to be investigated, and when appropriate, sanctions will be brought to bear.

D. Cost Allocation

1. NOPR Proposal

96. In response to the NOPR and September 13, 2010 Technical Conference, many commenters argue that, in order to determine the justness and reasonableness of the proposed compensation level, the corresponding cost allocation must be considered.[185]

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[184] 18 CFR 1.c (2010).

[185] ISO-NE May 13, 2010 Comments at at 39-40; see also May 13, 2010 Comments of: AEP at 6-10; CAISO at 6; ConEd at 2; Hess at 3; ICC at 12; PJM at 8; Potomac Economics at 3; Massachusetts AG at 11; Midwest ISO TOs at 5-6; Midwest TDUs at 13; EEI at 5; NECPUC at 12, 22; NECA at 11; RRI at 6; SDG&G at 3-4.

More specifically, these commenters raise concerns regarding how the costs associated with payment of LMP for demand response will be allocated, or assigned, within an ISO or RTO. Several commenters assert that the issues of cost allocation and net benefits are inherently linked, so that the Commission must address both issues together.[186]

2. Comments

97. Comments reveal five specific methods for cost allocation: (1) assignment of costs to the load serving entity (LSE) associated with the demand response provider, (2) assignment of costs broadly to all purchasing customers, (3) bifurcated assignment of costs with some directly assigned to a LSE and others assigned broadly, (4) directly assign the cost for demand response compensation to the retail customers that bid the demand response into the wholesale market, and (5) the settlement method proposed by CDRI, which incorporates the cost of demand response into the dispatch algorithm. Some commenters argue not for a specific method, but for each regional entity to select and employ a method of its own,[187] and a few other commenters assert that the Commission need not address cost allocation in this proceeding.[188]

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[186] As further addressed below, several commenters assert that the costs of demand response compensation should be borne by only those market participants determined to have benefitted from the subject load reduction, as determined by some type of net benefits test. See, e.g., May 13, 2010 Comments of: ISO-NE at 5-6; NECPUC at 22; PJM at 12-14; P3 at 37-38.

[187] EPSA May 12, 2010 Comments at 67; Midwest TDUs May 13, 2010 Comments at 1; ODEC May 14, 2010 Comments at 5; Potomac Economics May 14, 2010 (continued...)

98. Some commenters argue that costs should be assigned to the LSE associated with the demand response provider because it is this entity that receives the full benefit of demand response.[189] Others argue that costs should be assigned broadly to all purchasing customers because of the concept of cost causation.[190] Cost causation dictates that the costs of demand response should be allocated directly to those entities that benefit from the demand response service provided.[191] Another method presented involves a bifurcated assignment of costs, with some directly assigned to a LSE and others assigned broadly.[192] The fourth method suggested is to directly assign the costs of demand

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Comments at 9-10; RRI May 13, 2010 Comments at 4; SoCal Edison May 13, 2010 Comments at 4 (advocating that the local regulatory authority is the proper entity to regulate cost allocation); Viridity May 13, 2010 Comments at 24; EnerNOC Sept. 13, 2010 Comments at 1; Midwest TDUs Sept. 13, 2010 Comments at 2.

[188] Massachusetts AG May 13, 2010 Comments at 9-10.

[189] PJM May 13, 2010 Comments at 15; Midwest ISO May 13, 2010 Comments at 6; CAISO May 13, 2010 Comments at 6; Detroit Edison May 13, 2010 Comments at 3-4; EEI May 13, 2010 Comments at 5; NUSCO May 13, 2010 Comments at 2; National Grid Sept. 13, 2010 Comments at 2-3; Midwest ISO Oct. 13, 2010 Comments at 4.

[190] NECPUC May 13, 2010 Comments at 22; DC OPC May 13, 2010 Comments at 4; PCA Sept. 10, 2010 Comments at 4; Steel Manufactures Ass'n Sept. 13, 2010 Comments at 5; Ohio Commission Sept. 13, 2010 Comments at 4; Wal-Mart Sept. 14, 2010 Comments at 3.

[191] PJM May 13, 2010 Comments at 9; NECPUC May 13, 2010 Comments at 22; PCA Sept. 10, 2010 Comments at 4.

[192] PJM May 13, 2010 Comments at 12; ISO-NE May 13, 2010 Comments at 5.

response to the retail customer that bid the demand response into the wholesale market.[193] Lastly, the settlement algorithm proposed by CDRI adjusts upward the day-ahead price paid by the customers that participate in the day-ahead energy market to account for these costs.[194]

3. Commission Determination

99. When a demand response provider curtails, the RTO experiences a reduction in load with a corresponding reduction in billing units through which the RTO derives revenue. When the two conditions discussed above are met, however, the RTO must pay LMP to both generators and demand response providers for the resources that clear the energy market. The difference between the amount owed by the RTO to resources, including demand response providers, and the revenue it derives from load results in a negative balance that must be addressed through cost allocation. Therefore, a method is needed to ensure that RTOs and ISOs recover the costs of obtaining demand response.

100. Since the dispatch of demand response resources affects the LMP charged, and will result in a lower LMP, the customers benefitting from that lower LMP depends upon transmission constraints, and the price separation such constraints cause within the RTO.

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[193] DC OPC May 13, 2010 Comments at 4. It concedes that this could be a complex undertaking and would result in billing a retail customer for energy that did not consume. Id.

[194] CDRI, Integration of Demand Response Into Day Ahead Markets (Attachment B), May 13, 2010 Comments at 16.

In some hours in which transmission constraints do not exist, RTOs establish a single LMP for their entire system (a single pricing area) in which case the demand response would result in a benefit to all customers on the system. When transmission constraints are present, however, LMPs often vary by zone, or other geographic areas. Allocating the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response resource reduces the market price for energy at the time when the demand response resource is committed or dispatched will reasonably allocate the costs of demand response to those who benefit from the lower prices produced by dispatching demand response.[195]

101. We reject the various other methods of cost allocation suggested by commenters. Assignment of all costs to the LSE associated with the demand response provider, as suggested by some commenters, would not include others who benefit from the demand response. Bifurcated assignment of costs to the LSE and to others appears to represent an arbitrary division of cost responsibility without regard to the degree to which each receives benefits.

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[195] This approach is consistent with long-standing judicially-endorsed cost allocation principles. See, e.g., Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1368, 1370-71 (D.C. Cir. 2004); see also Illinois Commerce Comm'n v. FERC, 576 F.3d 470, 476 (7th Cir. 2009).

102. We therefore find just and reasonable the requirement that each RTO and ISO allocate the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduces the market price for energy at the time when the demand response resource is committed or dispatched. Accordingly, each RTO and ISO is required to make a compliance filing on or before July 21, 2011 that either demonstrates that its current cost allocation methodology appropriately allocates costs to those that benefit from the demand reduction or proposes revised tariff provisions that conform to this requirement.

E. Commission Jurisdiction

1. Comments

103. Some commenters, including several state commissions and LSEs, express concern about whether and how standardizing demand response compensation in the wholesale market will affect treatment of demand response at the retail level. They assert that the issue of demand response compensation is fundamentally intertwined with retail rates, ratepayer issues, and state jurisdictional concerns.[196] Some commenters note general concerns about the need for federal and state level coordination. They assert that

[196] See, e.g., CAISO May 13, 2010 Comments at 12; PJM May 13, 2010 Comments at 8 (appropriate and efficient demand response compensation may require coordination between the Commission, retail regulatory authorities, competitive retail suppliers, and other RTOs).

many states have taken significant steps to install advanced meters and implement programs to encourage efficient use of energy and that the success of state-level efforts should be a factor in deciding whether and how to implement demand response programs in the wholesale market.[197] According to these commenters, a Commission-mandated compensation level could have the unintended consequence of retarding the expansion of price-responsive demand at the retail level.[198]

104. Other commenters flatly question the Commission's jurisdiction to set the compensation for demand response in wholesale energy markets. They argue that it is within the purview of retail regulatory authorities to take into account local policies and concerns, and the types of demand response being offered, when determining the appropriate compensation level.[199] Indeed, the California Commission seeks clarification

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[197] See ISO-NE IMM May 13, 2010 Comments at 6.

[198] Illinois Commission May 13, 2010 Comments at 8; PJM May 13, 2010 Comments at 23; EEI May 13, 2010 Comments at 4; Capital Power May 13, 2010 Comments at 5; ODEC May 13, 2010 Comments at 60; Steel Producers May 13, 2010 Comments at 2.

[199] See Illinois Commission May 13, 2010 Comments at 13; CAISO May 13, 2010 Comments at 12-13; PJM IMM May 13, 2010 Comments at 5 ("The assertion that demand side participants should be paid full LMP, regardless of their retail tariff rate, because the current approach of paying LMP minus G represents an intervention into retail rate design, cannot be correct. The entire demand side program exists only because of the disconnect between wholesale and retail rates. The assertion that the program design should not account for the details of retail rate design leads to the conclusion that there should be no demand side program at all."); NECPUC May 13, 2010 Comments at 25 ("As energy market customers benefit most from both a well-functioning wholesale

(continued...)

that this Commission does not seek to regulate retail customer rates or seeks LSE oversight authority traditionally exercised by states. The California Commission asserts that this Commission's actions concerning CAISO's Proxy Demand Resource tariff filing[200] illustrates that demand response settlement mechanisms are within the authority of the California Commission.[201]

105. Other commenters foresee retail regulatory authorities effectively taking an end-run around any Commission-mandated compensation level by adjusting retail rate design

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market and robust participation in retail programs, a balance between these two segments is essential. Compensation that increases demand response resource participation in the wholesale market should not be so generous, from the perspective of the customer, that it makes participation in retail programs pale in comparison."); SDG&E, SoCal Edison, and PG&E May 13, 2010 Comments at 4 ("[M]andating that ISOs take on settlement responsibility or precluding any retail settlement between retail customers, LSEs or DRPs would intrude on retail jurisdictional authority and contravenes the premise of separation outlined in Order 719."); Consumers Energy May 13, 2010 Comments at 3; Detroit Edison May 13, 2010 Comments at 4.

[200] See California Independent System Operator Corp., 132 FERC ¶ 61,045 (2010).

[201] California Commission May 13, 2010 Comments at 9-10. 1. See also SDG&E, SCE, PG&E May 13, 2010 Comments at 2 ("[T]he Commission should clarify that its order does not preclude LRAs from administering retail revenue settlements between retail customers, Load Serving Entities (LSEs) and Demand Response Providers (DRPs) associated with DR participation in wholesale markets.").

or prohibiting jurisdictional end-use customers from participating in wholesale market opportunities available to demand response resources.[202] The Illinois Commission argues:

> [W]hen load serving entities are vertically integrated with generation regulated under state authority . . . any non-zero payment to a demand response resource reduces the revenues to generators under the state regulatory authority. The result is a leakage of money to an entity outside of the state's regulatory authority. Therefore, retail rates to all customers may need to be increased in order to recover the costs to generators that would have otherwise been recovered through the purchase of electricity, but instead went to the payment of a demand response resource. Therefore, compensating demand response resources may increase the likelihood that state commissions will prohibit the participation of demand response resources in the jurisdictions.[203]

106. Similarly, PJM states that the prohibition devised by retail regulatory authorities with jurisdiction over smaller distributors that deliver 4 million MWh or fewer per annum

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[202] See PJM May 13, 2010 Comments at 24; PJM May 13, 2010 Comments at 18 (It is reasonable to assume that each retail regulatory authority in PJM will re-examine the impact of load reduction based on wholesale compensation equal to the LMP, including cost allocation, on the LSEs subject to its jurisdiction, and potentially re-align retail market rules affecting economic load response participation.); Delaware Commission and NECPUC May 13, 2010 Comment at 25; OMS May 13, 2010 Comments at 7 (state commissions and LSEs have significant concerns that the potential costs for non-participating customers may exceed the benefits that ARCs can provide to their states and to participating customers, so state commissions will have a significant disincentive to support the participation of ARCs in RTO energy markets and in their states if LMP compensation is adopted).

[203] Illinois Commission May 13, 2010 Comments at 15.

may entail the revocation of previously provided permission to participate in some or all of the wholesale market opportunities for demand resources.[204]

107. Some commenters further posit that, even where retail regulatory authorities do not prohibit or limit demand response participation, they may make adjustments to the retail rate, which affect the ultimate compensation that the retail customer will be paid for its demand reductions.[205] For example, the OMS asserts,

> If the Commission were to adopt the proposed rule, state commissions and LSEs could correct this distorted price signal by revising retail tariffs for customers that do business with [aggregators of retail customers] in order to charge the retail rate to participating customers for energy which was not consumed or metered as a result of load reductions.[206]

108. Another set of commenters, especially generators, assert that due to the disconnect between wholesale and retail issues related to demand response, Commission-mandated payments for demand response will fail to address true barriers to demand response, which exist, they assert, at the retail level. These commenters argue that the Commission's actions in this proceeding ignore the fact that the primary barrier to demand response is the disconnect between retail and wholesale prices and, according to these commenters, the remedy resides at the retail -- not wholesale -- level where there is

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[204] PJM May 13, 2010 Comments at 20-21.

[205] CAISO May 13, 2010 Comments at 4.

[206] OMS May 13, 2010 Comments at 3. See also EEI May 13, 2010 Comments at 4.

a lack of dynamic pricing.[207] For example, some commenters recognize that the lack of retail real-time pricing is a barrier to demand response participation but further assert that whatever changes the Commission makes to wholesale demand response (where there is real-time pricing) will not address that fundamental problem.[208]

109. On the other hand, some commenters, such as commercial customers, wholly reject challenges to the Commission's authority to set the compensation level for demand response occurring in organized wholesale energy markets.[209] They assert that the FPA gives the Commission broad authority to correct market flaws, including compensation for demand response.[210]

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[207] Calpine May 13, 2010 Comments at 3.

[208] See EPSA May 13, 2010 Comments at 7 ("The NOPR incorrectly attempts to resolve retail market barriers to DR participation (i.e., lack of dynamic pricing) through a wholesale pricing fix."); RRI Energy May 13, 2010 Comments at 5 ("The NOPR is essentially trying to use an inefficient wholesale solution to remedy a retail problem. The NOPR does not attempt to address (nor should it attempt to address) the various retail rate structures that demand response providers in various regions of the country face."); The Brattle Group May 13, 2010 Comments at 8 ("[T]he appropriate avoidable retail generation rate is best done through agreements between the LSE and the curtailment service provider under the oversight of the relevant retail regulating authority. This approach . . . avoids requiring the RTO to sort through potentially complicated retail rate structures."); Steel Manufacturers Ass'n May 13, 2010 Comments at 9 ("[T]here is no rational basis for the Commission, or RTOs, to adopting varying demand response participation or compensation rules based on the retail pricing method of otherwise qualified participating loads.").

[209] DR Supporters Aug. 30, 2010 Reply Comments at 4.

[210] Id.

110. Some commenters further argue that any disconnect between wholesale and retail issues relevant to demand response should not negate the Commission's efforts in this proceeding. They argue that dynamic retail pricing, retail shopping opportunities and the potential for retail energy efficiency measures are no substitute for adequate wholesale demand response compensation and the deployment of demand response measures akin to a generator.[211]

111. Moreover, some commenters assert that, while the Commission has authority to establish the compensation level for demand response in the wholesale market, the Commission cannot require subtraction of retail rate components from the LMP rate, reasoning that retail rates reflect a myriad of local concerns beyond the Commission's jurisdiction. These commenters assert that LMP reflects the wholesale value of the demand response service provided and that proponents of the LMP-G formulation (subtracting a portion of the retail rate) seek to draw the Commission into a review of retail rate matters beyond its purview.[212] Additionally, these commenters point to the difficulty of isolating the generation component of the retail rate from other components, such as transmission, distribution, and overhead. They argue that different retail rate contracts reflect different costs of generation, depending on local circumstances existing

[211] Wal-Mart May 13, 2010 Comments at 11.

[212] Viridity June 18, 2010 Comments at 13.

at the time the contract was executed, and that retail rate structures reflect a wide range of competing considerations, such as cost causation, the impact of rate design on employment, and the state of the local economy, all of which are appropriately left to state commissions. These commenters posit that, instead of tailoring the wholesale rate, i.e., LMP, to retail rate conditions, it is better to get the wholesale rate right in the first instance and then allow retail rate structures adjust as needed to wholesale market conditions.[213] According to Dr. Kahn, accounting for the retail rate in this Final Rule would "ignore the proper scope of the Commission's regulatory responsibilities, the fact that the great majority of retail rate designs are economically inefficient and that it is retail rates that should not be permitted to undermine efficient wholesale rates rather than the reverse."[214]

2. Commission Determination

112. We begin by rejecting challenges to the Commission's authority to set the compensation level for demand response in organized wholesale energy markets. Section 205 of the FPA tasks the Commission with ensuring that all rates and charges for or "in connection with" the transmission or sale for resale of electric energy in interstate commerce, and all rules and regulations "affecting or pertaining to" such rates or charges

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[213] Viridity June 18, 2010 Comments at 14.

[214] DR Supporters Aug. 30, 2010 Comments (Kahn Affidavit at 4).

are just and reasonable.[215] The Commission has previously explained that it has jurisdiction over demand response in organized wholesale energy markets, because it directly affects wholesale rates. [216]

113. For this reason, the Commission has jurisdiction to regulate the market rules under which an ISO or RTO accepts a demand response bid into a wholesale market.[217] Furthermore, as discussed above, the Commission's actions in this proceeding are consistent with Congressional policy requiring federal level facilitation of demand response, because this Final Rule is designed to remove barriers to demand response participation in the organized wholesale energy markets.

114. Nevertheless, we recognize that jurisdiction over demand response is a complex matter that lies at the confluence of state and federal jurisdiction. By issuing this Final Rule, the Commission is not requiring actions that would violate state laws or regulations. The Commission also is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response.

115. We acknowledge that many barriers to demand response participation exist and that our ability to address such barriers is limited to the confines of our statutory authority. At the same time, the FPA requires the Commission to ensure that the rates

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[215] 16 U.S.C. 824d (2006).

[216] Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 47.

[217] Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 52.

charged for energy in wholesale energy markets are just, reasonable, and not unduly discriminatory or preferential. The Commission has the authority, indeed the responsibility, to assure that wholesale rates are just and reasonable. Therefore, we disagree with commenters who would have the Commission refrain from acting on demand response compensation in the organized wholesale energy markets because of the potential actions that state retail regulatory authorities may or may not take. As we note above, this Final Rule is not intended to usurp state authority or impede states from taking any actions within their authority. Rather, the Commission is taking action here to fulfill its statutory mandate to ensure just, reasonable, and not unduly discriminatory or preferential wholesale rates.

V. Information Collection Statement

116. The Office of Management and Budget (OMB) requires that OMB approve certain information collection and data retention requirements imposed by agency rules.[218] Therefore, the Commission is submitting the proposed modifications to its information collections to OMB for review and approval in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.[219]

117. OMB's regulations require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection(s) of information,

[218] 5 CFR § 1320.11(b) (2010).

[219] 44 U.S.C. § 3507(d) (2006).

OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

118. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

Burden Estimate and Information Collection Costs: The estimated Public Reporting burden and cost for the requirements contained in the final rule follow.

FERC-516 Data Collection	**Number of Respondents (a)**	**No. of Responses Per Respondent Per Year (b)**	**Hours Per Response (c)**	**Total Annual Hours (d) [a*b*c]**
Compliance filing, including tariff provisions and analysis (one-time filing, due 7/22/2011)	6 (RTOs and ISOs)	1 (one-time filing)	300	1,800 (one-time filing)
Study on	6 (RTOs and	1(one-time	2,000	12,000 (one-

dynamic net benefits approach (one-time filing, due 9/21/2012)	ISOs)	filing)		time filing)
Monthly update to price threshold and web posting (due monthly, starting after the compliance filing due 7/22/2011)	6 (RTOs and ISOs)	12	50	3,600

In Year 1, the following requirements are imposed[220]: (1) compliance filing due on or before July 22, 2011, and (2) monthly updates (for months 5-12, and starting after the compliance filing). The total corresponding burden hours are estimated to be: 1,800 hrs. + (8 filings * 6 respondents * 50 hrs./filing), for a total of 4,200 hours. The corresponding total cost is estimated to be: 4,200 hours * $220/hour, for a total of $924,000.

In Year 2, (a) the monthly update to the price threshold, and (b) the study on dynamic net benefits approach (due on or before September 21, 2012) are imposed. The corresponding total burden is estimated to be 3,600 + 12,000 hours, for a total of 15,600

[220] The one-time study is due on or before September 21, 2012. For the purpose of the burden and cost estimates, we are including all of the burden and cost related to the study in Year 2, although filers may perform part of the work in Year 1.

hours. The corresponding total cost estimate is: 15,600 hours * $220/hour, for a total of $3,432,000.

In Year 3, the monthly update to the price threshold is imposed. The corresponding total burden and cost are estimated to be 3,600 hours and $792,000 (3,600 hours * $220/hour).

Title: FERC-516, "Electric Rate Schedules and Tariff Filings"

Action: Proposed Collections.

OMB Control No: 1902-0096.

Respondents: Business or other for profit, and/or not for profit institutions.

Frequency of Responses: One-time filings for (a) the compliance filing, due on or before July 22, 2011, and (b) the study on dynamic net benefits approach, due on or before September 21, 2012. In addition, monthly updates to the price threshold and web posting will be required starting after the compliance filing.

Necessity of the Information: The information from FERC-516 enables the Commission to exercise its statutory obligation under sections 205 and 206 of the FPA. FPA section 205 specifies that all rates and charges, and related contracts and service conditions for wholesale sales and transmission of energy in interstate commerce be filed with the Commission and must be "just and reasonable." In addition, FPA section 206 requires the Commission, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable, unduly discriminatory or preferential.

119. In Order No. 719, the Commission emphasized the importance of demand response as a vehicle for improving the competitiveness of organized wholesale electricity markets and ensuring supplies of energy at just, reasonable and not unduly discriminatory or preferential rates. This Final Rule addresses the need for organized wholesale energy markets to provide compensation to demand response resources on a comparable basis to supply-side resources when demand response resources are comparable to supply-side resources, so that both supply and demand can meaningfully participate. This final rule establishes a specific compensation approach for demand response resources participating in organized wholesale energy markets, administered by RTOs and ISOs. Each Commission-approved RTO and ISO that has a tariff provision providing for participation of demand response resources in its organized wholesale energy market must: (a) pay demand response resources the market price (full LMP) for energy (when found to be cost-effective as determined by the net benefits test described herein), (b) submit a one-time compliance filing, (c) perform monthly updates to the Price Threshold, and (d) submit a one-time Study on Dynamic Net Benefits Approach.

120. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Ellen Brown, Information Clearance Officer, Office of the Executive Director, e-mail: DataClearance@ferc.gov, phone: (202) 502-8663, fax: (202) 273-0873]. Comments on the requirements of the final rule may also be sent to the

Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments to OMB should be submitted by e-mail to: oira_submission@omb.eop.gov. Comments submitted to OMB should include Docket Number RM10-17 and OMB Control Number 1902-0096.

VI. Environmental Analysis

121. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[221] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this Final Rule under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale subject to the Commission's jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classifications, and services.[222]

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[221] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

[222] 18 CFR § 380.4(a)(15) (2010).

VII. Regulatory Flexibility Act

122. The Regulatory Flexibility Act of 1980 (RFA)[223] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[224] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[225] ISOs and RTOs, not small entities, are impacted directly by this rule.

123. California Independent System Operator Corp. (CAISO) is a non-profit organization with over 54,000 megawatts of capacity and over 25,000 circuit miles of power lines.

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[223] 5 U.S.C. § 601-612 (2006).

[224] 13 CFR § 121.101 (2010).

[225] 13 CFR § 121.201, Sector 22, Utilities.

124. New York Independent System Operator, Inc. (NYISO) is a non-profit organization that oversees wholesale electricity markets, dispatches over 500 generators, and manages a nearly 11,000-mile network of high-voltage lines.

125. PJM Interconnection, L.L.C. (PJM) is comprised of more than 600 members including power generators, transmission owners, electricity distributors, power marketers, and large industrial customers, serving 13 states and the District of Columbia.

126. Southwest Power Pool, Inc. (SPP) is comprised of 61 members serving over 6.2 million households in nine states and has almost 50,000 miles of transmission lines.

127. Midwest Independent Transmission System Operator, Inc. (Midwest ISO) is a non-profit organization with over 145,000 megawatts of installed generation. Midwest ISO has over 57,000 miles of transmission lines and serves 13 states and one Canadian province.

128. ISO New England, Inc. (ISO-NE) is a regional transmission organization serving six states in New England. The system is comprised of more than 8,000 miles of high-voltage transmission lines and over 350 generators.

129. The Commission believes this rule will not have a significant economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

VIII. Document Availability

130. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

131. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

132. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

IX. Effective Date and Congressional Notification

133. This Final Rule will become effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Commission has

determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

By the Commission. Commissioner Moeller dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 35, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

2. Amend § 35.28 as follows:

Add a new paragraph (g)(1)(v).

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(v) Demand response compensation in energy markets. Each Commission-approved independent system operator or regional transmission organization that has a tariff provision permitting demand response resources to participate as a resource in the energy market by reducing consumption of electric energy from their expected levels in response to price signals must:

(A) pay to those demand response resources the market price for energy for these reductions when these demand response resources have the capability to balance supply and demand and when payment of the market price for energy to these resources is cost-effective as determined by a net benefits test accepted by the Commission;

(B) allocate the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduces the market price for energy at the time when the demand response resource is committed or dispatched.

Note: The following appendix will not be published in the Code of Federal Regulations.

APPENDIX

List of Commenters

Alcan Primary Products Corp. (Alcan)
Alcoa Inc. (Alcoa)
Alliance for Clean Energy New York, Inc. (ACENY)
Alliance to Save Energy (Alliance)
American Chemistry Council (ACC)
American Clean Skies Foundation
American Council for an Energy-Efficient Economy (ACEEE)
American Electric Power Service Corporation (AEP)
American Forest & Paper Association (AFPA)
American Municipal Power, Inc. (AMP)
American Public Power Association (APPA)
American Wind Energy Association (AWEA)
ArcelorMittal USA Inc. (ArcelorMittal)
Battelle Pacific Northwest Laboratories (Battelle)
Boston College Law School Administrative Law Class (BC Law)
California Department of Water Resources State Water Project (CDWR)
California Independent System Operator Corporation (CAISO)
California Public Utilities Commission (California Commission)
Calpine Corp. (Calpine)
Capital Power Corporation (Capital Power)
Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities)
Citizens for Pennsylvania's Future (PennFuture)
Coalition of Midwest Transmission Customers (CMTC)
Connecticut Municipal Electric Energy Cooperative (CMEEC)
Consert Inc. (Consert)
Conservation Law Foundation (CLF)
Consolidated Edison Solutions, Inc. (ConEd)
Constellation Energy Commodities Group, Inc. (Constellation)
Consumer Demand Response Initiative (CDRI)
Consumer Power Advocates (CPA)
Consumers Energy Company (Consumers Energy)
CPG Advisors, Inc. (CPG)
CPower, Inc. (CPower)
Crane & Co., Inc. (Crane)
Delaware Public Service Commission (Delaware Commission)

Demand Response and Smart Grid Coalition (Smart Grid Coalition)
Demand Response Supporters (DR Supporters)
Derstine's Inc. (Derstine's)
Detroit Edison Company (Detroit Edison)
Direct Energy Services, LLC (Direct Energy)
Dominion Resources Services, Inc. (Dominion)
Dr. Alfred E. Kahn (Dr. Kahn)
Dr. Charles J. Cicchetti (Dr. Cicchetti)
Dr. Roy J. Shanker (Dr. Shanker)
Dr. William W. Hogan (Dr. Hogan)
Duke Energy Corporation (Duke Energy)
Durgin and Crowell Lumber Co., Inc. (Durgin)
Edison Electric Institute (EEI)
Edison Mission Energy (Edison Mission)
Electric Power Supply Association (EPSA)
Electricity Committee
Electricity Consumers Resource Council (ELCON)
Electrodynamics, Inc. (Electrodynamics)
Energy Curtailment Specialists, Inc. (ECS)
EnergyConnect (EnergyConnect)
Energy Future Coalition (EFC)
EnerNOC, Inc. (EnerNOC)
Environmental Defense Fund (EDF)
Exelon Corporation (Exelon)
Federal Trade Commission (FTC)
FirstEnergy Service Company (FirstEnergy)
GDF SUEZ Energy North America, Inc. (GDF)
Hess Corporation (Hess)
Illinois Citizens Utility Board (Illinois CUB)
Illinois Commerce Commission (ICC)
Independent Power Producers of New York, Inc. (IPPNY)
Indicated New York Transmission Owners (Indicated New York TOs)
Industrial Energy Consumers of America (IECA)
Industrial Energy Consumers of Pennsylvania (IECPA)
Intergrys Energy Services, Inc. (Intergrys)
International Power America, Inc. (IPA)
Irving Forest Products, Inc. (Irving Forest)
ISO New England Inc. (ISO-NE)
ISO-NE Internal Market Monitor (ISO-NE IMM)
Jiminy Peak Mountain Resort, LLC

Joint Consumer Advocates (Joint Consumers)
Limington Lumber (Limington)
Madison Paper Industries (Madison Paper)
Maryland Governor Martin O'Malley (Governor O'Malley)
Maryland Public Service Commission (Maryland Commission)
Massachusetts Attorney General (Massachusetts AG)
Midwest Independent Transmission System Operator, Inc. (Midwest ISO)
Midwest ISO Transmission Owners (Midwest ISO TOs)
Midwest TDUs
Mirant Corporation (Mirant)
Monitoring Analytics, LLC (PJM IMM)
National Electrical Manufactures Association (NEMA)
National Energy Marketers Association (NEM)
National Grid USA (National Grid)
National League of Cities (NLC)
Natural Gas Supply Association (NGSA)
New England Conference of Public Utilities Commissioners (NECPUC)
New England Consumer Advocates (NECA)
New England Power Generators Association Inc. (NEPGA)
New England Power Pool Participants Committee (NEPOOL)
New England Public Systems (NE Public Systems)
New Jersey Board of Public Utilities (NJBPU)
New York Independent System Operator, Inc. (NYISO)
New York Mayor Michael R. Bloomberg (Mayor Bloomberg)
New York State Consumer Protection Board (NYSCPB)
New York State Public Service Commission (New York Commission)
North America Power Partners LLC (NAPP)
Northeast Utilities Services Company (NUSCO)
Northern California Power Agency (NCPA)
NSTAR Electric Company (NSTAR)
Occidental Chemical Corp. (Occidental)
Office of the People's Counsel for the District of Columbia (DC OPC)
Okemo Mountain Resort (Okemo)
Old Dominion Electric Cooperative (ODEC)
Organization of Midwest ISO States (OMS)
Partners HealthCare (Partners)
Pennsylvania Department of Environmental Protection (PA Department of Environment)
Pennsylvania Office of Consumer Advocate (PCA)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
Pennsylvania State Representative Chris Ross (Rep. Ross)

Pepco Holdings, Inc. (PHI)
PJM Interconnection, L.L.C. (PJM)
PJM Power Providers Group (P3)
Potomac Economics, Ltd. (Potomac Economics)
PPL Parties (PPL)
Praxair, Inc. (Praxair)
Precision Lumber, Inc. (Precision)
Price Responsive Load Coalition (PRLC)
PSEG Companies (PSEG)
Public Interest Organizations (PIO)
Public Utilities Commission of Ohio (Ohio Commission)
Raritan Valley Community College (Raritan)
Robert J. Borlick (Mr. Borlick)
RRI Energy, Inc. (RRI)
San Diego Gas & Electric Company (SDG&E)
Schneider Electric USA, Inc. (Schneider)
Southern California Edison Company (SoCal Edison)
Southwest Power Pool, Inc. (SPP)
Steel Manufacturers Association (Steel Manufacturers Ass'n)
Steel Producers (SP)
Tendrill Networks, Inc. (Tendrill)
The Brattle Group
The E Cubed Company, L.L.C. (E3)
University of California, San Diego (UCSD)
Utility Economic Engineers (UEE)
Verso Paper Corp. (Verso)
Virginia Committee for Fair Utility Rates (Virginia Committee)
Viridity Energy, Inc. (Viridity)
Wal-Mart Stores, Inc. (Wal-Mart)
Waterville Valley Ski Resort Inc. (Waterville)
Westar Energy, Inc. (Westar)
Wisconsin Industrial Energy Group (WIEG)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Demand Response Compensation in Organized Wholesale Energy Markets

Docket No. RM10-17-000

(Issued March 15, 2011)

MOELLER, Commissioner, *dissenting*:

While the merits of various methods for compensating demand response were discussed at length in the course of this rulemaking, nowhere did I review any comment or hear any testimony that questioned the benefit of having demand response resources participate in the organized wholesale energy markets. On this point, there is no debate. The fact is that demand response plays a very important role in these markets by providing significant economic, reliability, and other market-related benefits.

However, in a misguided attempt to encourage greater demand response participation in the organized energy markets, today's Rule imposes a standardized and preferential compensation scheme that conflicts both with the Commission's efforts to promote competitive markets and with its statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.[1] For these reasons, I cannot support this Rule.

Standardizing Demand Response Compensation

As an initial matter, RTOs and ISOs currently offer different types of demand response products that vary from region to region and in terms of capability and services offered in the day-ahead and real-time energy markets. Moreover, the RTOs and ISOs to date have been working with their market participants in a stakeholder process to design demand response compensation rules that are tailored to suit the needs of their individual energy markets. However, this will all change once the Rule takes effect and this existing framework is replaced with the requirement that every organized wholesale energy market pay demand resources the market price for energy (LMP) when its demand reductions are, in theory, found to be cost-effective.

[1] 16 U.S.C. § 824d (2006).

As I recognized in my initial statement in this proceeding, organized markets such as the PJM Interconnection have already demonstrated the ability to develop demand response compensation rules. Accordingly, I would have preferred to allow these markets to continue to develop their own rules. Different demand response products will have different values that reflect their varying capabilities and to require a standard payment fails to reflect these meaningful differences.[2]

However, without ever determining that the existing region-by-region approach to compensation is unjust and unreasonable, the Rule implies that the current approach is no longer adequate to ensure that rates remain just and reasonable. In turn, the Rule finds that "greater uniformity in compensating demand response resources" is required and as justification for its action, references the existence of various barriers that limit the participation of demand response in the energy markets.[3] The majority ultimately concludes that these barriers can be removed by better equipping demand response providers with the financial resources to invest in enabling technologies.[4] This is to say that the majority believes that paying demand resources more money will help overcome these barriers and encourage more participation. The Rule, however, never clearly explains how the existence of barriers, in turn, justifies a payment of full LMP to demand resources.

The Rule (like the NOPR) does not sufficiently discuss the need for standardizing compensation across the organized markets or elaborate on how standardization will remove genuine barriers that prevent meaningful participation by demand resources in the energy markets.[5] While the Energy Policy Act of 2005 states that the policy of the

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[2] California Commission May 13, 2010 Comments at 6, "[P]romulgating a uniform national rule at this time may inadvertently impede the implementation of optimal demand response compensation for an individual ISO or RTO which address the needs of that particular region." The California Commission "is concerned that mandatory 'one size fits all' pricing may stifle national and regional efforts to collect valuable data and experience regarding the effects of different demand response program designs on consumer participation and conflict with Congressional objectives."

[3] Rule at P 17, 57-59.

[4] Rule at P 57-59.

[5] Significant barriers do exist which prevent demand response from reaching its full potential. Specifically, 24 barriers were identified in our National Assessment of Demand Response Potential, FERC Staff Report, (June 2009) at 65-67.

U.S. Government is to remove unnecessary barriers to demand response, the statute never authorized the Commission to stimulate increased demand response participation by requiring its compensation to include incentives or preferential treatment.[6] Although, the majority is quick to claim "that removing barriers to demand response participation is not the same as giving preferential treatment to demand response providers...", this is exactly what is occurring in this Rule.[7] As discussed below, the majority's determination is troubling as the Rule both affords preferential treatment to demand response resources and unduly discriminates against them in other respects.

Demand Response Resources are Comparable . . . Sometimes

At the outset, the concept of "comparability" is at the core of this rulemaking, *i.e.*, whether demand response resources are capable of providing a service comparable to generation resources and if so, whether these resources should receive comparable compensation for a comparable service. On this point, I believe they should.[8] This is not to say that a megawatt produced is the same as a megawatt not consumed; they are not perfect equivalents. The characteristics of a megawatt and a "negawatt" are different, both in terms of physics and in economic impact.

Assuming, however, that a demand resource can provide a balancing service that is identical to that of a generation resource, it would make sense that a demand resource providing a comparable service would receive comparable compensation. But this may not occur under the Rule. The majority explains that if a demand resource is capable of providing a service comparable to a generation resource, it will only be eligible to receive comparable compensation, by definition, if it can also be determined that the resource will result in a price-lowering effect to the market by passing a net benefits test.[9]

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[6] See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 965 (2005).

[7] Rule at P 59.

[8] As explained below, I believe that comparable compensation is represented by the value realized by the demand resource for providing a comparable service, regardless of whether the source of that value is a payment from the market or a savings by the resource.

[9] Rule at P 47-50.

In no other circumstance is a resource required to show that its participation will depress the market price in order to receive comparable compensation for a comparable service. [10] Such a definition unduly discriminates against demand resources and as such, this requirement is unjust, unreasonable, and unduly discriminatory.

Overcompensating Demand Resources and the Net Benefits Test

At first glance, the Rule's requirement that RTOs and ISOs pay demand response resources the LMP only when it is deemed cost-effective appears to make sense. There is near-universal agreement that the LMP reflects the value of the marginal unit, and as such, it sends the proper price signal to keep supply and demand in relative balance. Accordingly, the Rule explains that if the demand resource is capable of providing a comparable service and is also cost-effective (*i.e.*, using a net benefits test to ensure that the overall benefit of the reduced LMP that results from dispatching demand recourses exceeds the cost of dispatching those resources), then this resource should be paid the same as a generation resource. However, the decision to pay demand resources the full LMP under such circumstances actually results in overcompensation that is economically inefficient, preferential to demand resources, and unduly discriminatory towards other market resources.

An example may help to illustrate a major flaw with this Rule. Assume that both a generation resource and a demand resource bid into the energy market and both bids are accepted and paid the LMP ($100). Then consider the fact that the demand resource will save an amount that it would have otherwise paid by not purchasing generation at the retail rate ("G"), which is $25. While the Rule requires that RTOs and ISOs pay the demand resource the LMP (which is the identical amount the generation resource receives), the Rule effectively ignores the fact that the demand resource will actually receive a total compensation of LMP+G ($125) as a result of its decision not to consume.[11] Meanwhile, the generation resource will only receive the LMP ($100)

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[10] Testimony of Audrey Zibelman, President and CEO of Viridity Energy, Inc., Sept. 13, 2010 Tr. at 119, "[T]he fact that we're debating this [net benefits test] is somewhat absurd. We have not required any other resource to demonstrate a benefit in order to enter this market."

[11] The proper economic measure of value realized by the demand resource is one where the RTO or ISO makes a reduction from the LMP to account for the retail rate, but then recognizes that the savings associated with the avoided retail generation cost should be added back into the equation, *i.e.*, (LMP-G)+G.

payment as a result of its decision to produce. While the Rule's intent is to ensure that a demand resource receives "the same compensation, the LMP, as a generation resource", this is not the actual result.[12] In this example, what will happen is that the Rule will require that the demand response resource be overcompensated by $25.[13]

The Rule effectively finds that demand resources being compensated at the *value* of full LMP is not enough, so instead requires that demand resource be *paid* the full LMP plus be allowed to retain the savings associated with its avoided retail generation cost. Professor William W. Hogan refers to this outcome as a "double-payment" because demand resources would "receive" both the cost savings from not consuming electricity at a particular price, plus an LMP payment for not consuming that same increment of electricity.[14] Not only is this result not comparable (by valuing a negawatt more than a megawatt) and economically inefficient (by distorting the price signal), but this preferential compensation will harm the efficiency of the competitive wholesale energy markets.

The use of a net benefits test further reduces competitive efficiency and only complicates the issue. As the Rule explains, the net benefits test involves the determination of a threshold price point that is plotted along a historical supply curve in an attempt to accurately calculate whether the cost of procuring additional demand response is outweighed by the value it brings to the market in the form of a lower LMP.[15]

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[12] Rule at P 82. If it were the result, the generation resource would be paid the LMP, $100, and the demand resource would be paid $75 and realize an additional $25 in retail rate savings. Accordingly, both resources realize equivalent compensation valued at $100.

[13] Ohio Commission May 13, 2010 Comments at 6, "[T]he Commission's proposal that RTOs pay demand response resources the full LMP takes the incentives for wholesale demand response resources a step too far. It would provide an incentive to the supplier of a demand response resource that exceeds the payments available to an equivalent supply resource. The Commission should instead focus on removing the existing barriers in the wholesale markets...."

[14] See Attachment to Answer of EPSA, Providing Incentives for Efficient Demand Response, Dr. William W. Hogan, October 29, 2009 (Docket No. EL09-68).

[15] Testimony of Robert Weishaar, Jr., Attorney for Demand Response Supporters, Sept. 13, 2010 Tr. at 46-47, "Administratively constructing an LMP-based break point for compensating Demand Response participation would ignore many other qualitative and

(continued...)

However, this test, which attempts to justify the LMP payment by promising a "win-win" outcome, is nothing more than a fig leaf that provides little protection against the long-term potential for unintended market damage. As recognized by ISO-NE, generation is not dispatched and paid for only when such generation reduces LMP, instead generation is dispatched and paid for only when it is cost-effective.[16] Likewise, logic would require that demand resources be treated similar to generation resources and be similarly cost-effective.

During a technical conference convened to discuss the specific question on the necessity of a net benefits test, the Commission heard testimony from a panel of experts. A clear majority of the witnesses (representing a spectrum of interests that included demand response advocates, economists, generators, and the RTOs and ISOs) argued against the use of a complicated and admittedly imprecise[17] net benefits test.[18] Chief among their concerns was that a net benefits test is unnecessary since the market clearing function in a wholesale market, by definition, serves to guarantee that the resource that clears the market is the lowest-cost resource.[19] Other experts commented that the net benefits test would be complicated, costly to implement, and of little value.[20] Notably, Dr. Alfred E. Kahn, the majority's oft-quoted expert in defense of the full LMP payment, did not opine on the merit of subjecting the LMP payment to a net benefits test.

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quantitative benefits of Demand Response. Focusing only on the LMP impacts of Demand Response is problematic."

[16] ISO-NE May 13, 2010 Comments at 3-4.

[17] Rule at P 80. Recognizing that "the threshold price approach we adopt here may result in instances both when demand response is not paid the LMP but would be cost-effective and when demand response is paid the LMP but is not cost-effective."

[18] Testimony of Donald Sipe, Attorney for Consumer Demand Response Initiative, Sept. 13, 2010 Tr. at 43, "[T]here is probably not a need for a Net Benefits Test. But if one is adopted, it should not be an artificial threshold that can be wrong both ways. It should not be a mechanism that treats DR differently than generation."

[19] Viridity Energy, Inc., Oct. 13, 2010 Comments at 10. See also ELCON Oct. 13, 2010 Comments at 3; and Environmental Defense Fund Comments at 2.

[20] Testimony of Andy Ott, Sr. Vice President, PJM Interconnection, Sept. 13, 2010 Tr. at 19, "[Y]ou have to use caution to actually take a benefits test and apply that to compensation, because you may have unintended consequences."

Further, as explained by Dr. Roy J. Shanker, if the Commission adopted the payment of LMP minus the retail rate ("G"), then there is no need for a net benefits test since the customer is paid the difference between the LMP and what they would have paid under their retail rate, which is their net benefit.[21] He testified that the "Net Benefits criteria is troubling in and of itself, as it explicitly incorporates consideration of portfolio effects caused by the reduced demand on all load payments, versus the economic decision-making of individual market participants pursuing their own legitimate business purpose."[22]

I similarly agree that this test is unnecessary and will only distort price signals by attracting more demand response than is economically efficient.[23] The use of a net benefits test also is troubling in that the Commission's decision can be viewed as somehow equating the concept of a just and reasonable rate with a lower price.[24] However, I recognize that to defend its compensation scheme, the majority needed some proposal that could arguably demonstrate that the cost of paying full LMP to demand resources would be outweighed by the "benefit" of a lower market price.[25] The net benefits test serves this unenviable role.

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[21] Testimony of Roy J. Shanker, Ph.D, PJM Power Providers Group, Sept. 13, 2010 Tr. at 60, "If the Commission adopts the appropriate non-discriminatory pricing for Demand Response, and payment of LMP minus the retail rate in the context of customer that face a fixed retail rate, then there is no need for a Net Benefits test."

[22] Id., Tr. at 61.

[23] EPSA May 13, 2010 Comments at 23. See also May 13, 2010 Comments of APPA at 13; FTC at 9; Midwest TDUs at 14; Mirant at 2; New York Commission at 5; PJM at 6; PSEG at 5; and Potomac Economics at 6-8.

[24] Courts have stated that to be "just and reasonable," rates must fall within a "zone of reasonableness" where they are neither "less than compensatory" to producers nor "excessive" to consumers. Farmers Union Central Exchange v. FERC, 734 F.2d 1486 (D.C. Cir. 1984), cert denied, 469 U.S. 1034 (1984). See also EPSA May 13, 2010 Comments at 19; and ISO-NE at 26-28.

[25] Testimony of Ohio Commissioner Paul Centolella, Sept. 13, 2010 Tr. at 141, "The Net Benefits test reflects a recognition that paying full LMP may over-compensate Demand Response and increase cost to customers."

Relationship to State Retail Regulation

The Rule recognizes that the demand resource will retain the retail rate ("G") as part of the provider's total compensation, but declines to account for this savings citing "practical difficulties" for state commissions, RTOs and ISOs.[26] While the authority over retail rates is properly within the jurisdiction of the state commissions, under the LMP-G equation, the RTO/ISO merely subtracts the retail rate; it does not interfere with the retail rate in any way.[27] Although the Rule refers to the New York Commission's position that subtracting the retail rate would be an "administrative burden" or create "undue confusion"[28], other state commissions disagree and contend that the retail rate can be deducted without any concern about impacting the states' retail jurisdiction.[29]

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[26] Rule at P 63. The RTOs and ISOs uniformly state that compensation which ignores the retail rate will yield uneconomic outcomes and overcompensate the demand resource. Moreover, none of the RTOs or ISOs claimed it would be difficult to subtract the retail rate from the LMP payment. See May 13, 2010 Comments of CAISO at 5-6; ISO-NE at 17-26; Midwest ISO at 6-11; NYISO at 12-16; and PJM at 5-16.

[27] Testimony of Joel Newton, New England Power Generators Ass'n, Sept. 13, 2010 Tr. at 75; "The Commission is getting into a real close area with retail ratemaking as we go through this entire process. For the Commission then to say 'ignore the LSE payment' which is the realm of state commissions, it's almost as you're just hoping that the state commissions will go out and fix it. The state commissions can do that...[b]ut the proper thing to do now is to get the price right at the outset." See also Testimony of Ohio Commissioner Paul Centolella, Sept. 13, 2010 Tr. at 197; "[FERC is] putting the state in the position where if we were to try to get back to an efficient level of incentives, we would be having to in effect issue a charge for energy that was not consumed. We would be doing what would be perceived as a take-back by that customer. And that would put us in a very difficult position."

[28] Rule at P 28. Significantly, the New York Commission "acknowledges the overstated price signal inherent in an LMP-based formula for DR compensation...." "Although we understand that *an LMP demand response compensation formula may result in uneconomic demand response decisions in the markets (i.e., a price signal that exceeds marginal cost)*, it also creates an incentive to participate in DR programs...." New York Commission May 13, 2010 Comments at 5-6 (emphasis added).

[29] Illinois Commission May 13, 2010 Comments at 13, "[I]f tariffs are well designed, controversy over the jurisdictional issue can be avoided. Requiring an ex ante approval of the retail rate to be subtracted from the LMP at the time demand response resources are utilized ...accomplishes this design." See also Indiana Commission

(continued...)

Moreover, the Rule does not conclude that LMP-G would interfere with the retail jurisdiction of the states, but goes as far as to acknowledge the subtraction of G is "perhaps feasible."[30] The fact is that this calculation is quite feasible. Markets such as the PJM Interconnection currently subtract the retail rate portion from the LMP payment and there is no evidence that accounting for the retail rate by making the necessary reduction is either burdensome or interferes with the retail jurisdiction of state commissions.[31]

The Unintended Consequences of Paying Too Much

Today's determination, unencumbered by "textbook economic analysis of the markets subject to our jurisdiction" will undoubtedly have effects, both in the short-term and the long-term.[32] The intended consequence of providing additional compensation to demand resources is that demand response participation will increase in the energy markets. In turn, this additional demand response participation will have the effect of lowering the market price. However, it is at this point where the unintended effects will begin to appear.

With a reduced LMP, the price signal sent to customers will be that the cost of power is cheaper so they may decide to use more power even though the real cost of producing that power is now higher. Such a result turns the concept of scarcity pricing on its head and results in an economically inefficient outcome. Conversely, customers who are demand response providers now stand to receive more than the market price as an incentive to curtail their consumption and will begin to make inefficient decisions about using power.[33] Such inefficiencies will result in customers experiencing a short-

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September 16, 2009 Comments at 3 (Docket No. EL09-68), "LMP-G is an accepted indicator of cost-effectiveness. Therefore, to provide incentive compensation at a level that is above the LMP raises the specter of unjust and unreasonable rates."

[30] Rule at P 63.

[31] See Sections 3.3A.4 and 3.3A.5 (Market Settlements in the Real-Time and Day-Ahead Energy Markets) of the Appendix to Attachment K of the PJM Tariff.

[32] Rule at P 46.

[33] Federal Trade Commission May 13, 2010 Comments at 6, "If customers have to pay the retail price for power they use but pay nothing for power they resell, then they will have incentives to resell power in situations in which it would be more beneficial for

(continued...)

term benefit by way of a lower LMP, but will also impose long-term costs on the energy markets.[34]

The long-term costs of allowing demand resources to receive preferential compensation will manifest themselves in various ways. As noted in my initial statement in this proceeding, the lack of dynamic prices at the retail level is the primary barrier to demand response participation. This Rule does not remedy this barrier and customers who pay fixed retail rates will not benefit from lower wholesale market prices. Meanwhile, at the wholesale level, the corrosive effect of overcompensating demand resources over time will come at the expense of other resources, particularly generation resources that will have less to invest in maintaining existing facilities and financing new facilities.[35]

The Commission's recent progress in promoting competitive wholesale energy markets has the potential to be undone as a result of this well-meaning, but misguided Rule. I believe in the proven value of market solutions and therefore agree with the majority's statement that "while the level of compensation provided to each resource affects its willingness and ability to participate in the market, ultimately the markets themselves will determine the level of generation and demand response resources needed

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society for them to consume it." See also EPSA May 13, 2010 Comments at 23; APPA at 13; FTC at 9; Midwest TDUs at 14; Mirant at 2; New York Commission at 5; PJM at 6; PSEG at 5; and Potomac Economics at 6-8.

[34] PJM's Independent Market Monitor (a/k/a Monitoring Analytics, LLC) Oct. 16, 2009 Comments at 7-8 (Docket No. EL09-68), "Demand side resources are not generation. In a well functioning market, demand-side resources avoid paying the market price of energy when they choose not to consume. This allows customers to make efficient decisions about using power. It also follows that a customer receiving more than the market price as an incentive to curtail will make inefficient decisions about using power, and that this inefficiency imposes a cost rather than providing a benefit to society."

[35] NYISO May 13, 2010 Comments at 15, "[P]aying demand response an LMP-based payment because it is thought that demand response participation will reduce LMPs for all customers is not a sufficient rationale for justifying an 'additional payment' for a favored technology. Demand response is not the only resource able to provide such benefits. However, [other] technologies may be kept out of the market by demand response that would be uneconomic at LMP-G but participates when subsidized at LMP."

for purposes of balancing the electricity grid."[36] That's precisely how markets should work. Price signals will attract resources and new investment when prices are high, and perhaps not so much when prices are low.[37] If the playing field is level, resources can compete to the best of their abilities and efficient, cost-effective market outcomes will result.

As noted earlier, I would have preferred that we allow the regional markets to continue to develop their own compensation proposals. However, I also recognize that returning to a pre-NOPR era would be difficult now that the Commission has signaled a new policy of standardized compensation. Accordingly, if I were to now support any standardization of demand response compensation, it would be the LMP-G approach, which in my opinion, is the only economically efficient outcome for the markets.

Ultimately, the Rule, by requiring demand resources to artificially suppress the market price in order to receive incomparable compensation, will negatively impact the long-term competitiveness of the organized wholesale energy markets.[38] As such, lacking sufficient rationale, I cannot support this Rule as it violates the Commission's statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.

Philip D. Moeller
Commissioner

[36] Rule at P 59.

[37] PJM Interconnection's experience with paying LMP-G for demand response in its energy market provides an example of how market fundamentals properly influence demand resource participation. PJM's Independent Market Monitor recently reported that "[p]articipation levels through calendar year 2009 and through the first three months of 2010 were generally lower compared to prior years due to a number of factors, including lower price levels, lower load levels, and improved measurement and verification, but *have showed strong growth through the summer period as price levels and load levels have increased*. Citing Monitoring Analytics, LLC, 2010 State of the Market Report for PJM at 30 (March 10, 2011) (emphasis added).

[38] Federal Power Act § 205(a), 16 U.S.C. § 824d (2006), "[A]ll rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

TAB 9

Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

Amendment of market rules

33 (1) The IESO shall, in accordance with the market rules, publish any amendment to the market rules at least 22 days before the amendment comes into force. 2004, c. 23, Sched. A, s. 42.

Notice to the Board

(2) The IESO shall give the Board a copy of the amendment and such other information as is prescribed by the regulations on or before the date the IESO publishes the amendment under subsection (1). 2004, c. 23, Sched. A, s. 42.

Board's power to revoke

(3) Despite section 4.1 of the *Statutory Powers Procedure Act* and section 35.1 of this Act, the Board may, not later than 15 days after the amendment is published under subsection (1) and without holding a hearing, revoke the amendment on a date specified by the Board and refer the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

Application for review

(4) Any person may apply to the Board for review of an amendment to the market rules by filing an application with the Board within 21 days after the amendment is published under subsection (1). 2004, c. 23, Sched. A, s. 42.

***Application of* Ontario Energy Board Act, 1998**

(5) Subsection 19 (4) of the *Ontario Energy Board Act, 1998* applies to an application under subsection (4). 2004, c. 23, Sched. A, s. 42.

Review by Board

(6) The Board shall issue an order that embodies its final decision within 120 days after receiving an application for review of an amendment. 2004, c. 23, Sched. A, s. 42; 2017, c. 2, Sched. 10, s. 1.

Stay of amendment

(7) No application for review of an amendment under this section shall stay the operation of the amendment pending the completion of the Board's review of the amendment unless the Board orders otherwise. 2004, c. 23, Sched. A, s. 42.

Same

(8) In determining whether to stay the operation of an amendment, the Board shall consider,

(a) the public interest;

(b) the merits of the application;

(c) the possibility of irreparable harm to any person;

(d) the impact on consumers; and

(e) the balance of convenience. 2004, c. 23, Sched. A, s. 42.

Order

(9) If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order,

(a) revoking the amendment on a date specified by the Board; and

(b) referring the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

TAB 10

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
APPLICATIONS FOR INTERLOCUTORY RELIEF

1993: October 4 / 1994: March 3.

File Nos.: 23460, 23490.

[1994] 1 S.C.R. 311 [1994] 1 R.C.S. 311 [1994] S.C.J. No. 17 [1994] A.C.S. no 17 1994 CanLII 117

RJR-MacDonald Inc., Applicant; v. The Attorney General of Canada, Respondent, and The Attorney General of Quebec, Mis-en-cause, and The Heart and Stroke Foundation of Canada, Interveners on the the Canadian Cancer Society, application for the Canadian Council on Smoking and Health, and interlocutory relief Physicians for a Smoke-Free Canada And between Imperial Tobacco Ltd., Applicant; v. The Attorney General of Canada, Respondent, and The Attorney General of Quebec, Mis-en-cause, and The Heart and Stroke Foundation of Canada, Interveners on the the Canadian Cancer Society, application for the Canadian Council on Smoking and Health, and interlocutory relief Physicians for a Smoke-Free Canada

Case Summary

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control

Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

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Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc. Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and Yves Leboeuf, for the respondent. W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal. Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal. Solicitors for the respondent: Côté & Ouellet, Montreal. Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However,

under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravé cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public

health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of

the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of

Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior

Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

   (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by

some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be

"given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would

seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these

tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance

that the applications for a stay must be dismissed with costs to the successful party on the appeal.

TAB 11

Ainsley Financial Corporation et al. v. Ontario SecuritiesCommission et al.[Indexed as: Ainsley Financial Corp. v. Ontario SecuritiesCommission], 14 O.R. (3d) 280

Ontario Reports

Ontario Court (General Division),

R.A. Blair J.

August 13, 1993

Action No. 92-CQ-26469

14 O.R. (3d) 280 | [1993] O.J. No. 1830

Case Summary

Administrative law — Boards and tribunals — Powers — Ontario Securities Commission — Commission not having jurisdiction to issue policy statement about trading in penny stocks — R.R.O. 1990, Reg. 1015, s. 98(9) — Securities Act, R.S.O. 1990, c. S.5.

Securities regulation — Jurisdiction — Ontario Securities Commission — Commission not having jurisdiction to issue policy statement about trading in penny stocks — R.R.O. 1990, Reg. 1015, s. 98(9) — Securities Act, R.S.O. 1990, c. S.5.

Injunctions — Interlocutory relief — Balance of convenience — Motion to suspend operation of policy statement issued by Ontario Securities Commission — Public interest a factor in measuring balance of convenience — Public interest outweighing interests of private litigants.

The plaintiffs' business was predominantly that of trading in penny stocks. The plaintiffs were registered as "securities dealers" under s. 98(9) of R.R.O. 1990, Reg. 1015, made under the Securities Act. The securities dealer category encompassed traders in securities who did not come within another category such as members of the Toronto Stock Exchange ("TSE") or members of the Investment Dealers Association of Canada ("IDA"). Securities dealers were not members of any self-regulatory organization; the activities of securities dealers were governed exclusively by the Act, its regulations, and by the authority of the Ontario Securities Commission. The Commission, concerned about the widespread use of high pressure and unfair sales practices in the trading of speculative penny stocks in the over-the-counter market, issued Policy Statement 1.10 entitled "Marketing and Sale of Penny Stocks". This policy statement, amongst other things, called for the furnishing of a risk disclosure statement to clients to describe the investment risk of penny stocks, the provision of a suitability statement that stated the investment was suitable for and recommended to the client and the disclosure of the nature and the amount of all compensation payable to the securities dealers. Members of the TSE or IDA were exempt from this policy statement, the rationale being that the policy statement was needed for traders who were not members of a self-regulatory organization with associated compliance and disciplinary mechanisms. The plaintiffs moved for summary judgment in an action for a declaration that the Commission was without jurisdiction to issue the policy statement or, in the alternative, an interlocutory injunction suspending the operation of the policy statement until trial.

Held, the plaintiffs' motion for summary judgment should be granted.

The merits, reasonableness, and need for the policy statement for the trading of penny stocks were not the issues to be determined. The issue for determination was whether the Commission, a creature of statute without

inherent jurisdiction and whose powers were derived exclusively from its statutory mandate, was acting within the mandate provided by the Securities Act. The judicial deference accorded the Commission was qualified by the requirement that the Commission be acting within the scope of its statutory mandate. Here, the policy statement was not a guideline; it was a mandatory or regulatory provision that raised the spectre of disciplinary proceedings for non-compliance. The Act did not provide the Commission with a jurisdiction of a general discretionary nature nor did the Act include an open-ended general "mandating" section. Although in several specific instances the Act gave the Commission a discretion to act in the public interest, there was nothing in the Act that delegated to the Commission a general jurisdiction to regulate the securities industry in the public interest. The public interest jurisdiction provided to the Commission by s. 27 of the Act, which empowered the Commission to discipline registrants, did not provide the jurisdictional foundation for the policy statement since s. 27 required a hearing and was designed for specific cases; s. 27 did not clothe the Commission with authority to make prospective proclamations of general application for all affected registrants. Moreover, the subject matter of the policy statement fell within the regulatory power of the Lieutenant-Governor in Council, but this power had not been delegated to the Commission. When a regulatory field is occupied by the Lieutenant-Governor in Council, the Commission has no authority to adopt measures of a regulatory nature in the occupied area, particularly where the measures have the effect of augmenting or amending what the Act or the regulations say will suffice. Thus, the Commission did not have jurisdiction to issue Policy Statement 1.10 and no facts being in dispute, this was a proper case for the granting of summary judgment.

Had summary judgment not been granted, this would not have been a case for an interlocutory injunction because the public interest was a factor in determining the balance of convenience and this public interest outweighed the interests of the plaintiffs as private litigants.

Cases referred to

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] 2 W.L.R. 316, 119 Sol. Jo. 136 (H.L.); Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458, 65 Alta. L.R. (2d) 97, [1989] 3 W.W.R. 456, 93 N.R. 1, 47 C.R.R. 394n; C.T.C. Dealer Holdings Ltd. v. Ontario Securities Commission (1987), 59 O.R. (2d) 79, 37 D.L.R. (4th) 94, 35 B.L.R. 117 sub nom. Re Canadian Tire Corp., 21 O.A.C. 216 (Div. Ct.); Capital Cities Communications Inc. v. Canada (Canadian Radio-television & Telecommunications Commission), [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, 18 N.R. 181; Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), [1912] 1 Ch. 158 (C.A.); Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commission) (1988), 56 D.L.R. (4th) 95, 32 C.P.C. (2d) 62, [1989] 1 W.W.R. 168, 72 Sask. R. 1 (C.A.); Esquimalt Anglers' Assn. v. Canada (Minister of Fisheries & Oceans) (1988), 21 awT.R. 304; Gordon Capital Corp. v. Ontario Securities Commission (1991), 1 Admin. L.R. (2d) 199 (Ont. Div. Ct.); Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 1 C.P.C. (3d) 248, 83 D.L.R. (4th) 734, 20 R.P.R. (2d) 49 (C.A.); Jones v. Gamache, [1969] S.C.R. 119, 7 D.L.R. (3d) 316; Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., [1941] S.C.R. 573, [1941] 2 D.L.R. 209; Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321, [1987] 3 W.W.R. 1, 87 C.L.L.C. 14,015, 46 Man. R. (2d) 241, 73 N.R. 341, sub nom. Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832; Pezim v. British Columbia (Superintendent of Brokers) (1992), 96 D.L.R. (4th) 137, 66 B.C.L.R. (2d) 257 (C.A.); Pizza Pizza Ltd. v. Gillespie (1990), 70 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.); R. v. Greenbaum, [1993] 1 S.C.R. 674, 79 C.C.C. (3d) 158, 19 C.R. (4th) 347, 100 D.L.R. (4th) 183, 14 M.P.L.R. (2d) 1, 149 N.R. 114; W.D. Latimer Co. v. Ontario (Attorney General) (1973), 2 O.R. (2d) 391, 43 D.L.R. (3d) 58 (Div. Ct.), affd sub nom. W.D. Latimer Co. v. Bray (1974), 6 O.R. (2d) 129, 52 D.L.R. (3d) 161 (C.A.)

Statutes referred to

Broadcasting Act, S.C. 1991, c. 11, s. 5(1)
Canadian Charter of Rights and Freedoms
Penny Stock Act (U.S.)

Securities Act, R.S.O. 1990, c. S.5, ss. 27(1), 70, 74, 104(2) (c), 127, 128, 143, paras. 1, 8, 10, 16, 18, 32
Securities Act, R.S.Q., c.V-1.1, ss. 274, 276
Securities Act, S.B.C. 1985, c. 15

Rules and regulations referred to

Penny Stock Rules (U.S.)
R.S.O. 1990, Reg. 1015 (Securities Act), ss. 98(9), 105
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 20.01

Authorities referred to

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Baawlie, James C. and Alboini, Victor P., "The National Sea Division -- Exploring the Parameters of Administrative Discretion" (1977-78), 2 Can. Bus. Law Jo. 454
Braithwaite, W.J., "Comment on Healy: National Policy Statement No. 41", Law Society of Upper Canada, Special Lectures, 1989, p. 379
Janisch, Hudson N., "Regulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility", Law Society of Upper Canada, Special Lectures, 1989, p. 97
MacIntosh, Jeffrey G., "Excessive Use of Policy Statements by Canadian Securities Regulators" (1992), 1 Corporate Financing, p. 19
Salter, Q.C., Charles, "The Priorities of the Ontario Securities Commission" (1991), 14 O.S.C.B. 2134Shorter Oxford English Dictionary, 3rd ed., p. 1784
Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988), pp. 4-5
Wright, Robert J. (Remarks of), "Ticker Club", October 19, 1990 (1990), 13 O.S.C.B. 4326

MOTION under rule 20.01 of the Rules of Civil Procedure for summary judgment declaring that the Ontario Securities Commission was without jurisdiction to issue a policy statement.

Bryan Finlay, Q.C., J. Gregory Richards and Philip Anisman, for plaintiffs.

John I. Laskin and James Doris, for defendants.

R.A. BLAIR J.

I -- OVERVIEW

These proceedings bring into contention the validity of a policy statement issued by the Ontario Securities Commission and the jurisdiction of the O.S.C. to promulgate such policy statements.

O.S.C. Policy Statement 1.10, with which the Commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

The plaintiffs submit that the policy is invalid. As a result, they ask on this motion for:

(1) an order for summary judgment in the form of a declaration that the Commission is without jurisdiction to issue the policy statement; or, in the alternative,

(2) an interlocutory injunction restraining the Commission from requiring any of the plaintiffs to adhere to the policy pending the trial of the action.

In the action the plaintiffs seek declaratory and related relief, and damages. They submit:

(a) that the policy is invalid because the Commission has no jurisdiction to issue it; and, in the alternative,

(b) that the policy is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and (vi) it is prohibitive in its effect.

II -- FACTS

Securities Dealers

The plaintiffs are registered as securities dealers under the Ontario Securities Act, R.S.O. 1990, c. S.5 (the "Act").

A "securities dealer" is a category of registrant under s. 98(9) of the regulation made under the Act (R.R.O. 1990, Reg. 1015, as amended). Securities dealers are persons or companies that are registered for trading in securities and that engage in the business of trading in securities in the capacity of agent or principal, but who do not come within another category in s. 98 of the regulation. The securities dealer category does not include "brokers", who are members of the Toronto Stock Exchange ("TSE") or "investment dealers", who are members of the Investment Dealers Association of Canada ("IDA"). The registration and examination requirements for securities dealers are the same as those for members of the TSE and the IDA, and securities dealers are entitled to the same trading rights as members aw those organizations.

There is, however, no statutory or regulatory requirement that securities dealers be members of a self-regulatory organization such as the TSE or IDA. No such organization exists for securities dealers. Thus, they are governed exclusively by the provisions of the Act, the regulation and the regulatory supervision of the Commission.

While there are approximately 64 securities dealers registered in the province, only the plaintiffs (and one other company which is not affected by the policy) are engaged predominantly in the business of dealing in the trading of penny stocks. Consequently, it is the plaintiffs which are primarily affected by the promulgation of the policy, and, indeed, there seems to be little controversy that it is the activities of the plaintiff securities dealers which the policy is intent upon reaching.

Policy 1.10

Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The Commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the policy

Policy 1.10 was developed by the Commission as a result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the Commission in this respect.

The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> PURPOSE OF THIS POLICY
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.
> This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

In a section entitled "Appropriate Business Practices", the policy states:

> The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

> (1) the furnishing of a risk disclosure statement to the client -- in Form 1, attached to the policy -- together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment;

and,

before any order to purchase a penny stock can be accepted,

(2) the provision of a suitability statement in Form 2 (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and,

(3) the return of the suitability statement, signed by the client, to the securities dealer; and thereafter,

(4) an agreement between the client and the securities dealer with respect to the price of the penny stock to be purchased.

In addition, Policy 1.10 provides:

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; and,

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

Only one risk disclosure statement is called for -- "prior to effecting the first transaction in a penny stock with a client" -- and a suitability statement "need not" be provided to or executed by a client after two transactions in penny stocks and the client's election not to have any further suitability statements provided.

Risk disclosure statement

Form 1, the risk disclosure statement, is essentially a warning to those contemplating an investment in penny stocks, a "red flag", as it were. It states in bold block capitals that "THERE ARE SIGNIFICANT RISKS ASSOCIATED WITH INVESTING IN PENNY STOCKS", and explains under seven different heading the various ways and areas in which this is so, concluding with the bolded admonition in upper case letters: "REMEMBER IF YOU CANNOT AFFORD TO LOSE YOUR INVESTMENT YOU SHOULD NOT BE INVESTING IN PENNY STOCKS".

Suitability statement

Form 2, the suitability statement, is more complex and a greater source of concern and object of attack by the plaintiffs. Part A consists of a client information section to be completed by the salesperson. Part B is a suitability recommendation, also to be completed and signed by the salesperson, to the effect that the investment is suitable for and recommended to the client. Part C, entitled "Dealer Compensation", contains information for the client as to whether the dealer is acting as agent/principal and as to the details of all compensation or remuneration to be received. Finally, Part D, to be completed and signed by the client, is the client acknowledgement stating that the client,

a) has received a copy of the penny stock risk disclosure statement;

b) has reviewed the client information set out and that it is accurate;

c) has reviewed the suitability recommendation and dealer compensation set out and agrees to purchase the stock in question "subject to agreement with respect to the price of [the securities]".

Exemptions

Policy 1.10 is to apply to all trades in penny stocks (as defined under the policy) conducted by securities dealers who are not members of the TSE or the IDA. There are some other exemptions, but they are not relevant. The Commission reserves to itself the right to determine, on what appears to be a transaction-by-transaction basis, that the practices need not be adopted.

The rationale for the exemption of members of the TSE and the IDA from the provisions of the policy is that they are members of self-regulatory organizations, whereas the plaintiffs are not. Accordingly, the plaintiffs are not subject to the wide array of compliance, investigation, enforcement, disciplinary and other rules, regulations, policies and by-laws of such self-regulatory organizations.

The plaintiffs submit, on the other hand, that members of the TSE and IDA compete with them in the sale of penny stocks. They argue that the policy is targeted at them, the plaintiffs, for the purpose of putting them out of business or, at least, of driving them into the arms of the TSE or the IDA. Indeed, one of their group, A.C. MacPherson, is not a plaintiff because it has already made application to become a member of the IDA. In support of this contention, the plaintiffs point to the acknowledgement of the Commission itself that such an eventuality is likely. The Commission's minutes of November 19, 1991 reflect that staff was instructed to obtain an outside legal opinion on the Canadian Charter of Rights and Freedoms implications "of an approach which would have a disproportionate adverse impact upon a particular segment of the industry". In addition, the Commission minutes of July 14, 1992, noted "that the Policy could be expected to prompt broker-dealers to apply to become members of the TSE and the IDA".

Review of the Penny Stock Industry by the Commission

The Commission argues that Policy 1.10 is a reasonable response to a continuing incidence of investor complaints and mounting evidence of abusive and unfair sales practices employed by securities dealers. Staff and the Commission conducted a comprehensive review of the penny stock industry in Ontario. This examination included, amongst other things:

a) a review of recent court and Commission decisions involving abusive or unfair practices in the sale of penny stocks by securities dealers;

b) a systematic review of investor complaints;

c) interviews of investors who had lodged complaints, and of registered salespersons formerly employed by securities dealers;

d) a study of the regulatory response in the United States to abusive sales practices in the penny stock industry, including meetings with officials of the S.E.C. and including an examination of the provisions of the U.S. Penny Stock Act enacted by Congress and the U.S. Penny Stock Rules arising thereunder; and,

e) meetings with representatives of various groups in the securities industry.

With the completion of this review, the Commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, had concluded that these abuses were centred in the practices of the plaintiff securities dealers. It set out to remedy the situation for the reasons and in the manner outlined above.

III -- LAW AND ANALYSIS

Role and Jurisdiction of the O.S.C.

General

The Ontario Securities Commission is a creature of statute. Whatever power and authority it has must be derived from that source: see, for example, R. v. Greenbaum, [1993] 1 S.C.R. 674 at pp. 687-89, 79 C.C.C. (3d) 158; Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988), at pp. 4-5.

As a statutory tribunal, the Commission has no inherent jurisdiction. Under the Ontario Securities Act, it has no statutory jurisdiction of a general discretionary nature, nor is there any general "mandating" section of a sweeping nature anywhere in the Act. The Commission has a discretionary jurisdiction, to be sure -- and a broad one, at that -

- but its discretionary powers are to be found in a myriad of specific sections, each delegating to the Commission a particular task in the exercise of its regulatory function in the securities industry.

The role of the O.S.C. under the Act, in general terms, is to protect the investing public and to preserve the integrity of the capital markets in Ontario: see, for example, Gordon Capital Corp. v. Ontario Securities Commission (1991), 1 Admin. L.R. (2d) 199 (Ont. Div. Ct.) at p. 208, per Craig J. In W.D. Latimer Co. v. Ontario (Attorney General) (1973), 2 O.R. (2d) 391, 43 D.L.R. (3d) 58 (Div. Ct.), affirmed sub nom. W.D. Latimer Co. v. Bray (1974), 6 O.R. (2d) 129, 52 D.L.R. (3d) 129 (C.A.), Wright J. (in the Divisional Court) described the Commission's mandate as follows (at p. 393):

> The Commission exists by virtue of the Securities Act, as amended by 1971, Vol. 2, c. 31. It can be said generally that it is the public agency charged by that statute with specific duties in relation to securities offered to or traded by the public in Ontario. The statute and the Regulations made under it give wide and strong powers of registration, administration, regulation, and investigation to the Commission with regard to securities, stock exchanges, dealers, salesmen, underwriters, promoters, advisers, offerings to the public, take-over bids, company practice, insider trading, financial disclosure and like matters.
> I propose to set out the provisions of the Securities Act which particularly concern the actions of the Commission here before us. Before doing so I should state my conclusion from all the terms of the Act that the Commission has been given very wide powers and immunities and very heavy responsibilities and very broad discretions to control those who seek the money of members of the public for securities or who deal in or are concerned with them. The Securities Act and the Commission are to protect the investing public in Ontario from grave and pressing perils clearly apprehended by the Legislature and calling for potent and unorthodox measures of control and protection.

(Emphasis added)

These statements, and judicial pronouncements in a host of other decisions, make it abundantly clear that within its discretionary bounds the Commission and its decisions are to be accorded great curial deference. The exercise of its discretionary authority will not be interfered with unless it has been wielded in a fashion which fetters the application of the discretion, and provided it has been exercised in good faith, with an obvious and honest concern for the public interest and with evidence to support its opinion: C.T.C. Dealer Holdings v. Ontario Securities Commission (1987), 59 O.R. (2d) 79 (Div. Ct.) at pp. 95-98, 37 D.L.R. (4th) 94 at pp. 110-13.

The special regulatory character of securities commissions and their paramount obligation to protect the public was commented upon by the Supreme Court of Canada in Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301 at p. 314, 57 D.L.R. (4th) 458 at p. 467, where L'Heureux-Dubé J. said:

> Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in Gregory & Co. Inc. v. Quebec Securities Com'n (1961), 28 D.L.R. (2d) 721 at p. 725, [1961] S.C.R. 584 at p. 588, where Fauteux J. observed:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere, from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

To attract such judicial deference and to be insusceptible of attack in the courts, however, the Commission must be exercising a public interest discretion entrusted to it by the Act or the regulations. It must be acting within the scope of its statutory mandate. The question for determination in this case is whether it is doing so in the promulgation of Policy 1.10.

> I have concluded that it is not.

Policy 1.10 states that it "is intended to inform interested parties that the Commission will be guided by [the] Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario". These two sources would appear to be the jurisdictional underpinnings relied upon by the Commission in support of its authority to issue the policy, although in argument Mr. Laskin stated, on behalf of the Commission, that the Commission did not seek to rely upon s. 27(1) for that purpose.

In my opinion, the jurisdictional foundation for Policy 1.10 cannot be erected on either footing. The public interest jurisdiction of the Commission under s. 27(1) of the Act does not support the promulgation of what is, in effect and by its own language, a regulation. The general public interest jurisdiction on which the Commission purportedly relied, does not exist.

Is there a need for the policy?

Before pursuing this jurisdictional inquiry further, I pause to make the following, perhaps extraneous, observation. In concluding, as I have, that the Commission has exceeded its jurisdiction in issuing Policy 1.10, I am not meaning to suggest there may be no need for some sort of investor protection such as the measures provided for in it. There may, indeed, be such a need.

Much was made by the plaintiffs, in argument, of the nature and perceived frailties of the "evidence" relied upon by the Commission in making its determination to issue the policy statement and in devising the contents of that policy. I am satisfied, however, that the information which the Commission had before it, in its various forms, amply justified its concern and was adequate for the Commission's purposes in triggering the Commission's desire to act.

What is at issue here is not whether what the Commission proposes to do by way of Policy 1.10 is, or is not, a good idea. The issue is whether it has the jurisdiction to do what it purports to have done.

Does the O.S.C. possess a general public interest jurisdiction?

In arriving at my determination that the Commission has no general jurisdiction to regulate the securities industry in the public interest, I have considered carefully the various provisions of the Securities Act and the regulations made thereunder.

In a number of specific instances, in addition to s. 27(1), the legislature has delegated to the Commission a discretion to act in the public interest. For example, the Commission may grant exemptions from prospectus requirements and from the requirements of Part XX dealing with take-over and issuer bids "where it is satisfied that to do so would not be prejudicial to the public interest" (ss. 74 and 104(2)(c)). It may order that the continued distribution of securities under a prospectus cease (s. 70) or that trading in a security cease (s. 127), each on a public interest basis. Finally, the Commission has the important power to order that various exemptions granted under the Act do not apply (s. 128) where, in its opinion, it is in the public interest to do so.

None of these provisions can support the jurisdiction to promulgate Policy 1.10, however.

There is nothing in the Act or the regulations which delegates to the Commission a general jurisdiction to regulate the securities industries in the public interest. Nor is there even a broad-sweeping mandating section of the sort found, for example, in the Quebec counterpart to Ontario's legislation.

In Quebec, s. 276 of the Quebec Securities Act, R.S.Q., c. V-1.1, declares:

> 276. The function of the [Quebec Securities] Commission is
>
> (1) to promote efficiency in the securities market;
>
> (2) to protect investors against unfair, improper or fraudulent practices;
>
> (3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaged in the distribution of securities and of the securities issued by these persons;

> (4) to define a framework for the professional activities of persons dealing in securities, for associations of such persons and for bodies entrusted with supervising the securities market.

(Emphasis added)

In addition, s. 274 of the Quebec statute permits the Quebec Securities Commission to draw up policy statements defining the requirements following from the application of s. 276, within its discretionary powers.

Nor does the O.S.C. possess the rule-making power entrusted by Congress to its U.S. counterpart, the S.E.C.

Section 5(1) of the Broadcasting Act, S.C. 1991, c. 11, which provides that the Canadian Radio-television and Telecommunications Commission "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)", is an example of an open-ended mandating provision of the sort which the Ontario Securities Act does not contain. It was in the context of this wide mandate under the old Broadcasting Act that the Supreme Court of Canada upheld a CRTC policy statement in Capital Cities Communications Inc. v. Canada (Canadian Radio-television & Telecommunications Commission), [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

In Capital Cities Communications, the appellants alleged an excess of jurisdiction because the CRTC's decision which was under attack had been based on a policy statement and not on law or regulation. Chief Justice Laskin framed the question for the court in this fashion, at p. 170:

> The issue that arises therefore is whether the [CRTC] or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only ad hoc in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?

The Chief Justice answered that question in the negative as follows (at p. 171):

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act [now s. 5(1)], objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

(Emphasis added)

The Commission relies heavily on this authority in support of its position that it possesses a broad power to implement policy statements in the exercise of a general public interest jurisdiction, even in the absence of a specific provision in its constating legislation, or the regulations thereunder, to that effect. There are a number of distinguishing features between the two situations, however. The first is that the Securities Act does not contain any broad mandating section like s. 5 of the Broadcasting Act, as I have already noted. The second is that Policy 1.10 is not a "guideline", in my view; it is a mandatory requirement of a regulatory nature. The third is that the CRTC policy statement had been arrived at after extensive hearings involving the interested parties, which is not the case here. I do not find, in the Capital Cities Communications decision, authority for the proposition that the O.S.C. has the jurisdiction to proclaim policy statements like Policy 1.10 in the absence of specific statutory authority to do so.

Policy 1.10: Its mandatory and regulatory nature

In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.

The policy is not simply, as it purports to be, "a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the sale of penny stocks", focusing in that respect on the use of two forms, namely the risk disclosure statement and the suitability statement. Its effect is to impose a positive obligation upon securities dealers to follow those practices, thus creating their status as "appropriate practices". Failure to comply raises the spectre of disciplinary proceedings. The juxtaposition between the statement of the Commission's belief that the business practices set out in the policy should be adopted in the public interest -- to be found in the section of the policy entitled "Purpose of the Policy" -- and the reference to the draconian powers of the Commission under s. 27(1) of the Act -- in the same paragraph -- is telling in this respect.

This is regulation of the conduct of those engaging in the business of trading in penny stocks. Whatever the desirability of such regulation may be, the O.S.C. simply does not have the statutory mandate to regulate in such a fashion.

Very revealing as to the regulatory intention of Policy 1.10 is its wording in the final paragraph of the section outlining the purpose of the Policy. I repeat the final paragraph here. It states:

> This Policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

(Emphasis added)

As the notice announcing the issuance of Policy 1.10 on March 25, 1993 states, the policy "contemplates that, except in specified circumstances, a penny stock risk disclosure statement will be provided. . . and that a written suitability statement will be obtained" (emphasis added).

Both the notice and the policy go on to provide that in certain circumstances the contemplated business practices "need not be adopted", implying, at least, that save for the exceptions, those business practices "need" (i.e., "must") be adopted. Indeed, under the heading "Appropriate Business Practices" the Commission states flatly its conclusion "that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks". Having enunciated such a position, in what conceivable circumstances could the Commission resile therefrom and conclude "on the particular facts and circumstances of each case" -- which it says it will continue to consider -- that the failure to comply with such business practices did not contravene the public interest? When I asked counsel for the Commission for an example of such a circumstance, no answer was forthcoming.

Confirmation of the mandatory nature of the policy may be found in the approach of the Commission staff towards its implementation. In the Staff Report to the Commission, prior to the announcement of the policy, the following passage is found:

> We believe that the key to the success of the Policy in significantly reducing the unfair sales practices by broker/ dealers in the sale of penny stocks is strict enforcement of its terms and provisions. The Policy provides a framework for enabling staff of the Commission to verify that broker/ dealers are complying with their know-your-client and suitability obligations as well as their obligation to deal fairly, honestly and in good faith with their clients. In this regard it is recommended that the Compliance Unit conduct regular unannounced spot checks of the various broker/dealers to determine that suitability statements are being completed in compliance with the requirements of the Policy.

(Emphasis added)

To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

Section 27(1) and the public interest

The Commission has very broad powers to discipline and to sanction errant registrants. These are found in s. 27 of the Act, which provides as follows:

> 27(1) [Suspension, cancellation, etc.] The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest.

Section 27(1) contains the disciplinary teeth for the Commission's regulatory role under the Act and regulations. It is beyond dispute that the Commission is entitled to particular judicial deference and "a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants. . . under subs. [27(1)] of the Act": see, Gordon Capital Corp. v. Ontario Securities Commission, supra, at pp. 208 and 211. Speaking on behalf of the Divisional Court in that case, Craig J. said (at p. 211):

> There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion: Ontario (Securities Commission) v. Mitchell, [1957] O.W.N. 595, at p. 599. . . . . .
> The scope of the OSC's discretion in defining "the public interest" standard under subs. 26(1) [now s. 27(1)] is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public . . .

In spite of all of this, however, s. 27(1) cannot provide the jurisdictional foundation for a policy statement such as Policy 1.10. It requires a hearing. No hearing was held. Indeed, one of the complaints of the plaintiffs in the action is that they were not consulted in any meaningful way, whereas others who would have been affected by the proposed policy -- their competitors, the plaintiffs say, the registered brokers and investment dealers -- were consulted (and, as an aftermath of the consultation, exempted from the dictates of the policy).

Even if the Commission had purported to hold a hearing under s. 27(1) for purposes of entertaining submissions regarding the promulgation of the policy, the section and the hearing would not support the jurisdiction for the policy, in my opinion. The Commission's discretionary jurisdiction under s. 27(1) is grounded in the consideration of specific cases. As Craig J. said in Gordon Capital, quoted above: "It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest". It is in that context in which the Commission's public interest discretion under this provision of the Act, and the broad latitude and judicial deference which the exercise of that discretion is afforded, must be considered. Section 27(1) does not clothe the Commission with authority to make prospective proclamations of general application for all affected registrants.

Policy 1.10 is regulatory in nature. Its effect is to set up what are tantamount to mandatory requirements, as I have outlined above. It contemplates -- with the sort of vigorous enforcement support called for in the staff report referred to earlier -- that two specific type of forms "will be" utilized by the affected securities dealers and that certain specific information "must be" provided to investors prior to taking an order for the purchase of penny stocks. Included in the "guide" as to the disclosure of information regarding the securities dealer's compensation are instructions as to how the mark-up aspect of that remuneration is to be calculated.

To "regulate" is "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions", and "regulation" is "the act of regulating": The Shorter Oxford English Dictionary, 3rd ed., p. 1784. Policy 1.10 is regulation.

Even if the Policy is not mandatory in its nature, as I have concluded, but simply issued "as a guide" which is "intended to inform interested parties that the Commission will be guided by [it] in exercising its public interest jurisdiction under subsection 27(1) of the Act", it still constitutes regulation, or is tantamount thereto, in my view. In either case it is clear that a failure to meet the "expectations" of the policy will attract disciplinary procedures under the Act, or at least carries with it the threat or intimation of such proceedings. Neither those whose activities in the securities industry are the object of the policy, nor their advisors, are likely to lose sight of the reality of the situation. The mere existence of such a state of affairs is a very effective weapon in the regulator's arsenal, of course.

It may be said -- as the general section of the O.S.C.'s published collection of policy statements says -- that "O.S.C. Policy Statements do not have the force of law and are not intended to have such effect". In the case of Policy 1.10, however, its language, its contents and its effect, make such a statement meaningless. Moreover, the same section goes on to say -- in the same passage as that cited above -- that the policy statements "are intended to set forth certain basic policies of the Commission relating to securities regulation in the Province of Ontario and the role of the Commission with respect thereto and accordingly the Commission expects issuers to comply with the O.S.C. Policy Statements unless compliance is waived" (emphasis added).

The difference between something that is intended to have the force and effect of law, and something that is merely expected to be complied with unless compliance is waived by the agency proclaiming it, is a mystery to me.

The securities industry is a highly regulated area of endeavour. Provincial and federal legislation, and regulations made under such legislation, weave an intricate -- and very necessary -- web of legislative and administrative supervision and control over the industry. Ontario's Securities Act occupies about 90 pages of the Carswell compilation. Regulation 900, with Forms and amending regulations occupies 321 pages! Of these, Reg. 900 itself takes up 93 pages and the Forms about 185. In short, the securities industry is governed by a carefully balanced blend of legislative edict, regulatory standards, and delegated administrative authority. The division of authority in different ways is not accidental.

In an interesting article entitled "The Excessive Use of Policy Statements by Canadian Securities Regulators", published in (1992), 1 Corporate Financing 19, an industry periodical, Professor Jeffrey G. MacIntosh emphasized this dichotomy. At p. 20 he wrote:

> It is vitally important to recognize, however, that the "public interest power" was never intended to be, nor could it logically be construed to be unlimited in nature. Had the legislature intended it to be unlimited, then it need not have troubled itself with the task of devising a Securities Act. The Ontario legislature, for example, need only have created the Ontario Securities Commission, ceded to it plenary powers, and instructed it to act "in the public interest". It need not have outlined in great detail precisely that which the Lieutenant Governor in Council can (and, implicitly, that which he cannot) do to add the statutory rules by way of regulation. That the provincial legislatures have both created legislative law and limits to regulatory powers is not merely accidental.
> While is it clear that the ability to act remedially "in the public interest" cedes some residual discretionary authority to the regulators, it was obviously the intention of the legislature not to delegate to the Ontario Securities Commission the power to make substantive law of a legislative or regulatory character. Indeed, had the legislature wished to do so, it could have easily accomplished that objective by giving the OSC rule-making authority like that possessed by the SEC in the United States. However much this might be a good idea, it has not been done. It is thus impossible to escape the conclusion that policy statements must not be used [to] create substantive legal requirements of a legislative or regulatory character. Any other conclusion would be inconsistent with the Rule of Law.

(Emphasis added)

I agree with this statement.

The Ontario Securities Commission is the regulator of the securities industry, but it is not empowered to make the regulations. That power has been delegated by the legislature to the Lieutenant Governor in Council by the Act. Under s. 143 of the Act, the Lieutenant Governor in Council is granted the power to make regulations. The subject matter of Policy 1.10 falls directly within several of these regulation-making areas. It deals, for instance, with "the furnishing of information to the public. . . by a registrant in connection with securities or trades therein": s. 143, para. 8. It involves regulation of "the trading of securities" in the over-the-counter market (i.e. "other than on a stock exchange recognized by the Commission"): para. 10. It prescribes "documents,. . . statements, agreements and other information and the form, content and other particulars relating thereto that are required to be filed, furnished or delivered" and prescribes "forms for use under [the] Act and the regulations" (s. 143, paras. 16 and 18). Finally, it encompasses matters "respecting the content and distribution of written, printed or visual material. . . that may be distributed or used by a person or company with respect to a security whether in the course of distribution or otherwise" (s. 143, para. 32).

Where the legislature has intended a regulation making power to be delegated to the Commission, it has expressly said so. For example, in para. 1 of s. 143, the Lieutenant Governor in Council is entitled to make regulations "prescribing categories. . . and the manner of allocating persons and companies to categories, including permitting the Director to make such allocations". Under para. 37 of the same section, regulations may be made permitting the Commission or the Director to grant exemptions from the various provisions of the regulations. In s. 105 of the regulation itself, the Commission is authorized to "prescribe conditions of registration" after holding a hearing to afford an opportunity for those affected by the proposed conditions to be heard (it has apparently chosen not to follow this route in paving the way for the introduction of the policy). Nowhere, however, is the Commission delegated the power to make regulations in the areas which are outlined above and which comprise so much of the substance of Policy 1.10.

Where the field has been occupied, as it were, by the legislature or by the Lieutenant Governor in Council pursuant to s. 143 of the Act, the Commission has no authority to adopt measures of a regulatory nature in that occupied area, particularly where the measures have the effect of augmenting or amending what the Act and/or regulations say will suffice: see Pezim v. British Columbia (Superintendent of Brokers) (1992), 96 D.L.R. (4th) 137, 66 B.C.L.R. (2d) 257 (C.A.), appeal to the Supreme Court of Canada pending; Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commission) (1988), 56 D.L.R. (4th) 95, 32 C.P.C. (2d) 62 (Sask. C.A.).

In Pezim, the British Columbia Court of Appeal had before it a somewhat analogous situation to the case at bar. There, some of the directors and senior management of certain mining corporations were found by the British Columbia Securities Commission to have violated the "material change" disclosure requirements of the British Columbia Securities Act, S.B.C. 1985, c. 15. During the course of various option transactions they had received information concerning the results of the companies' drilling program but had not issued a press release disclosing that information. The court concluded that the information in question did not constitute a "material change" in the affairs of the companies. Although possession of the information may have involved knowledge of a "material fact", and although insider trading in the face of such knowledge was forbidden under another section of the Act, there was no requirement under the Act to disclose such a "material fact" to the public. It was argued further, however, that even if this were so, the results from the drilling program were material facts which affected the market price or value of the securities of the companies and, accordingly, that there was an obligation to disclose the information as a result of the standards of the securities business as set out in National Policy No. 40, dealing with "Timely disclosure".

The Court of Appeal rejected this argument for reasons that seem apt to the case at bar. I cite from the majority decision of Lambert J.A., at p. 150:

> Without reaching any decision about whether there is any power in the Commission to inquire into and impose penalties for conduct falling short of what the Commission judges to be a proper standard of conduct for those engaged in the securities business, it is my opinion that where the particular type of conduct that is being considered is conduct that is so closely governed by legislative provisions as is the conduct relating to disclosure of material changes or material facts, the Commission does not have the power to impose different

> and more exacting standards than those specifically adopted and imposed by the legislature and then to make penal orders for a breach of those standards which is not a breach of the legislative standards. . . .
> That is not to say that higher standards are not desirable. That is a question of careful policy judgment. But they should not be regarded as mandatory where the legislature, in balancing the policy considerations, has specifically chosen not to make them mandatory.

Governance by policy statement and the sweep of such pronouncements have been matters of controversy and the subject of commentary by academics and members of the industry, for some time. In addition to the article by Professor MacIntosh cited above, I have read the following: Hudson N. Janisch, "Regulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility", Law Society of Upper Canada, Special Lectures, 1989, p. 97; James C. Baillie and Victor P. Alboini, "The National Sea Decision <mdawExploring the Parameters of Administrative Discretion" (1977-78), 2 Can. Bus. Law Jo. 454 at p. 468; W.J. Braithwaite, "Comment on Healy: National Policy Statement No. 41", Law Society of Upper Canada, Special Lectures, 1989, p. 379; James C. Baillie, "Coercion by Commission" (June 1990), CA Magazine, p. 20; Remarks of Robert J. Wright, "Ticker Club", October 19, 1990 (1990), 13 O.S.C.B. 4326 at p. 4327; Charles Salter, Q.C., "The Priorities of the Ontario Securities Commission" (1991), 14 O.S.C.B. 2134 at p. 2142.

The issue of administrative agencies, such as the O.S.C., expanding their regulatory reach through the exercise, or purported exercise, of broad discretionary powers is an important one. The exercise of discretion is an essential tool for the effective supervision of an industry as complex as the securities industry. From a practical point of view, it would be impossible for the Commission to carry out its mandate, in either a long-term or day-to-day sense, without the broad discretionary powers delegated to it by the Act and regulations. And, if those ample discretionary powers are to be exercised, "there is merit", as Chief Justice Laskin noted in Capital Cities Communications, supra, at p. 171, "in having it known [how that will be done] in advance".

Resort to convenience and practicality can only be justified, however, when the measures adopted by the administrative agency in question fall within the scope of its statutory mandate. Were it otherwise, the carefully constructed legislative schemes governing the power and conduct of the O.S.C., and other such agencies, would be rendered meaningless. The rule of law, a central concept in our legal system, would be undermined.

The importance of preserving the integrity of the legal framework within which the administrative agency must operate is emphasized in several of the commentaries referred to above, and is well stated in the following passage from Professor Wade's text, Administrative Law, supra, at p. 5, as follows:

> The primary purpose of administrative law is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. "Abuse", it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.

Elsewhere in that same text, Professor Wade describes the import of the rule of law in the following terms, which are excerpted from the section of the text at pp. 23-24:

> The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong. . . or which infringes a [person's] liberty. . . must be able to justify its action as authorised by law -- and in nearly every case this will mean authorised by Act of Parliament. Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which [the person] can then safely disregard. . . . . .
> The secondary meaning of the rule of law. . . is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power.. . . An essential part of the rule of law,

> accordingly, is a system of rules for preventing the abuse of discretionary power.. . . The rule of law requires that the courts should prevent its abuse . . .

(Emphasis added)

These passages accent the significance of requiring an administrative tribunal to observe its statutory limits.

For the foregoing reasons, I am satisfied that the O.S.C. lacks the statutory mandate to provide it with the jurisdiction to issue Policy 1.10. As there are no facts in dispute or other questions on this issue which require a trial for their resolution, this is a proper case for the granting of summary judgment under rule 20.01: see Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 1 C.P.C. (3d) 248 (C.A.); Pizza Pizza Ltd. v. Gillespie (1990), 70 O.R. (2d) 225, 45 C.P.C. (2d) 168 (Gen. Div.).

Alternative Relief Claimed

In view of my disposition of this matter on the jurisdictional point, it is not necessary to deal at length with the alternative submissions made on behalf of the plaintiffs.

The plaintiffs' alternative assertions in the action, it will be recalled, are that Policy 1.10 is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and (vi) it is prohibitive in its effect. They seek an interlocutory injunction restraining the Commission from implementing the policy pending the trial of these issues.

Had I concluded that the promulgation of policy statements such as Policy 1.10 fell within the statutory mandate of the Commission, I would have declined to grant such an injunction.

I am satisfied on the materials before me that the plaintiffs have met the threshold test of establishing a serious question to be tried on the merits with respect to at least some of the alternative grounds put forward. This is particularly so, I think, with respect to the argument that the policy fetters the Commission's discretion, for the reasons outlined above regarding jurisdiction; with respect to the argument that it is unworkable in terms of its impact on the way securities dealers are to conduct their business; and with respect to the argument that the policy is discriminatory in that it is targeted at the plaintiffs and does not apply to members of the TSE and the IDA who also engage in the trading of low cost, highly speculative penny stocks.

It seems to me, as well, that the plaintiffs are likely to suffer irreparable harm if the policy were to be put into operation wrongly. Having regard to its detailed provisions and the impact they would have upon the plaintiffs' business operations, it is unlikely that any harm they would suffer could be adequately compensated for by the common law remedy of damages.

When it comes to a consideration of the balance of convenience and the question of maintaining the status quo, however, the scales tip in favour of declining an interlocutory injunction.

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

I assume for the purposes of this discussion that the Commission was acting within its jurisdiction in issuing Policy 1.10. In such circumstances the court should be reluctant to prevent the exercise of the Commission's statutory power, even where the challenge to the exercise of that authority is a serious one: see Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321; Esquimalt Anglers' Assn. v. Canada (Minister of Fisheries & Oceans) (1988), 21 F.T.R. 304.

In the Metropolitan Stores case the Supreme Court of Canada was asked to consider the propriety of a stay of proceedings before the Manitoba Labour Relations Board. At stake was the constitutional validity of Manitoba's legislation empowering the Board to impose a first collective agreement in labour disputes. The court set aside the

stay, applying the same principles that govern the granting of interlocutory injunctions, and holding that no such restraint should have been imposed in the circum-stances.

Giving judgment on behalf of the court, Mr. Justice Beetz reviewed the debate over the appropriate test to be applied upon the granting of an interlocutory injunction. He concluded, with respect to constitutional cases, that the "serious question to be tried" formulation of American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.), was sufficient, provided that the public interest is taken into consideration in determining the balance of convenience. The consequences for the public as well as for the parties, of the granting of a stay or an injunction, he held to be "special factors" in assessing the balance of convenience: see pp. 127-29 S.C.R., pp. 333-34 D.L.R.

Cases in which it is sought to enjoin the law enforcement agency or administrative tribunal from enforcing the impugned provisions until their validity has been finally determined, Beetz J. referred to as "suspension cases". With regard to such cases he had this to say, at pp. 135-36 S.C.R., pp. 338-39 D.L.R.:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance. . . the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases. . . is susceptible temporarily to frustrate the pursuit of the common good.
> While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

(Emphasis added)

While these remarks are made in the context of an attack upon the constitutional validity of provincial legislation, I see no distinction in principle between that kind of situation and one in which what is challenged is the validity of a measure imposed by an administrative tribunal or law enforcement agency acting within its jurisdiction.

Assuming as I have, for the purposes of this part of my decision, that the O.S.C. had the power within its statutory mandate to issue Policy 1.10 and that the validity of the measure is attacked on other grounds, I would refuse to grant the interlocutory injunction sought on the ground that the balance of convenience militates against it. In my view, the public interest in having the protection of the impugned provisions would outweigh the interests of the plaintiffs, as private litigants, in having the relief granted.

IV -- CONCLUSION

It was argued on behalf of the Commission that the Plaintiff's action was premature, and that they should await the bringing of disciplinary proceedings against them before raising the arguments put forward. However, the right of a litigant to challenge the jurisdiction of an administrative body to make rules, regulations or by-laws by bringing an action for a declaration that the administrative body has exceeded its jurisdiction under its enabling statute in issuing the disputed provisions, is well settled: see Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), [1912] 1 Ch. 158 (C.A.); Jones v. Gamache, [1969] S.C.R. 119, 7 D.L.R. (3d) 316; Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., [1941] S.C.R. 573, [1941] 2 D.L.R. 209.

As I have already indicated, the case is a proper one, in my view, for the granting of summary judgment under the Rules of Civil Procedure on the jurisdictional issue. Accordingly, judgment is granted in favour of the plaintiffs in

the form of a declaration that Policy 1.10 is invalid, the Commission having exceeded its jurisdiction under its enabling legislation in promulgating it.

In view of that disposition, it is not necessary to make any further order in relation to the interlocutory injunctive relief claimed. I may be spoken to with respect to costs.

I would like to thank all counsel for their thorough and skilful assistance in this difficult matter.

Judgment accordingly.

TAB 12

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110

Supreme Court Reports

Supreme Court of Canada

Present: Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

1986: June 20 / 1987: March 5.

File No: 19609.

[1987] 1 S.C.R. 110 [1987] 1 R.C.S. 110 [1987] S.C.J. No. 6 [1987] A.C.S. no 6

Attorney General of Manitoba, appellant; v. Metropolitan Stores (MTS) Ltd., respondent; and Manitoba Food and Commercial Workers, Local 832, respondent; and The Manitoba Labour Board, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Courts — Procedure — Stay of proceedings and interlocutory injunctions — Constitutional validity of legislation challenged — Board proposing to act pursuant to challenged legislation — Motion to stay Board's proceedings until determination of constitutional validity of legislation-- Decision to deny motion overturned by Court of Appeal — Principle governing judge's discretionary power to grant stay — Appropriateness of Court of Appeal's intervention in motion judge's discretion — Labour Relations Act, C.C.S.M., c. L10, s. 75.1.

Constitutional law — Charter of Rights — Currency of impugned legislation — Whether or not presumption of constitutionality when legislation challenged under Charter.

The Manitoba Labour Board was empowered by The Labour Relations Act to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the Canadian Charter of Rights and Freedoms. Within the framework of this action, the employer applied by way of motion in the Court of Queen's Bench for an order to stay The Manitoba Labour Board until the issue of the legislation's validity had been heard. The motion was denied. The Board, unfettered by a stay order, indicated that a [page111] collective agreement would be imposed if the parties failed to reach an agreement. The Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay order and granted a stay. At issue here are: (1) whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the Charter; (2) what principles govern the exercise of a Superior Court Judge's discretionary power to order a stay of proceedings until the constitutionality of impugned legislation has been determined; and (3) whether the Court of Appeal's intervention in the motion judge's discretion was appropriate.

Held: The appeal should be allowed.

The innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the presumption of constitutional validity in its literal meaning -- that a legislative provision challenged on the basis of the Charter can be presumed to be consistent with the Charter and of full force and effect.

A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. In order to better delineate the situations in which it is just and equitable to grant an interlocutory injunction, the courts currently apply three main tests.

The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience. The second test addresses the question of irreparable harm. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

When one contrasts the uncertainty in which a court finds itself with respect to the merits of the constitutional [page112] challenge of a law at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an interlocutory injunction, not only for the parties to the litigation but also for the public at large, it becomes evident that the courts ought not to be restricted to the traditional application of the balance of convenience.

It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties, and in cases involving interlocutory injunctions directed at statutory authorities, it is erroneous to deal with these authorities as if they had any interest distinct from that of the public to which they owe the duties imposed upon them by statute. Such is the rule even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Charter. The granting of an interlocutory injunction generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant who requests the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. The rule of the public interest should not be interpreted as meaning that interlocutory injunctive relief will only be granted in exceptional or rare circumstances, at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons.

Finally, in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar.

Here, the motion judge applied the correct principles in taking into consideration the public interest and the [page113] inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the parties. The Court of Appeal was not justified in substituting its discretion for that of the motion judge: the emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion.

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Disapproved: Home Oil Distributors Ltd. v. Attorney-General for British Columbia, [1939] 1 D.L.R. 573; considered: American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504; Morgentaler v. Ackroyd (1983), 42 O.R. 659; Société

de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166; Procureur général du Québec c. Lavigne, [1980] C.A. 25, reversing [1980] C.S. 318; Campbell Motors Ltd. v. Gordon, [1946] 4 D.L.R. 36; Law Society of Alberta v. Black (1984), 8 D.L.R. (4th) 346, dismissing (1983), 144 D.L.R. (3d) 439; referred to: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Therens, [1985] 1 S.C.R. 613; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; McKay v. The Queen, [1965] S.C.R. 798; Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638; Black v. Law Society of Alberta, [1986] 3 W.W.R. 590, leave to appeal granted [1986] 1 S.C.R. x; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Boeckh v. Gowganda-Queen Mines, Ltd. (1912), 6 D.L.R. 292; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127; Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association, [1979] O.J. No. 682, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ.; Daciuk v. Manitoba Labour Board, Man. Q.B., June 25, 1985, Dureault J. (unreported); Metropolitan Toronto School Board v. Minister of Education (1985), 6 C.P.C. (2d) 281; Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843; Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2; Weisfeld v. R. (1985), 16 C.R.R. 24; Turmel v. Canadian Radio-Television and Telecommunications Commission (1985), 16 C.R.R. 9; Marchand v. Simcoe County Board of Education (1984), 10 C.R.R. 169; Gould v. Attorney General of Canada, [1984] 2 S.C.R. 124, aff. [1984] 1 F.C. 1133, setting aside [1984] 1 F.C. 1119; Cayne v. Global Natural Resources plc., [1984] 1 All E.R. 225; R. v. Jones, [1986] 2 S.C.R. 284; Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66; Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575; [page114] Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Smith v. Inner London Education Authority, [1978] 1 All E.R. 411; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; Bregzis v. University of Toronto (1986), 9 C.C.E.L. 282; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Liquor Licensing Board [1986] 2 S.C.R. ix; Home Oil Distributors Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444; Société Asbestos Ltée c. Société nationale de l'amiante, [1979] C.A. 342; Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042; Garden Cottage Foods v. Milk Marketing Board, [1983] 2 All E.R. 770.

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APPEAL from a judgment of the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, ordering a stay of proceedings pending disposition of a constitutional challenge and allowing an appeal from a decision of Krindle J. (1985), 36 Man. R. (2d) 152, denying an application for a stay of proceedings before The Manitoba Labour Board. Appeal allowed.

Stuart Whitley and Valerie J. Matthews-Lemieux, for the appellant. Walter L. Ritchie, Q.C., and Robin Kersey, for the respondent Metropolitan Stores (MTS) Limited. A.R. McGregor, Q.C., and D.M. Shrom, for the respondent the Manitoba Food and Commercial Workers, Local 832. David Gisser, for the respondent The Manitoba Labour Board.

Solicitor for the appellant: Tanner Elton, Winnipeg. Solicitors for the respondent Metropolitan Stores (MTS) Limited: Thompson, Dorfman, Sweatman, Winnipeg. Solicitors for the respondent Manitoba Food and Commercial Workers, Local 832: Simkin, Gallagher, Winnipeg. Solicitor for the respondent Manitoba Labour Board: David Gisser, Winnipeg.

The judgment of the Court was delivered by

BEETZ J. —

I The Facts, the Proceedings and the Judgments of the Courts Below

1 The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, described them at p. 181:

> Under the terms of the Labour Relations Act, C.C.S.M., c. L-10, there is provision allowing the [page116] Manitoba Labour Board to impose a first collective circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.

The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the Labour Relations Act under which a first collective agreement might be imposed, declared invalid, as contravening the Charter of Rights and Freedoms. Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle, J. (see 36 Man. R. (2d) 152). The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

2 The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

3 The reasons of Krindle J. (1985), 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

> The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to Court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of the 22. Nine employees wrote in letters opposing the certification of the union. [page117] We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compell [sic] decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.
>
> The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation ....
>
> Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms.
>
> . . .
>
> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year [page118] period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.

> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

4 In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal at pp. 181-83, exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge:

> The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date ....
>
> It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J., was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.
>
> [page119] Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.
>
> Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.
>
> At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation; it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the Labour Relations Act are under attack as violating the Charter, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board "... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the Labour Relations Act".
>
> . . .
>
> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the [page120] exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

5 In allowing the appeal, the Manitoba Court of Appeal ordered that:

> all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of The Labour Relations Act (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

6 It is from this interlocutory order that the Attorney General is appealing by leave of this Court. He is supported by the Manitoba Food and Commercial Workers, Local 832, (the"Union") and by The Manitoba Labour Board, (the "Board").

II The Issues

7 The points in issue, according to appellant's factum, are as follows:

1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms?
2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of The Labour Relations Act, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?
3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings?

   [page121]

4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

8 The first issue stated by the appellant is related to the existence of a so-called presumption of constitutional validity of a law when challenged under the Canadian Charter of Rights and Freedoms and will be dealt with first.

9 The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a Superior Court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in Charter cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the vires of delegated legislation: as I read those cases, there is no

essential difference between this type of cases and the Charter cases in so far as the principles governing the grant of interlocutory injunctive relief are concerned.

10 Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The Canadian Charter of Rights and Freedoms and the So-called Presumption of Constitutional Validity

11 According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recognize that a presumption of constitutional validity continues to exist [page122] where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms".

12 I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

13 We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force and effect.

14 Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

15 A reason of principle related to the character of the Charter also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.

16 As was said by Lamer J., speaking for himself and five other members of the Court in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 496:

> The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

[page123]

17 The Charter extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed by three years pursuant to s. 32(2) of the Charter, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

18 Furthermore, the innovative character of the Charter affects even traditional rights already recognized before the coming into force of the Charter and which must now be viewed in a new light. In R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, this Court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the Charter to such interpretation of this freedom as had prevailed before the Charter. At pages 343-44 of the Big M case, Dickson J., as he then was, speaking for himself and four other members of the Court, wrote

as follows:

> ... it is certain that the Canadian Charter of Rights and Freedoms does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

19 Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the Charter than it has received prior to the Charter: R. v. Oakes, [1986] 1 S.C.R. 103.

20 Thus, the setting out of certain rights and freedoms in the Charter has not frozen their content. [page124] The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the Charter, must remain susceptible to evolve in the future:

> In my opinion the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.
>
> (Per Le Dain J., dissenting, although not on this point, in R. v. Therens, [1985] 1 S.C.R. 613, at p. 638.)

21 The views of Le Dain J. reflect those of Dickson J., as he then was, in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

22 In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of this constitutional instrument.

23 This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

24 One such meaning refers to the elementary rule of legal procedure according to which "the one [page125] who asserts must prove" and "the onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": D. Gibson, The Law of the Charter: General Principles (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

25 Still another meaning of the "presumption of constitutionality" is the rule of construction under which an

impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: McKay v. The Queen, [1965] S.C.R. 798. In the Southam case, supra, a Charter case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional". But that was a question of "reading in", not "reading down". The extent to which this rule of construction otherwise applies, if at all, in the field of the Charter is a matter of controversy: Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638, at p. 658 (Ont. C.A.); Black v. Law Society of Alberta, [1986] 3 W.W.R. 590, at p. 628 (Alta. C.A.), leave to appeal has been granted, [1986] 1 S.C.R. x; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés," La Charte canadienne des droits et libertés: Concepts et impacts (1984), pp. 124-26; R.M. McLeod, et al., eds., The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences (1983), vol. 1, pp. 2-198 to 2-209; P.W. Hogg, Constitutional Law of Canada (2nd ed. 1985), p. 327; D. Gibson, The Law of the Charter: General Principles (1986), pp. 57, 58 and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

[page126]

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceedings Pending the Constitutional Challenge of a Legislative Provision

26 The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

27 It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at p. 330.

(1) The Usual Conditions for the Granting of a Stay

28 Prior to the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law (Halsbury's Laws of England, vol. 24, 4th ed., p. 577). The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec where the distinction between equity and law is unknown. The distinction the English Judicature Act created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to [page127] the Court to be "just and convenient" that such order should be made. See also Boeckh v. Gowganda-Queen Mines, Ltd. (1912), 6 D.L.R. 292.

29 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923),

55 O.L.R. 127, at p. 132; Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association, [1979] O.J. No. 682, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ.; Daciuk v. Manitoba Labour Board, Man. Q.B., June 25, 1985, Dureault J. (unreported); Metropolitan Toronto School Board v. Minister of Education (1985), 6 C.P.C. (2d) 281 (Ont. Div. Ct.), at p. 292, leave to appeal to the Court of Appeal refused.

30 The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

31 The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843, per McRuer C.J.H.C., at pp. 854-55. The House of Lords has somewhat relaxed this first test in American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court [page128] that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J. speaking for himself and five other members of the Court in a unanimous judgment referred to but did not comment upon this difference in Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, at pp. 9-10.

32 American Cyanamid has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance (Toronto 1983), at pp. 66-77.

33 In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the American Cyanamid description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, Modern Equity (12th ed. 1960), pp. 736-43). In my view, however, the American Cyanamid "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

34 The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves [page129] whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

35 The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

36 I now propose to consider the particular application of the test of the balance of convenience in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in American Cyanamid, supra, at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

37 It will be seen in what follows that the consequences for the public as well as for the parties, of granting a stay in

a constitutional case, do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

38 A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

39 The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to [page130] the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage

40 The limited role of a court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, supra, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

41 The American Cyanamid case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.

42 First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law; see Home Oil Distributors Ltd. v. Attorney-General for British Columbia, [1939] 1 D.L.R. 573, at p. 577; Weisfeld v. R. (1985), 16 C.R.R. 24, and, for an extreme example, Turmel v. Canadian Radio-Television and Telecommunications Commission (1985), 16 C.R.R. 9.

43 Still, in Charter cases such as those which may arise under s. 23 relating to Minority Language Educational Rights, the factual situation as well as [page131] the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff; Marchand v. Simcoe County Board of Education (1984), 10 C.R.R. 169, at p. 174.

44 Furthermore, in many Charter cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case.

45 This latter rule was clearly stated in Gould v. Attorney General of Canada [1984] 2 S.C.R. 124 aff. [1984] 1 F.C. 1133, which set aside [1984] 1 F.C. 1119. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J., dissenting, held at pp. 1137-38 that a court is sometimes

entitled to examine the merits of the case and anticipate the result of the action:

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(e) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court to show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.
>
> In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears [page132] to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

46 Mahoney J., whose opinion was generally approved by this Court, took the opposite view (at p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(e) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

47 Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in Cayne v. Global Natural Resources plc., [1984] 1 All E.R. 225, at p. 238. Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the Charter after all and thus will not need to be saved under s. 1; see R. v. Jones, [1986] 2 S.C.R. 284.

48 In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet:

> Unconstitutionality cannot be understood as an
>
> unqualified condition. It has to be understood in light
>
> of the plaintiff's ability to bring to fruition judgment
>
> in his favour.
>
> [page133]
>
> (J.E. Magnet, "Jurisdictional Fact, Constitutional Fact
>
> and the Presumption of Constitutionality" (1980), 11 Man. L.J. 21
>
> , at p. 29.)

49 However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

50 Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not

only in Charter cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R.J. Sharpe wrote in Injunctions and Specific Performance, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

(ii) The Consequences of Granting a Stay in Constitutional Cases

51 Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to Charter instances. I also propose [page134] to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the Code of Civil Procedure:

> 751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.
>
> 752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.
>
> An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

52 While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

53 Although constitutional cases are often the result of a lis between private litigants, they sometimes involve some public authority interposed between the litigants, such as the Board in the case at bar. In other constitutional cases, the controversy or the lis, if it can be called a lis, will arise directly between a private litigants and the State represented by some public authority; Morgentaler v. Ackroyd (1983), 42 O.R. 659.

54 In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined [page135] from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.

55 Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.

56 While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, [page136] in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

57 The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

58 Société de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the James Bay Region Development Act, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

> [TRANSLATION] ... I am not persuaded that the inconvenience suffered or apprehended by the respondents was of the same order of magnitude as the growing energy needs of Quebec as a whole.

59 Turgeon J.A. reached the same conclusions at p. 177:

> [TRANSLATION] It is important to note at the outset that hydroelectricity is the only primary energy resource the province of Quebec has. With the present acute world oil crisis, this resource has assumed a critical importance in guaranteeing the economic future and well-being of Quebec citizens. The interests of the people of Quebec are represented in the case at bar by the principal appellant companies.
>
> The evidence established that is imperative for Hydro-Quebec to complete its program if it is to meet the growing demand for electricity up to 1985 .... A suspension of work would have disastrous consequences, as it would mean an alternative program would have to be [page137] created to produce electricity by thermal or nuclear plants. [Emphasis added.]
>
> (Leave to appeal was granted by this Court on February 13, 1975, but a declaration of settlement out of court was filed on January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

60 In Procureur général du Québec c. Lavigne, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the Act respecting municipal taxation and providing amendments to certain legislation, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the Constitution Act, 1867, an allegation which was later sustained by this Court in Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575.

61 The Superior Court had granted an interlocutory injunction for the following reasons, inter alia, at p. 323:

> [TRANSLATION] At the outset it must be said that the case at bar is not an ordinary constitutional question: we are not concerned here with the usual conflict between the jurisdiction of the federal government and one of the provinces, the jurisdictional conflict between two provinces or a province which is alleged to be legislating beyond the limits of powers conferred by s. 92 of the B.N.A. Act.

> Rather, this is a very special case (like that of s. 133 of the B.N.A. Act), in which the legislation being challenged is said to be contrary to a constitutional guarantee.
>
> Accordingly, the question is not simply a constitutional one, it involves a guaranteed right, like the language right (133).
>
> [page138] In the case of a constitutional guarantee, such as language or religion, it will suffice that a person appears prima facie to have been deprived of a right for him to be absolutely entitled to the remedy of an injunction. This follows from the very nature of the constitutional guarantee. When a right is constitutionally guaranteed, it is indefeasible, however extreme the consequences ... [Emphasis added.]

62 The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

> [TRANSLATION] The Superior Court judge, indicating the reasons for issuing the injunctions, held that the disputed provisions prima facie infringed the constitutional guarantee contained in s. 93 of the British North America Act, and that in that case it will suffice that a person is deprived of a right for him to be absolutely entitled to the remedy of an injunction, without the need of presenting evidence on damage or the balance of convenience.
>
> On reviewing the record and considering the arguments submitted to us by counsel for the parties in connection with the Superior Court judgments, the Court is of the view that the right relied on by the plaintiffs, the applicants for an interlocutory injunction, is not clear, that the questions involved are highly complex ones. There is some doubt as to the scope of the constitutional guarantees relied on and the effect of the injunctions is to suspend the operation of a considerable portion of the law throughout the Province of Quebec. In the circumstances, the presumption that legislation is valid must prevail over the prima facie uncertain right at this stage of the proceedings. [Emphasis added.]

63 It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the Province.

64 A somewhat similar situation arose in Metropolitan Toronto School Board v. Minister of Education, supra. Interim measure regulations which provided for the funding of separate schools were challenged as being ultra vires by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the [page139] main application. The following words reflect the interest shown by the Court in the preservation of the educational system (at pp. 294-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other, the balance of convenience overwhelmingly is in the latter's favour. The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs. [Emphasis added.]

65 Reference can also be made to Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain Fisheries Officers from enforcing amendments made to the Pacific Commercial Salmon Fishery Regulations, the validity of which had been attacked. And see Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining Fisheries Officers from implementing the fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, and the Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the Fisheries Act. The Court noted at p. 795:

> ... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a

> case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm; ...

66 These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by [page140] Browne L.J. in Smith v. Inner London Education Authority, [1978] 1 All E.R. 411, at p. 422:

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in American Cyanamid Co v Ethicon Ltd.

67 Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

68 Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373, is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and ultra vires of the Province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into Court from time to time, the amount payable in respect of the taxes claimed.

69 In Campbell Motors Ltd. v. Gordon, [1946] 4 D.L.R. 36, the appellant company sought a declaration that The National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(c)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were ultra vires on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together [page141] with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the Board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an ex parte interim injunction restraining members of the Board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

70 Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (c) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

71 A more recent example can be found in Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.), and Law Society of Alberta v. Black (1984), 8 D.L.R. (4th) 346 (Alta. C.A.). The Law Society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the Charter. The Alberta Court of Queen's Bench granted an interlocutory injunction restraining the Law Society from enforcing the two rules against the plaintiff solicitors

pending the trial of the action. The Law Society only appealed the order granting the interlocutory injunction with respect to the first rule. In [page142] allowing the appeal, Kerans J.A., who delivered the reasons of the Court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the Cyanamid test simply disappears in such a case.

72 The Morgentaler case, supra, is an exemption case involving the Charter which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the Canadian Charter of Rights and Freedoms and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction, from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the Criminal Code. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed -- that is, what may law enforcement agencies [page143] do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?
>
> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.
>
> For example, let us assume that someone challenged the constitutional validity of the Narcotic Control Act, R.S.C. 1970, c. N-1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid.
>
> . . .
>
> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

73 The principles followed in the above-quoted cases have been summarized and confirmed for the greater part by this Court in Gould, supra. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(e) of the Canada

Elections Act, R.S.C. 1970 (1st Supp.), c. 14, had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the Canadian Charter [page144] of Rights and Freedoms which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this Court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(e) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

74 That the respondent inmate had thus a prima facie case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, inter alia, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

75 And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

76 The same principles have been followed recently in Bregzis v. University of Toronto (1986), 9 C.C.E.L. 282, where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of sixty-five, in accordance with the university's mandatory retirement policy. He challenged [page145] the legality of the retirement policy as well as s. 9(a) of the Human Rights Code, 1981, S.O. 1981, c. 53, on the ground that they offended s. 15 of the Canadian Charter of Rights and Freedoms. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both Morgentaler, supra, and Gould, supra, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

77 Another case involving facts somewhat similar to Bregzis is Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146, where the plaintiffs, fifteen doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the Hospital Act, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of sixty-five. The regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the fifteen respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

78 Finally, in Rio Hotel Ltd. v. Liquor Licensing Board, [1986] 2 S.C.R. ix, Rio Hotel Ltd., which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the Charter as well as of ss. 91 and 92 of the Constitution Act, 1867. It had [page146] lost in the New Brunswick Court of Appeal and was threatened with the cancellation of its permit when, in an unreported judgment dated July 31, 1986, this Court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and for hearing the appeal. No reasons were given by this Court but those who were present at the oral argument of the application for leave to appeal and

for a stay could easily infer from exchanges between members of the Court and counsel that the Court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) Conclusion

79 It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

80 The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

81 The problem had already been raised in the Campbell Motors case, supra, where Robertson J.A. wrote at p. 47 in the above-quoted passage:

[page147]

> If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish ....

82 In a case like the Morgentaler case, supra, for instance, to grant a temporary exemption from the provisions of the Criminal Code to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences ... Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

83 This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, supra, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, supra, and Vancouver General Hospital v. Stoffman, supra, can be considered as exceptional or rare. Even the Rio Hotel case, supra, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.

84 On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, supra, is closer to the [page148] mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

85 One of these instances is Home Oil Distributors Ltd. v. Attorney-General for British Columbia, supra, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the

enforcement of the Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was intra vires on its face. The sole ground invoked against it was that it constituted a colourable attempt to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In Home Oil Distributors Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444, this Court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the Campbell Motors case, supra, at p. 48, in a passage that may amount to a veiled criticism. In my view, the Home Oil Distributors decision of the British Columbia Court of Appeal constitutes a weak precedent.

86 The other instance is Société Asbestos Ltée c. Société nationale de l'amiante, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other [page149] person, physical or corporate, from enforcing any right conferred upon them by Bill No. 70, Loi constituant la Société nationale de l'amiante and by Bill No. 121, Loi modifiant la Loi constituant la Société nationale de l'amiante, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

87 In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Canadian Charter of Rights and Freedoms.

88 I should point out that I would have reached the same conclusion had s. 24 of the Charter been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the Charter clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

[page150]

89 On the whole, I thus find myself in agreement with the following excerpt from Sharpe, op. cit., at pp. 176-77:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part. See in this respect Black v. Law Society of Alberta, supra, p. 453, and the Rio Hotel case, supra.

V Review of the Judgments of the Courts Below

91 Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

92 The main legislative provision under attack is s. 75.1 of The Labour Relations Act of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the Board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(b), (d) and 7 of the Canadian Charter of Rights and Freedoms relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

[page151]

93 The "irreparable harm" test also clearly appears to have been satisfied.

94 As I read her reasons, Krindle J., at p. 153 implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

95 It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

96 The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

97 Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this Court to review these findings.

98 Krindle J. then considered the balance of convenience and I refer in this respect to the above-quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of

> invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained. [page152] In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

99 While this is an exemption case, not a suspension case, and each case, including a fortiori an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the Board. I have not been persuaded that she committed reversible error in concluding that "the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

100 I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

101 Thus, the Court of Appeal observed that it was open to the Board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" and it noted that the Board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

102 According to the reasons of the Court of Appeal, at p. 182, the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> ... wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed [page153] by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.

103 The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the Board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the Board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the Board's authority and upon the public in general. To repeat what was said by Browne L.J. in Smith v. Inner London Education Authority, supra, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

104 The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above-quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.

> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.
>
> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned [page154] motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

105 With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

106 In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

107 The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a court of appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above-quoted reasons, had been considered and taken into account by Krindle J.

108 The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence [page155] adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock:

> Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

> [page156] In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence 'so virtually we have to consider it all afresh'.
>
> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, it any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only it they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions. [p. 1046.]
>
> (See, also to the same effect, Garden Cottage Foods Ltd.
>
> v. Milk Marketing Board, [1983] 2 All E.R. 770 (H.L.))

109 I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

110 But there is more.

111 The Court of Appeal did not exercise its fresh discretion in accordance with the above-stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply [page157] attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

112 The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a prima facie case of violation of the Canadian Charter of Rights and Freedoms will normally trigger a recourse to the saving effect of s. 1 of the Charter. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with Gould, supra, and is inconsistent with the principles set out herein.

VI Conclusions

113 I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

114 There should be no order as to costs.

TAB 13

Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

MARKET RULES

Market rules

32 (1) The IESO may make rules,

(a) governing the IESO-controlled grid;

(b) establishing and governing markets related to electricity and ancillary services; and

(c) establishing and enforcing standards and criteria relating to the reliability of electricity service or the IESO-controlled grid, including standards and criteria relating to electricity supply generated from sources connected to a distribution system that alone or in aggregate could impact the reliability of electricity service or the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (1); 2004, c. 23, Sched. A, s. 41 (1, 2); 2009, c. 12, Sched. B, s. 11 (1).

Examples

(2) Without limiting the generality of subsection (1), the market rules may include provisions,

(a) governing the making and publication of market rules;

(b) governing the conveying of electricity into, through or out of the IESO-controlled grid and the provision of ancillary services;

(c) governing standards and procedures to be observed in system emergencies;

(d) authorizing and governing the giving of directions by the IESO, including,

(i) for the purpose of maintaining the reliability of electricity service or the IESO-controlled grid, directions requiring persons, including persons providing electricity supply generated from sources connected to a distribution system, within such time as may be specified in the direction, to synchronize, desynchronize, increase, decrease or maintain electrical output, to take such other action as may be specified in the direction or to refrain from such action as may be specified in the direction, and

(ii) other directions requiring market participants, within such time as may be specified in the direction, to take such action or refrain from such action as may be specified in the direction, including action related to a system emergency; and

(e) authorizing and governing the making of orders by the IESO, including orders,

(i) imposing financial penalties on market participants,

(ii) authorizing a person to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid, or

(iii) terminating, suspending or restricting a person's rights to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (2); 2004, c. 23, Sched. A, s. 41 (2-6); 2009, c. 12, Sched. B, s. 11 (2).

General or particular

(3) A market rule may be general or particular in its application. 1998, c. 15, Sched. A, s. 32 (3).

***Legislation Act, 2006*, Part III**

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the market rules or to any directions or orders made under the market rules. 1998, c. 15, Sched. A, s. 32 (4); 2006, c. 21, Sched. F, s. 136 (1).

Publication and inspection of market rules

(5) The IESO shall publish the market rules in accordance with the market rules and shall make the market rules available for public inspection during normal business hours at the offices of the IESO. 1998, c. 15, Sched. A, s. 32 (5); 2004, c. 23, Sched. A, s. 41 (7).

Notice to Board

(6) The IESO shall not make a rule under this section unless it first gives the Board an assessment of the impact of the rule on the interests of consumers with respect to prices and the reliability and quality of electricity service. 2004, c. 23, Sched. A, s. 41 (8).

Transition

(7) All rules made before subsection 4 (1) of Schedule A to the *Electricity Restructuring Act, 2004* comes into force remain in effect until amended or revoked in accordance with this Act. 2004, c. 23, Sched. A, s. 41 (8).

(8), (9) REPEALED: 2004, c. 23, Sched. A, s. 41 (8).

TAB 14

COURT OF APPEAL FOR ONTARIO

CITATION: Toronto (City) v. Ontario (Attorney General), 2018 ONCA 761
DATE: 20180919
DOCKET: C65861 (M49615) and (M49624)

Hoy A.C.J.O., Sharpe and Trotter JJ.A.

BETWEEN

City of Toronto

Respondent (Respondent by Appeal)

and

Attorney General of Ontario

Applicant (Appellant by Appeal)

AND BETWEEN

Rocco Achampong

Respondent (Respondent by Appeal)

and

Ontario (Hon. Doug Ford, Premier of Ontario), Ontario (Attorney General)

Applicants (Appellants by Appeal)

and

City of Toronto

Respondent (Respondent by Appeal)

AND BETWEEN

Chris Moise, Ish Aderonmu, and Prabha Khosla, on her own behalf and on behalf of all members of Women Win TO

Respondents (Respondents by Appeal)

and

Attorney General of Ontario

Applicant (Respondent by Appeal)

and

Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Respondents (Respondents by Appeal)

Robin Basu, Yashoda Ranganathan and Audra Ranalli, for the appellant Attorney General of Ontario

Diana W. Dimmer, Cory Lynch and Philip Chan, for the respondent City of Toronto

Rocco K. Achampong, Gavin Magrath and Selwyn A. Pieters, for the respondent Rocco Achampong

Patrick G. Duffy and Emma Romano, for intervener the City Clerk of the City of Toronto

Howard Goldblatt, Daniel Sheppard and Louis Century, for the respondents Chris Moise, Ish Aderonmu and Prabha Khosla, on her own behalf and on behalf of all members of Women Win TO

Donald K. Eady, Caroline V. (Nini) Jones and Jodi Martin, for the interveners Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Derek J. Bell and Ashley Boyes, for the intervener The Canadian Taxpayers' Federation

Patrick Cotter, for the intervener Toronto District School Board

Heard: September 18, 2018

By the Court:

[1] Given the urgency of this matter, an immediate decision on this stay motion is required to ensure that the Toronto municipal elections, set for October 22, 2018, proceed in as orderly a manner as possible. In the unusual circumstances of this case, we have decided to announce our decision without delay and with briefer reasons than otherwise might be expected for a matter of this importance.

[2] The issue before us is whether to grant the Attorney General's motion for a stay pending an appeal to this court of the order of the Superior Court of Justice that the relevant provisions of Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11, infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms* and are therefore of no force and effect: *City of Toronto et al. v. Ontario (Attorney General)*, 2018 ONSC 5151.

[3] The election period for the 2018 City of Toronto municipal elections, based on the City's by-laws providing for a 47-ward structure, began on May 1, 2018. Bill 5, introduced on July 30, 2018 and given Royal Assent on August 14, 2018, changed the course of the elections by imposing a 25-ward structure. Three proceedings were quickly brought to challenge the constitutionality of Bill 5, leading to the order at issue on this motion.

[4] The constitutional challenges raised several grounds, but the basis for the application judge's decision was the argument that Bill 5 infringed the s. 2(b) freedom of expression rights of both the candidates and the voters. That was also the focus of this stay motion and, accordingly, will be the focus of our reasons. Like the application judge, we are of the view that this was the strongest argument the respondents advanced.

[5] The application judge found that, although the province has plenary power to govern the affairs of municipalities (including municipal elections), by changing Toronto's ward structure well after candidates had been nominated and had commenced campaigning Bill 5 violated the s. 2(b) freedom of expression rights of both the candidates and the voters. In his view, changing the ward structure mid-election "substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters" and "undermined an otherwise fair and equitable election process": paras. 32, 34. The application judge found that Bill 5 infringed municipal voters' freedom of

expression rights by interfering with their right to vote. He characterized the right to vote as "an expressive activity" falling within the protection of s. 2(b) which, in his view, includes the right to "effective representation": paras. 40, 47. He found that increasing the population size of the wards from an average of 61,000 to an average of 110,000 denied the "voter's right to cast a vote that can result in effective representation": para. 60.

[6] The application judge rejected the Attorney General's submission that any infringement of s. 2(b) could be justified as a reasonable limit under s. 1 and accordingly declared parts of Bill 5 to be of no force and effect.

[7] The Attorney General has appealed the application judge's order to this court and asks this panel to stay that order pending appeal. If granted, the effect of the stay would be to leave Bill 5 in place and require the election to proceed on the basis of a 25-ward structure.

[8] In oral argument, counsel for the Attorney General stated that he had been instructed to advise this court that if a stay were granted, the government would not take Bill 31, the *Efficient Local Government Act, 2018*, currently before the Legislature, to a final vote at this time. Bill 31 would replace Bill 5 and include an override declaration pursuant to s. 33 of the *Charter*. We note that this undertaking was given, but add that it plays no part in our decision.

[9] The three-part legal test for when an appellate court should grant a stay of a lower court decision pending an appeal is set out in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. Ordinarily, the applicant must demonstrate that there is a serious issue to be tried; that it will suffer irreparable harm if the stay is not granted; and that the balance of convenience favours a stay pending the disposition of the appeal.

[10] The minimal "serious issue to be tried" component of that test assumes that the stay will operate as a temporary measure and that the rights of the parties will be finally resolved when the appeal proper is heard. However, *RJR-MacDonald* recognizes that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, the court may give significantly more weight to the strength of the appeal: p. 338. In our view, this is such a case. An immediate decision is required to permit the Toronto municipal elections to proceed on October 22. That decision must be rendered now and, subject to further legislative intervention, our decision will determine whether the election proceeds on the basis of 25 or 47 wards. In these circumstances, greater attention must be paid to the merits of the constitutional claim and, as contemplated by *RJR-MacDonald*, we must ask whether there is a strong likelihood that the appeal will succeed.

[11] The application judge was understandably motivated by the fact that the timing of Bill 5 changed the rules for the election mid-campaign, which he perceived as being unfair to candidates and voters. However, unfairness alone does not establish a *Charter* breach. The question for the courts is not whether Bill 5 is unfair but whether it is unconstitutional. On that crucial question, we have concluded that there is a strong likelihood that application judge erred in law and that the Attorney General's appeal to this court will succeed.

[12] The application judge's interpretation appears to stretch both the wording and the purpose of s. 2(b) beyond the limits of that provision. His decision blurs the demarcation between two distinct provisions of the *Charter*: the protection of expressive activity in s. 2(b) and the s. 3 guarantee of the democratic rights of citizens to vote and be qualified for office. The s. 3 right to vote and stand for office applies only with respect to elections to the House of Commons and the provincial legislatures: *Haig v. Canada*, [1993] 2 S.C.R. 995, at pp. 1031, 1033. Section 3 does not apply to municipal elections and has no bearing on the issues raised in this case.

[13] Unquestionably, Ontario's announcement of its intention to introduce Bill 5 disrupted the campaigns that were already underway. However, Bill 5 does not limit or restrict any message the candidates wish to convey to voters for the remainder of the campaign. Nor does it erase messages conveyed earlier, although it may reduce their effectiveness. While the change brought about by

Bill 5 is undoubtedly frustrating for candidates who started campaigning in May 2018, we are not persuaded that their frustration amounts to a substantial interference with their freedom of expression. The candidates were and are still free to say what they want to say to the voters. The inconvenience candidates will experience because of the change from 47 to 25 wards does not prevent or impede them from saying what they want to say about the issues arising in the election.

[14] There was still considerable time from the date of Bill 5's passage until voting day. Election campaigns inherently involve moving targets and changing issues that require candidates to adjust as matters proceed. Under Bill 5, nominations remained open until September 14, the same deadline that applied to the previous City elections. There is no suggestion that permitting nominations approximately 5 weeks before the election trammeled freedom of expression in any way by putting demands upon candidates who had already entered the race and who might need to strategically refocus their campaigns in response to issues raised by new candidates. In light of the time remaining for candidates to conduct their campaigns after its enactment, we are doubtful of the claim that the disruption Bill 5 caused constituted a substantial interference with the candidates' freedom of expression.

[15] Candidates had a reasonable expectation that they would be operating under a 47-ward platform when developing the messages for their campaigns.

However, neither that platform nor that expectation was constitutionally guaranteed. The ward platform could be changed by by-law or by legislation. The decision of the Legislature to change it during the campaign was unexpected and perhaps alarming. But candidates have no constitutionally guaranteed right to the 47-ward platform, and Bill 5 does not deprive them of their constitutional right to say whatever they want to say about civic issues. The candidates' right to freedom of expression does not carry with it the constitutional right to insist that either the City or the Province provide or maintain a platform, absent certain conditions that the application judge did not consider in this case: see *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Haig*. The application judge relied on *Libman v. Quebec (Attorney General),* [1997] 3 S.C.R. 569, but, as explained in *Baier*, at para. 41, that case involved a claim to freedom from certain statutory restrictions on expressive activity – i.e., a negative entitlement. It did not involve a claim for a positive entitlement to a particular platform, as in this case.

[16] The application judge found that because Bill 5 made the messages the candidates sought to convey less effective, it infringed their s. 2(b) rights. This proposition is not supported by the jurisprudence interpreting s. 2(b). *Baier* and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 hold that legislation that has the effect of diminishing the effectiveness of a message, but does not prevent the communication of that message, does not violate s. 2(b): *Delisle*, at paras. 40-41; *Baier*, at para. 48. As the minority recognized in *Harper*

v. Canada, 2004 SCC 33, [2004] 1 S.C.R. 827, s. 2(b) does protect "the ability to attempt to persuade one's fellow citizens through debate and discussion": para 16. However, it does not follow that government measures which do not prevent candidates from attempting to persuade voters, but have the effect of making those attempts less effective at achieving their desired result, violate s. 2(b).

[17] With reference to the s. 2(b) rights of the voters, the application judge, at paras. 40-61, placed significant reliance on the right to "effective representation", a concept recognized by the Supreme Court in *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158. We find it difficult to see how the right to effective representation, which is at the core of s. 3, is somehow embraced by s. 2(b), which protects freedom of expression. Section 2(b) and s. 3 rights are distinct rights to be given independent meaning: *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 877 at para. 67; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80. Moreover, as already noted, s. 3 of the *Charter* has no application to municipal elections and it does not protect them: *Haig*, at p. 1031; *Baier*, at paras. 38-39. While rights can overlap and a limit on the scope of one right should not be used to narrow the scope of another right, it does not follow that doctrines pertaining to s. 3 can be imported to expand the reach of s. 2(b).

[18] Finally, the application judge's conclusion that Ontario substantially interfered with the voter's right of freedom of expression when it doubled the

ward population size from a 61,000 average to a 110,000 average cannot be supported. The size of the City's electoral wards is a question of policy and choice to be determined by the legislative process subject to other provisions of the *Charter*, including s. 15(1). Whether wards of 61,000 or 110,000 are required to ensure effective representation is a debatable issue that cannot be determined by reference to the right to freedom of expression. Further, we share the application judge's inclination that there is no infringement of s. 15(1).

[19] Given our conclusion with respect to s. 2(b), it is not necessary to consider the application judge's conclusions concerning the application of s. 1 of the *Charter*.

[20] Our finding of a strong *prima facie* case on appeal bears upon the analysis under the second and third prongs of the *RJR-MacDonald* framework: see *RJR-MacDonald*, at p. 339. We recognize that in this case, Ontario does not have a monopoly on the public interest and that the City also speaks for the public interest. However, having acceded to the argument of the respondents that the more exacting "strong likelihood of success" standard should be applied and having reached the decision that the judgment under appeal was probably wrongly decided, we have no doubt that the moving party would suffer irreparable harm if a stay were not granted. It is not in the public interest to permit the impending election to proceed on the basis of a dubious ruling that invalidates legislation duly passed by the Legislature. We do not accept the

respondents' submission that, because Ontario exercised its legislative authority to enact Bill 5, it does not have "clean hands" and should not be entitled to the equitable relief of a stay from this court.

[21] Similarly, the balance of convenience favours granting a stay. As the Supreme Court held in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9, "[c]ourts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter." The court then stated that "only in clear cases" will stays preventing the "enforcement of a law on the grounds of alleged unconstitutionality succeed." Given our tentative conclusion that Bill 5 does not suffer from constitutional infirmity, we have no hesitation in finding that the balance of convenience favours granting a stay.

[22] The respondents insist upon the unfairness in the timing of Bill 5 and point to the uncertainty it has created. However, as noted by the application judge, at para. 30, the court challenge has exacerbated the difficult timeline the City Clerk faces in making the necessary preparations for the election. The City Clerk took steps to implement a 25-ward election upon the passage of Bill 5 and then reverted to plans for a 47-ward election after the application judge's order. The City Clerk has indicated that she has done all she can in the circumstances to prepare for either a 25 or 47 ward election and, provided the issue is resolved

promptly, an election on either basis remains possible. The respondents' claim to succeed on the balance of convenience is untenable.

[23] For these reasons, the order of the Superior Court is stayed.

[24] The City Clerk and the Attorney General ask this court to make certain ancillary orders required to conduct the election in an orderly manner. The City of Toronto indicated that it would not oppose those orders if a stay were granted. We are prepared to make the orders sought, subject to any further submissions as to the necessary details, and we remain seized of the matter for that purpose.

Released: "AH" "SEP 19 2018"

"Alexandra Hoy A.C.J.O."
"Robert Sharpe J.A."
"Gary Trotter J.A."

TAB 15

Dreco Energy Services Ltd. v. Wenzel, [2008] A.J. No. 944

Alberta Judgments

Alberta Court of Appeal

R.L. Berger, K.G. Ritter and P.A. Rowbotham JJ.A.

Heard: June 4, 2008.

Judgment: August 26, 2008.

Docket: 0803-0065-AC

Registry: Edmonton

[2008] A.J. No. 944 2008 ABCA 290 [2008] 10 W.W.R. 445 48 B.L.R. (4th) 43 93 Alta. L.R. (4th) 260 440 A.R. 273 2008 CarswellAlta 1145 170 A.C.W.S. (3d) 182

Between Dreco Energy Services Ltd. and Vector Oil Tool Ltd., Appellants (Plaintiffs), and Kenneth Hugo Wenzel, Kenneth H. Wenzel Oilfield Consulting Inc. and KW Downhole Tools Inc., Respondents (Defendants)

(40 paras.)

Case Summary

Civil litigation — Civil procedure — Injunctions — Circumstances when granted — Circumstances when not granted — Time for obtaining — Interlocutory or interim injunctions — Appeal by Dreco Energy Services and Vector Oil Tool from a decision setting aside an interlocutory injunction previously granted to the appellants against the respondents, Wenzel, Kenneth H. Wenzel Oilfield Consulting, and K.W. Downhole Tools — Parties were involved in ongoing litigation stemming from a share purchase agreement and an employment agreement — Case management judge concluded that Wenzel's termination date was March 15, 2002 and that the restrictive covenants expired five years later, on March 15, 2007 — Appeal dismissed — Tripartite test had not been met and the case management judge properly discontinued the interlocutory injunction.

Appeal by Dreco Energy Services and Vector Oil Tool from a case management judge's decision setting aside the interlocutory injunction previously granted to the appellants against the respondents, Wenzel, Kenneth H. Wenzel Oilfield Consulting ("KHW"), and K.W. Downhole Tools. The parties were involved in ongoing litigation stemming from a share purchase agreement and an employment agreement whereby Dreco purchased all of the shares of Vector, previously owned by Wenzel and KHW, and contracted Wenzel as an employee of Vector. Both agreements contained strict non-competition clauses or restrictive covenants, which the appellants alleged were breached when Wenzel incorporated Downhole following his resignation on February 21, 2002. In July 2002, the appellants commenced their action alleging breach of the restrictive covenants contained in the agreements. They also sought an interlocutory injunction, which was granted on February 26, 2004. On July 21, 2007, the appellants sought to extend the injunction beyond five years from the date Wenzel resigned, as was provided for in the agreements. The respondents' subsequent application to set aside the interlocutory injunction was granted because the basis for granting the injunction initially was no longer viable. The case management judge concluded that Wenzel's termination date was March 15, 2002 and that the restrictive covenants expired five years later, on March 15, 2007. Accordingly, the first part of the applicable tripartite test for granting an injunction - a strong prima facie case - was no longer met.

HELD: Appeal dismissed.

Not only was there no longer a strong prima facie case, but even using the lower threshold for the first part of the test, the balance of convenience currently weighed in favour of setting the interlocutory junction aside. The tripartite test had not been met and the case management judge properly discontinued the interlocutory injunction.

Appeal From:

On appeal from the Order by the Honourable Madam Justice S.J. Greckol. Dated the 19th day of February, 2008. Filed on the 11th day of March, 2008 (Docket: 0203-12910)

Counsel

T.W. Wakeling, Q.C. and P.D. Banks: for the Appellants.

R. M. Curtis, Q.C. and T.W. Achtymichuk, Q.C.: for the Respondents.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

1 The appellants, Dreco Energy Services Ltd. ("Dreco") and Vector Oil Tool Ltd. ("Vector") appeal the case management judge's decision to set aside the interlocutory injunction previously granted to the appellants against the respondents, Kenneth Hugo Wenzel ("Wenzel"), Kenneth H. Wenzel Oilfield Consulting Inc. ("KHW Inc."), and K.W. Downhole Tools Inc. ("Downhole").

Background

2 The parties are involved in ongoing litigation stemming from a share purchase agreement and an employment agreement (the "agreements") whereby Dreco purchased all of the shares of Vector, previously owned by Wenzel and KHW Inc., and contracted Wenzel as an employee of Vector. Both agreements contained strict non-competition clauses or restrictive covenants, which the appellants allege were breached when Wenzel incorporated Downhole following his resignation on February 21, 2002.

3 In July 2002, the appellants commenced this action alleging breach of the restrictive covenants contained in the agreements. They also sought an interlocutory injunction, which was granted by this Court on February 26, 2004, and ordered to continue until final disposition of the lawsuit or a contrary order by a Court of Queen's Bench justice: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95, 346 A.R. 356. Later that year, the respondents' application to narrow the terms of the injunction and to have it vacated in early 2005 was denied by the case management judge. A trial date has been set for October 2008.

4 The restrictive covenants in the agreements were subject to a maximum term of five years following termination or expiry of the respective agreements. On June 21, 2007, the appellants sought to extend the injunction beyond

five years from the date Wenzel resigned. On September 25, 2007, the respondents applied to set the interlocutory injunction aside or have it cease March 15, 2008. Both applications were heard by the case management judge, who concluded the injunction should be set aside because the basis for granting the injunction initially was no longer viable.

5 At the time of their initial applications in 2004, the appellants had made out a strong *prima facie* case for an interlocutory injunction because of the wording of the restrictive covenants and the evidence supporting a breach. The case management judge concluded that Wenzel's termination date was March 15, 2002 and that the restrictive covenants expired five years later, on March 15, 2007. Accordingly, the first element of the applicable tripartite test for granting an injunction -- a strong *prima facie* case -- was no longer met. Having made this finding, she did not go on to consider the other requirements of the test for injunctive relief. She also determined that the case law did not support a judicially enforced extension of the restrictive covenants, and that doing so would effectively grant the appellants the very remedies which they seek at trial.

Contractual Provisions

6 The relevant provisions of the agreements are attached to these reasons in Appendix A.

Issues

7 This appeal raises four issues.

1. Did the case management judge err by failing to consider and apply the 'clean hands' doctrine?
2. Did the case management judge err in her interpretation of the restrictive covenants contained in the agreements?
3. Did the case management judge err by failing to exercise her equitable jurisdiction to extend the duration of the interlocutory injunction beyond the contractual time frame?
4. Is the test for injunctive relief satisfied?

Standard of Review

8 The granting of, or refusal to grant, an interlocutory injunction involves the exercise of judicial discretion. Discretionary decisions of a case management judge warrant deference and will not be interfered with absent the judge proceeding arbitrarily or on wrong legal principles: *Metropolitan Life Insurance Co. v. Hover*, 1999 ABCA 123, 237 A.R. 30 at para. 10, citing *Russell Food Equipment (Calgary) Limited v. Valleyfield Investment Ltd.* (1962), 40 W.W.R. 292, 1962 CarswellAlta 57 at para. 9 (S.C.).

9 The standard of review typically applied to a case management judge's decision is reasonableness: *Indian Residential Schools, Re* (*sub nom. Doe v. Canada*), 2001 ABCA 216, 286 A.R. 307 at para. 23. However, on questions of law, the standard of appellate review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.

10 Correctness will apply where the question is whether the case management judge failed to consider an applicable legal test or principle, or failed to properly apply it. However, where a legal principle is applied to the facts, the assessment of the facts will be afforded deference: *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 363 A.R. 283; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 376 A.R. 133 at para. 18.

11 Contractual interpretation is subject to similar principles; namely, pure interpretation of contract involves issues of law, reviewable on a correctness standard: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 at para. 11, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 453; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA

163, 281 A.R. 273 at para. 14. However, where the interpretation necessitates fact-finding, an appellate court will defer to the facts found below, so long as there is no palpable and overriding error: see *Double N Earthmovers v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 at para. 16.

12 Here, we will defer to the case management judge's fact-finding, absent something unreasonable, but will review her articulation and application of the test for interlocutory injunctions, her interpretation of the restrictive covenants, and her analysis of the question of equitable jurisdiction to continue an injunction, using a correctness standard.

Analysis

Clean Hands

13 The appellants submit that the chambers judge failed to consider whether the respondents' litigation conduct precluded the termination of the injunction. They raise the clean hands doctrine, a doctrine which may prevent a party from obtaining relief to which it would otherwise be entitled. The clean hands doctrine does not, of itself, create a cause of action, or form the basis for granting relief. Accordingly, the issue of which party bears the onus of proof is important.

14 The appellants initiated the motion to continue the interlocutory injunction and, in the normal course, bore the onus of establishing the test for continuation. However, the appellants say that they filed their motion in order to trigger the respondents' application to set aside the injunction, and that once the respondents' motion was before the court the appellants' motion was moot. They say that the case management judge approached the issue incorrectly. Instead of asking at para. 8: "Should the interim injunction be continued?" she should have asked: "Should the interim injunction be set aside?" The appellants contend that had she adopted the latter approach, she would have appreciated that the onus of proof lay with the respondents, and accordingly, should have applied the clean hands doctrine.

15 We see no merit to this argument. The case management judge was alive to the order made by the Court of Appeal, the effect of which was that the interim injunction would continue subject to further order. Moreover, as the argument unfolded (as it did before us), the crucial issue was whether the interim injunction could extend beyond the contractual term of the covenant. In the result, mindful of the evidentiary and legal burden, it was not an error to ask whether the interim injunction should be extended beyond the five years specified in the agreements.

16 Further, the case management judge was well aware of the clean hands issue and referred to the respondents' litigation conduct in her reasons. She had been the case management judge for a number of years and issued several judgments, some of which expressly address the respondents' litigation conduct.

Effective Date of the Restrictive Covenants

17 The appellants submit that a fair reading of the restrictive covenants at issue, as well as the equitable relief provisions in the agreements, give the appellants ongoing entitlement to non-competition from the respondents. They dispute the case management judge's determination of a starting date for the five years of non-competition, but are most concerned with the end date, arguing that the respondents' breaches of the covenant warrant their being extended.

18 Before the case management judge, the appellants argued that the employment agreement turned into one of an indefinite term because the employment relationship continued beyond the fixed term delineated in the contract, and that Wenzel did not give twelve clear months notice, as required. Therefore, the five year period of non-competition would have only commenced on February 20, 2003, one year after Wenzel's resignation. In any event, say the appellants, the respondents have acknowledged that they were competing, in breach of the restrictive covenants, until at least March 14, 2004. As a result, five years of competition-free business would have started on that date, making the restrictive covenants still enforceable. The appellants further contend that on a 'purposive'

interpretation of the agreements that accounts for equity, they are entitled to five full years of competition-free business.

19 The respondents argue that on a plain and ordinary reading of the agreements, the period of non-competition ends five years after the start date; that the case management judge's finding regarding the date of termination, being March 15, 2002, should not be interfered with on appeal; and that the appellants should not be granted interlocutory relief based on alleged breaches of contractual provisions that are no longer in effect.

20 The case management judge made a finding of fact that the appellants knew Wenzel was leaving, and despite some negotiations that resulted in an extension of the definite term until Wenzel's new premises were ready, the employment agreement terminated on the last day Wenzel was paid, March 15, 2002. We will not interfere with that finding. On a plain reading of the provisions, the restrictive covenants expired March 15, 2007, being five years from termination of the employment agreement. The case management judge also commented that in the event the appellants were correct about the notice period, the restrictive covenants would have still expired on February 21, 2008, making the issue academic.

21 The case management judge's conclusions were made mindful of the Supreme Court of Canada's direction in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338, 111 D.L.R. (4th) 385 (reiterated by Côté J.A. when allowing the appeal from the initial denial of an injunction in this case) that a court must refrain from a full examination of the merits of the case at an interlocutory stage in the proceedings. She also acknowledged the appellants' entitlement to damages should the conclusions differ at trial.

22 Generally speaking, courts should interpret contracts according to the parties' intentions, as expressed by the plain meaning of the words used. Only where the meaning is ambiguous or the effect would be contrary to the parties' intention, should the court interpret a contract otherwise: *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445 at 1467, 59 D.L.R. (4th) 660; *Kensington Energy Ltd. v. B & G Energy Ltd.*, [2008] A.J. No. 440, 2008 ABCA 151 at para. 13. The factual context may be important in determining the intention of the parties: *ATCO Electric Ltd. v. Alberta (Energy & Utilities Board)*, 2004 ABCA 215, 361 A.R. 1 at para. 77; *Morrison v. Pantony*, [2008] A.J. No. 419, 2008 ABCA 145 at para. 14.

23 It has been approximately six years since Wenzel's employment with the appellants ceased, and over four years (54 months) since the interlocutory injunction was first issued. The purpose of the restrictive covenants was to provide the appellants with an opportunity to establish their business and re-acquaint themselves with potential customers. The appellants urged a purposive interpretation of the covenant, and argued that whenever there has been a breach, the court should tack on a period of time reflective of the period of breach and extend the duration of the covenant so as to ensure that the promisee is not deprived of its full operation. In support of their argument, the appellants submit that pre-trial interlocutory injunctive relief is prospective and is not intended to remedy past transgression. Whether the provisions at issue are interpreted based on their plain and ordinary meaning, or using a purposive approach, the passage of time has been significant and it is not reasonable to continue the injunction indefinitely at this interlocutory stage.

24 At trial, any issues regarding the length and scope of the injunction will be considered and balanced against any continuing right to injunctive relief. Moreover, if the trial judge determines that a few more months ought to have been added to this injunction, the appellants can be compensated with damages.

Equitable Jurisdiction to Continue the Interlocutory Injunction

25 The appellants say that even if the case management judge was right about the restrictive covenants expiring, she ought to have exercised her equitable jurisdiction to extend the interlocutory injunction in any event based on the respondents' misconduct to date.

26 We agree with the respondents and the case management judge that the cases dealing with this issue are conflicting, and, more importantly, that if the interlocutory injunction were continued on equitable principles, it would

run the risk of predetermining the merits of this case. The applicable analysis here requires an assessment of the case on a lower threshold than its full merits, and an assessment of the potential inconvenience to the parties.

Continuation of the Injunction -- The Tripartite Test

27 On a fresh application for an interlocutory injunction, a court must consider: (1) the merits of the case; (2) whether the applicant would suffer irreparable harm should the injunction be refused; and (3) in whose favour the balance of convenience weighs: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 127-129; *RJR-MacDonald* at 334; *American Cyanamid Co. v. Ethicon Ltd.*, [1974] A.C. 396 (H.L.). The same considerations apply on a motion to continue or to set aside an existing interlocutory injunction, but courts may address additional factors as well, including delay, inequitable conduct, and policy considerations.

The Merits Threshold

28 Prior to the *American Cyanamid* decision, the first part of the tripartite test required an applicant to demonstrate a strong *prima facie* case. That threshold was lessened in *American Cyanamid*, and subsequently in much of the Canadian jurisprudence, the onus on the applicant is merely to demonstrate that there is a serious question to be tried. Nevertheless, in certain instances, the more stringent standard is still used: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Aurora, ON: Canada Law Book, 1992) at 2-20 to 2-27.

29 When this Court granted the initial injunction sought by the appellants, Côté J.A. noted that it was not obvious from the authorities cited by the appellants that where a restrictive covenant arises from the sale of a business, as opposed to a pure employment situation, the first part of the test requires the applicant to meet the higher threshold of showing a strong *prima facie* case: see *Elsley v. J.G. Collins*, [1978] 2 S.C.R. 916 at 924-25. Because the appellants had made out a strong *prima facie* case in any event, it was unnecessary to decide what the applicable threshold should be on the facts of this case.

30 In the employment context, this Court has definitively said that a motion for an interlocutory injunction respecting restrictive covenants warrants the more stringent threshold on the first part of the tripartite test: *Enerflex Systems Ltd. v. Lynn*, 2005 ABCA 62, 363 A.R. 136 at para. 8; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 376 A.R. 133 at para. 10; also see *Elsley, supra*. However, it is still undecided whether the strong *prima facie* case test is also warranted in the context of a restrictive covenant arising from the sale of a business, where it is inextricably tied, as here, to the employment agreement.

31 Here, the case management judge determined that a strong *prima facie* case no longer existed because, on her assessment of the facts and the applicable contractual provisions, the restrictive covenants had expired. In her analysis, without a strong *prima facie* case, the tripartite test was no longer met. However, that reasoning is only sustainable if we assume that the first part of the tripartite test necessitates the party seeking the injunction to demonstrate a strong *prima facie* case, not merely a serious issue to be tried, which is clearly the basis on which the case management judge and the parties proceeded, as this issue was not raised on appeal.

32 Without deciding whether the higher threshold applies in this case, we find that based upon the case management judgment's findings, had she gone on to apply the second and third parts of the tripartite test, she would have come to the same conclusion in any event.

Irreparable Harm and Balance of Convenience

33 The test for irreparable harm has a high threshold and only relates to the harm suffered by the party seeking the injunction: *RJR-MacDonald* at 341. The Supreme Court in *RJR-MacDonald* described the irreparable harm test as follows: "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": at 341.

34 In the decision to grant the interlocutory injunction in the first place, at para. 15, Côté J.A. noted:

> [T]he contracts in question contain provisions documenting all parties' agreement that breach of these covenants would produce irreparable harm. Even if that were not viewed as conclusive, it would clearly be some substantial evidence. Harm difficult to compute in money is traditionally recognized as a form of irreparable harm.

35 Moreover, on the respondents' application to the case management judge in 2004 to narrow and ultimately set aside the injunction, the case management judge deferred to Côté J.A.'s reasons above: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABQB 842, 365 A.R. 135. At para. 62, she stated:

> I am of the view that the Court of Appeal saw the problem to be remedied as Mr. Wenzel marketing inventions within the scope of the Plaintiffs' goodwill and selling those inventions to the Plaintiffs' customers, thereby causing harm to the Plaintiffs' business in an incalculable fashion. This would remain an important feature of the business or undertaking to which Mr. Wenzel would turn, absent an injunction.

36 While those considerations remain relevant, the passage of time complicates this analysis. The appellants did not purchase non-competition forever, nor could they. It has now been over four years (54 months) since the interlocutory injunction was granted, and six years since the application was initially brought. The case management judge concluded that the restrictive covenants were no longer in effect as of March 15, 2007.

37 In many cases, the determination of whether to grant or refuse an interlocutory injunction is made based on the balance of convenience analysis, being a determination of which party will suffer greater harm from the granting or refusal of an injunction pending final outcome of the matter on the merits: *Metropolitan Stores, supra* at 129. When this issue was before the Court of Appeal previously, Côté J.A. stated, at para. 16:

> The plaintiffs bought a business from the individual defendant, and had an established growing business of their own. The individual defendant covenanted to end his separate business, and to work for the plaintiffs alone, and did. It is alleged that later he elected to establish a new competing business in the face of his covenants, and gambled that a court would accept his legal arguments and refuse to enforce his covenants. The plaintiffs can keep track of business which they get and the revenues from it, but no one can keep a record of business which does not come to the plaintiffs. ... In our view the balance favors the plaintiffs. The harm to them without an injunction, if the restrictive covenants are enforceable to any significant degree, is likely to be much greater than the harm to the defendants if the injunction is given but later set aside.

38 There was little question as to the restrictive covenants being enforceable, and there was *prima facie* proof that they were breached when this Court first decided to grant the injunction, not long after Wenzel left the employ of the appellants. The appellants contend that the passage of time does not constitute a change of circumstances significant enough to justify varying the injunction. We disagree. The passage of time has affected both the potential harm to the appellants and the potential enforceability of the covenants. The appellants have had over four years to develop their business. Moreover, compensation for the alleged harm will be addressed at trial.

Conclusion re: Tripartite Test

39 In our view, not only is there no longer a strong *prima facie* case, but even using the lower threshold for the first part of the test, the balance of convenience now weighs in favour of setting the interlocutory injunction aside. The tripartite test has not been met and the case management judge properly discontinued the interlocutory injunction.

40 Given our conclusions, it is not necessary to consider the respondents' application to admit fresh evidence. The appeal is dismissed.

R.L. BERGER J.A.
K.G. RITTER J.A.
P.A. ROWBOTHAM J.A.

* * * * *

APPENDIX A

Share Purchase Agreement:

ARTICLE 13. NON-COMPETITION AND NON-SOLICITATION

13.1 Non-Competition

Given:

(a) the information skills and detailed knowledge of the business and research and development activities of the Company and its affiliates that each of the Vendors and Directors has acquired and will continue to acquire during the continued employment of the Directors by the Company following closing, and the damage to the Company and its affiliates that would be caused if any Vendors or Directors were to use for its or his own benefit or make available such information, skills and knowledge to any competitor of the Company or any of its affiliates;

(b) that the development of downhole drilling products from the commencement of initial research and design to the date of commercial production frequently encompasses periods of several years or more, and that the Vendors' and the Directors' duties are such that each has been and will continue to be involved in the early stages of research and development in relation to such products; and

(c) the business of the Company and its affiliates is international in scope and consequently protection of the Company's legitimate business interests encompasses broad geographic areas which have made it difficult for the parties to be precise about restricted territories;

each of the Vendors and the Directors agrees that for a period of:

(d) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(e) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(f) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(g) one (1) year;

following the termination or expiry of the Employment Agreements to be entered into on the Closing Date between the Company and the Directors (the "Termination Date"), he or it shall not directly or indirectly (whether as employee, consultant, representative, principal, agent, owner, partner, shareholder, director, officer or otherwise) own, operate, be engaged in the operation of or have any financial interest in any person (as defined in this Agreement) which provides or intends to provide:

(h) any service which involves research, development, design or manufacturing of any downhole drilling products which is similar or related to that which is being provided by the Company or any affiliate on the Termination Date or has been provided by the Company or any affiliate during the two years preceding the Termination Date; or

(i) any research, development, design or manufacturing of any downhole drilling products which is similar or related to any product under development or manufacture by the Company or any affiliate on the Termination Date or within the two years preceding the Termination Date (a "Protected Product") and which would compete with a Protected Product in any of the markets in which it is or (in the case of a product under development) is anticipated to be provided, sold or distributed; or

(j) any service for the purposes of sale or renal or supply of any downhole drilling products which are then provided by the Company or any affiliate;

anywhere:

(k) in any country, jurisdiction or locale in which the Company or any of its affiliates are then engaged or have, within the two years preceding the Termination Date, been engaged to a significant degree in the design, manufacture, supply, sale or rental of downhole products or in which the Company or any of its affiliates generate or have, within the two years prior to the Termination Date, generated 5% or more of its annual revenue except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(l) in any country, jurisdiction or locale in North America and South America in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(m) in any country, jurisdiction or locale in North America in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(n) in any jurisdiction or locale in Canada in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company.

Clauses (d), (e), (f) and (g) of this section 13.1 are separate and distinct and severable covenants and clauses (k), (l), (m) and (n) of this section 13.1 are separate and distinct and severable covenants, and have been inserted to reflect the parties best efforts to protect the legitimate business interests of the Company and its affiliates from and after the Effective Date.

13.4 Non-Solicitation

Each of the Vendors and the Directors agrees that for a period of:

(a) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(b) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(c) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(d) one (1) year;

following the termination or expiring of the employment agreements to be entered into on the Closing Date between the Company and the Directors for any reason, he shall not, directly or indirectly:

(e) induce or attempt to induce any significant customer, the Company or any other person with whom the Company or any affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental activities, to alter or terminate its relationship with the Company or such affiliate; or

(f) induce or attempt to induce any employee of any Customer or of any other person with whom the Company or any affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental activities to alter, leave or terminate his employment with such Customer or person; or

(g) induce or attempt to induce any employee of the Company or any affiliate to alter, leave or terminate his employment; or

(h) provide or offer to provide or solicit the provision of services or products to any Customer or any other person with whom the Company or any affiliate has a relationship of any kind related or similar to and compete with the services or products provided to that Customer or other person by the Company or such affiliate as at or within two years prior to the Termination Date.

Clauses (a), (b), (c) and (d) of this section 13.4 are separate and distinct and severable covenants and have been inserted to reflect the parties best efforts to protect the legitimate business interests of the Company and its affiliates from and after the Effective Date.

...

13.7 Equitable Relief on Breach

Each of the Vendors and the Directors recognize that a breach by any of the Vendors or the Directors of any of the covenants contained in this Article would result in damages to the Purchaser or the Company and that the Purchaser or the Company could not be adequately compensated for such damages by monetary awards. Accordingly, each of the Vendors and the Directors agree, that in the event of any such breach, in addition to all other remedies available to the Purchaser or the Company at law or in equity, the Purchaser or the Company shall be entitled as a matter of right to apply to a court of competent equitable jurisdiction for such relief by way of restraining order, injunction, decree or otherwise, as may be appropriate to ensure compliance with the provision of this Agreement.

...

13.9 Restrictions Reasonable

Each of the Vendors and the Directors have carefully considered the nature and extent of the restrictive covenants set forth herein and agree that the same are reasonable including with respect to duration, scope of activity and geographical area and necessary to protect the Purchaser's and the Company's legitimate interests, and that they do not prevent any individual from reasonably earning a living.

13.10 Restrictions May be Modified By Court

In the event that a Court of competent jurisdiction should conclude that any of the covenants set out in section 13.1 or 13.4 is too long in duration or too broad in scope or in territory, the said Court shall have the power and the duty to reduce its duration, scope and/or territory to the maximum duration, scope and/or territory it deems reasonable instead of invalidating such covenant and as of such ruling the said covenant shall be deemed modified accordingly.

Employment Agreement:

3.1 Term

The period of employment under this Agreement shall commence on December 1, 1996 (the "Effective Date") and shall continue until October 31, 2001, or until earlier terminated by Vector in accordance with Article 6 below. The term of this Agreement may extend beyond October 31, 2001 for an indefinite period, provided that during such extended term, either party may terminate this Agreement by giving to the other not less than twelve months prior notice in writing of his or its intention to terminate.

ARTICLE 11. NON-COMPETITION AND NON-SOLICITATION

11.1 Non-Competition

Given:

(a) the information skills and detailed knowledge of the business and research and development activities of the Company and its affiliates that Wenzel has acquired and will continue to acquire during the continued employment of Wenzel by Vector following closing, and the damage to Vector and the Affiliates that would be caused if Wenzel was to use for his own benefit or make available such information, skills and knowledge to any competitor of Vector or any of the Affiliates;

(b) that the development of downhole drilling products from the commencement of initial research and design to the date of commercial production frequently encompasses periods of several years or more, and that Wenzel's duties are such that he has been and will continue to be involved in the early stages of research and development in relation to such products; and

(c) the business of Vector and the Affiliates is international in scope and consequently protection of Vector's legitimate business interests encompasses broad geographic areas which have made it difficult for the parties to be precise about restricted territories;

Wenzel agrees that for a period of:

(d) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(e) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(f) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(g) one (1) year;

following the termination or expiry of this Agreement (the "Termination Date"), he shall not directly or indirectly (whether as employee, consultant, representative, principal, agent, owner, partner, shareholder, director, officer or otherwise) own, operate, be engaged in the operation of or have any financial interest in any person (as identified in this Agreement) which provides or intends to provide;

(h) any service which involves research, development, design or manufacturing of any downhole drilling products which is similar or related to that which is being provided by Vector or any Affiliate on the Termination date or has been provided by Vector or any Affiliate during the two years preceding the Termination Date; or

(i) any research, development, design or manufacturing of any downhole products which is similar or related to any product under development or manufacture by Vector or any Affiliate on the Termination Date or within the two years preceding the Termination Date (a "Protected Product") and which would compete with a Protected Product in any of the markets in which it is or (in the case of a product under development) is anticipated to be provided, sold or distributed; or

(j) any service for the purposes of sale or renal or supply of any downhole products which are then provided by Vector or any Affiliate;

anywhere:

(k) in any country, jurisdiction or locale in which Vector or any of the Affiliates are then engaged or have, within the two year period prior to the Termination Date, been engaged to a significant degree in the design, manufacture, supply, sale or rental of downhole products or in which Vector or any of the Affiliates generate or have, within the said two year period, generated 5% or more of its annual revenue except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(l) in any country, jurisdiction or locale in North America and South America in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(m) in any country, jurisdiction or locale in North America in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(n) in any jurisdiction or locale in Canada in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company.

Clauses (d), (e), (f) and (g) of this section 11.1 are separate and distinct and severable covenants and clauses (k), (l), (m) and (n) of this section 11.1 are separate and distinct and severable covenants, and have been inserted to reflect the parties best efforts to protect the legitimate business interests of Vector and the Affiliates.

...

11.4 Non-Solicitation

Wenzel agrees that for a period of:

(a) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(b) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(c) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(d) one (1) year;

following the termination or expiry of this Agreement for any reason, he shall not, directly or indirectly:

(e) induce or attempt to induce any Customer or any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products, to alter or terminate its relationship with Vector or such Affiliate; or

(f) induce or attempt to induce any employee of any Customer or of any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products, to alter, leave or terminate his employment with such Customer or person; or

(g) induce or attempt to induce any employee of Vector or of any Affiliate to alter, leave or terminate his employment; or

(h) provide or offer to provide or solicit the provision of services or products to any Customer or any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products which are related or similar to and compete with the services or products provided to that Customer or other person by Vector or such Affiliate as at or within two years prior to the Termination Date.

Clauses (a), (b), (c) and (d) of this section 11.4 are separate and distinct and severable covenants and have been inserted to reflect the parties best efforts to protect the legitimate business interests of Vector and the Affiliates.

11.5 Equitable Relief on Breach

Wenzel recognizes that a breach by him of any of the covenants contained in this Article would result in damage to Vector or the Affiliates and that Vector or the Affiliates could not be adequately compensated for such damage by monetary awards. Accordingly, Wenzel agrees, that in the event of any such breach, in addition to all other remedies available to Vector or any Affiliate at law or in equity, Vector shall be entitled as a matter of right to apply to a court of competent equitable jurisdiction for such relief by way of restraining order, injunction, decree or otherwise, as may be appropriate to ensure compliance with the provision of this Agreement.

...

11.7 Restrictions Reasonable

Wenzel has carefully considered the nature and extent of the restrictive covenants set forth herein and agree that the same are reasonable including with respect to duration, scope of activity and geographical area and necessary to protect the legitimate interests of Vector and the Affiliates and that they do not prevent him from reasonably earning a living.

11.8 Restrictions May be Modified By Court

Without limiting the foregoing, the parties agree that each of the provisions of this Article 11 shall be deemed to be separate and distinct and if, for any reason whatsoever, any of these provisions is held null or unenforceable by the final determination of a court of competent jurisdiction and all appeals therefrom shall have failed or the time for such appeals shall have expired, such provision shall be deemed deleted from this Agreement without affecting the validity or enforceability of any other provisions hereof which shall remain in full force and effect.

TAB 16

AltaLink Management Ltd. (Re), 2012 LNAUC 92

Alberta Utilities Commission Decisions

Alberta Utilities Commission

Panel: Carolyn Dahl Rees, Vice Chair; Mark Kolesar, Vice Chair; Bill Lyttle, Commission Member

Decision: May 14, 2012.

Decision No. 2012-124; Application Nos.

1607924, 1607942, 1607994, 1608030,

1608033; Proceeding ID No. 1592

2012 LNAUC 92 | [2012] A.E.U.B.D. No. 128

AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc. Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project

(191 paras.)

DECISION

Contents

1 Introduction

1 On September 26, 2010, AltaLink Management Ltd. and EPCOR Transmission and Distribution Inc. (the Heartland applicants) filed an application to construct and operate a double-circuit 500 kilovolt transmission line to connect the existing 500 kilovolt system on the south side of the City of Edmonton to a new substation to be located in the Gibbons-Redwater area. The Heartland application included a preferred route and an alternate route. The Heartland application also included an option in which the first 20 kilometres of the preferred route would be installed underground.

2 The preferred route was approved on November 1, 2011, in AUC Decision 2011-436 (the Heartland decision). The hearing panel rejected the underground option because it found that "the health and safety, property value and environmental impacts individually or together do not justify the additional cost of placing the line underground".[1]

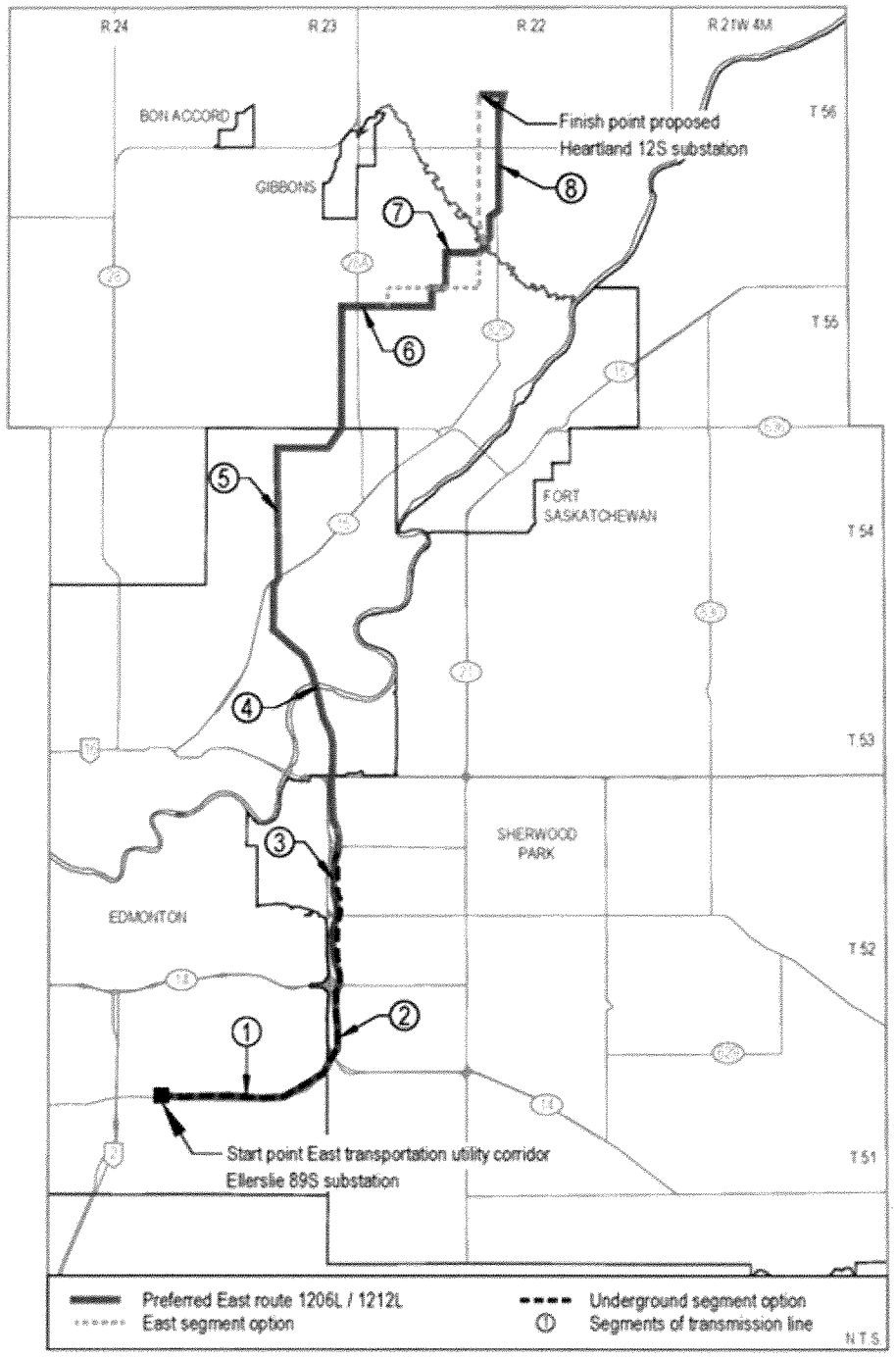
3 Six parties asked the Commission to review and vary the Heartland decision: Strathcona County (the County), Responsible Electricity Transmission for Albertans (RETA), James and Michelle Prins, William, Kenton and Trevor Prins, Aspen Valley Farms, and the FIRST group.

4 In this decision the Commission panel that ruled on the Heartland application is referred to as the "hearing panel" and the Commission panel that considered the review applications is referred to as the "review panel".

5 The review applications of Strathcona County and RETA focused on the decision to reject the underground option. The review applications by the two Prins groups focused on the approval of route segment 6-3, which is immediately adjacent to their respective lands. The review application by Aspen Valley Farms focused on the approval of segment 8 of the preferred route which crosses Aspen Valley Farms. The review panel dismissed the FIRST group's application in a ruling dated January 24, 2012 (Appendix 1).

6 The following map shows the preferred route (divided into eight numbered segments) that was approved by the panel and the location of the underground option.

Figure 1. Map of approved, preferred east route with underground option



7 The review applications were opposed by the Heartland applicants, the Alberta Electric System Operator (AESO), ATCO Electric (ATCO) and the Blue Route Utility Elimination Group (BRUTE).

8 The issues raised by the review applications are:

a. Did the hearing panel make an error (or errors) of law, fact or jurisdiction in its assessment of the route alternatives and its decision to reject the underground option and approve the aboveground preferred route that, either individually or collectively, give rise to a substantial doubt as to the correctness of the Heartland decision;

b. Are there new facts, a change in circumstances, or facts not previously placed in evidence because the facts were not known at the time of the hearing, that relate to the underground option that raise a reasonable possibility that the Commission could materially vary or rescind the Heartland decision?

c. Did the hearing panel make an error (or errors) of law, fact or jurisdiction when it approved route segment 6-3 and segment 8 of the preferred route and, if so, do those errors raise a substantial doubt as to the correctness of the Heartland Decision?

d. Are there new facts, a change in circumstances, or facts not previously placed in evidence as the facts were not known at the time of the hearing, that could lead the Commission to materially vary its decision to approve route segment 6-3 or route segment 8?

9 This decision is organized into nine sections, including this introduction. Section two is a brief review of the background to this proceeding. Section three is a description of the legislative framework for review and variance applications and the role of a review panel. In section four the review panel addresses the issue of the standing of the review applicants. In section five the review panel considers the grounds for review raised by the County and RETA that are based on alleged errors of law, fact or jurisdiction. In section six, the review panel considers the grounds for review raised by the County and RETA that are based on new facts, change in circumstances or facts not previously placed in evidence. In section seven the review panel addresses the review applications of James and Michelle Prins and William, Kenton and Trevor Prins. In section eight, the review panel addresses the review application of Aspen Valley Farms. Section nine of the decision provides the review panel's conclusion on the review applications.

2 Background

10 The Heartland decision was issued on November 1, 2011. On November 25, 2011, Strathcona County filed an application to review and vary the Heartland decision and a motion to suspend the operation of that decision pending the outcome of its review and variance application. James and Michelle Prins filed their request for review and variance of the Heartland decision on November 30, 2011.

11 On December 8, 2011, the review panel wrote to interested parties and set a schedule and process for consideration of the two review applications it had received and for any additional review applications filed in accordance with the time limits specified in *AUC Rule 016: Review and Variance of Commission Decisions* (Rule 016).

12 On December 15, 2011, the chair of the review panel, Vice-Chair Carolyn Dahl Rees, heard submissions from Strathcona County and other interested parties on the County's motion to suspend the operation of the Heartland decision. On December 19, 2011, the County's motion was dismissed in a written ruling (Appendix 2).

13 William Prins, Kenton Prins and Trevor Prins filed their application to review and vary the Heartland decision on December 19, 2011. RETA and Aspen Valley Farms both filed their review and variance applications on January 2, 2012. The Colchester Parents Association filed a letter of support for the RETA application on January 16, 2011.

14 The Heartland applicants, the AESO, ATCO and the Blue Route Utility Transmission Elimination group (BRUTE) filed submissions opposing the review and variance applications.

15 The review panel held a hearing to consider oral submissions from interested parties in Edmonton, Alberta on January 25, 2012. Following the hearing, the review panel received additional submissions from Aspen Valley Farms. The review panel established a schedule for further comments on the new submissions by Aspen Valley

Farms with the final date for submissions being February 17, 2012. The review panel considers February 17, 2012 to be the date upon which the record for the Heartland review and variance proceeding (Proceeding ID No. 1592) closed.

3 The Commission's review and variance process

3.1 Legislative framework

16 The Commission's authority to review, vary, rescind or confirm its own decisions is found in Section 10 of the *Alberta Utilities Commission Act*. Section 10 states that the Commission may make rules respecting the review of its own decisions. The Commission has made rules governing its review of its own decisions and those rules are found in Rule

17 The review and variance process has two stages. In the first stage, the Commission decides whether there are grounds to review its own decision; this is referred to as the "preliminary question". If the Commission decides that there are grounds to review the decision, it moves to the second stage of the review process where it holds a hearing to decide whether to confirm, vary, or rescind the original decision.

18 Section 3 of Rule 016 provides that the Commission may review one of its decisions on the basis of an error of fact, law or jurisdiction. This section states that such an application may only be made by a party to the decision within 60 days of the issuance of the decision. In accordance with Section 12 (a)(i) of Rule 016, the Commission must grant a review under this section if it is of the opinion that the applicant has raised a substantial doubt as to the correctness of the decision.

19 Section 4(1) of Rule 016 states that the Commission may review one of its decisions if a party that may be directly and adversely affected by the Commission's decision did not receive notice of the hearing. In accordance with Section 12(b) of Rule 016 the Commission must grant an application for review if, in its opinion, the review applicant has shown that the Commission's decision on the original application may directly and adversely affect his or her rights. An application for review on this ground must be filed within 30 days of the date upon which the Commission issued its decision.

20 Section 4(2) of Rule 016 provides that the Commission may review one of its decisions on the basis of new facts, a change in circumstances, or facts not previously placed in evidence as the facts were not known to the applicant at the time of the hearing. The section states that such an application may only be made by a person directly and adversely affected by the decision within 60 days of the issuance of the decision. In accordance with Section 12(a)(ii) of Rule 016, the Commission must grant a review if it is of the opinion that the applicant has raised a reasonable possibility that the new facts, change in circumstances etc. could lead the Commission to materially vary or rescind its decision.

3.2 The role of the review panel

21 One of the issues addressed by parties to the review proceeding was the role of a review panel.

22 Both RETA and the Heartland applicants cited the decision of Mr. Justice O'Brien of the Alberta Court of Appeal in *AltaGas Utilities Inc. v. Alberta Energy and Utilities Board*.[2] One of the issues before the Court in that decision was the Board's decision not to consider new evidence in a review application because it found that the evidence in question contained facts or evidence that could have been placed on the record in the original proceeding. The Court found as follows:

> [39] While the *Rules of Practice* do not specifically exclude such evidence, the practice of the Board in that regard was earlier set out in its Decision 2000-25, on an application for review and variance by *Canadian Western Natural Gas Company Limited and by the Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc.*, at pages 1-2:

> While the legislation setting out review provisions provides the Board with wide discretion, the case law has established restrictive guidelines for use by tribunals when considering whether to review and vary their decision. The reasons for these guidelines, or criteria, are to ensure and preserve the integrity of decision of a tribunal. A decision of a tribunal should be final, subject to decision or appeal. If a tribunal could review and change its decisions at will, the certainty of the decision of the tribunal would be in jeopardy.
>
> Therefore, in considering whether a review is warranted, the Board must address whether or not the FGA has established substantial doubt as to the correctness of the Decisions. This determination will be based on the following established criteria:
>
> * Where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the decision was made.
>
> * Where a decision is based on an error in law or in fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision.
>
> * Where correction of a clerical error or clarification of an ambiguity is required.
>
> * Where other criteria, particular to a given case, are shown to be valid.
>
> [44] The practice of the Board in this regard is analogous to the well-known rule in R. v. Palmer, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, relative to the admission of fresh evidence after trial. In my view, this matter encompasses a practice or procedure within the jurisdiction of the Board. I am not satisfied that any issue of law or of jurisdiction is involved such as to meet the test for granting leave.[3]

23 A portion of the above passage from EUB Decision 2000-25 was also included in a more recent decision of the Alberta Court of Appeal, *Talisman Energy Inc. v. Energy Resources Conservation Board*[4]. In that decision the Court of Appeal considered a decision of the Energy Resources Conservation Board to deny a review and variance application brought by Talisman Energy Inc.[5] One of the issues raised by Talisman was whether the ERCB applied the wrong standard of review in its review decision and gave undue deference to the initial hearing panel. Justice MacDonald found that decisions of the Board were entitled to a high degree of deference and cited Justice O'Brien's comments, above, including the excerpt from EUB Decision 2000-25. Justice McDonald concluded that the Board acted within its jurisdiction in according the hearing panel the deference it did and denied the application for leave to appeal.

24 On the basis of Justice O'Brien's comments, RETA argued that the test for an error of law or fact is whether the error is obvious or whether the error is shown on a balance of probabilities. The Heartland applicants disagreed and argued that when an error of fact is alleged, the applicant must demonstrate that the finding of fact, or inference of fact, is based on no evidence and amounts to a palpable and overriding error. In support of this proposition, the Heartland applicants relied upon the Energy Resources Conservation Board's decision to dismiss an application to review ERCB Decision 2009-050 by Talisman Energy Inc.[6], which was the decision that the Court of Appeal affirmed in *Talisman Energy Inc. v. Energy Resources Conservation Board.*

25 The review panel has considered the decisions of the Court of Appeal, the Energy and Utilities Board and the Energy Resources Conservation Board cited by the parties regarding the role of a review panel. In addition, the review panel also considered two other decisions: *Housen v. Nikolaisen*[7], a decision of the Supreme Court of Canada, and *Imperial Oil Resources Limited v. Ball*[8], a decision of the Alberta Court of Appeal. The review panel also had regard for Section 30 of the *Alberta Utilities Commission Act* which emphasizes the principle that decisions of the Commission are intended to be final.

26 In *Housen v. Nikolaisen* the Supreme Court of Canada ruled on the role played by appeal courts when reviewing the decisions of lower courts. It found that the role of an appeal court is not to retry the case, and stated that appeal courts must not substitute their views for that of the trial judge based on their own interpretation of the

evidence before the trial judge. The Court noted that this approach is based in part upon the principle that finality is an important goal of litigation.

27 The Supreme Court reviewed the appropriate standard of appellate review for errors of law and fact. The Court found that errors of law are to be reviewed on a standard of correctness. However, it found that findings of fact and inferences of fact made by a trial judge should not be disturbed unless there is a palpable and overriding error. The Court defined a palpable error as an error that is "plainly seen".[9] The Court stated as follows with respect to inferences of fact:

> ... Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts...[10]

28 The Alberta Court of appeal subsequently examined the role of a reviewing court in *Imperial Oil Resources Limited v. Ball.*[11] In addition to referencing the above passage from *Hausen v. Nikolaisen* it also commented on errors of law arising from the judge's consideration of evidence. It noted that an error of law will occur if a judge comes to a conclusion on the basis of no evidence, if he or she fails to consider relevant evidence, or if he or she relies upon nonexistent evidence.[12] The Court also stated as follows:

> However, where the weight assigned to the evidence is at issue, a trial judge's decision will be given deference, absent palpable and overriding error: Housen v. Nikolaisen, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235. Similarly, the palpable and overriding standard will apply when an appellant is challenging a finding of fact, or the drawing of an inference of fact: Housen, para. 18.

29 Having considered the above cases, the review panel notes that EUB Decision 2000-25, which described the Board's process for assessing applications for review and variance, was issued two years before *Housen v. Nikolaisen* and before the Board adopted formal rules for the consideration of such applications. The review panel also observes that the issue in *AltaGas v. Alberta (Energy and Utilities Board)* was not whether the Board used the correct test for assessing errors of errors of law or fact. Rather the issue in that decision related to whether the Board used the right test for granting a review on the basis of new evidence. While Mr. Justice O'Brien found that the Board adopted the correct test for the consideration of new evidence on a review; the test for assessing errors of law or fact was not an issue squarely before him. Similarly, in *Talisman v. Alberta (Energy Resources Conservation Board)* the issue the Court was considering was whether the ERCB review panel afforded the hearing panel too much deference. The question of the correct test for assessing errors of fact or inferences of fact was not specifically considered in that decision.

30 The review panel concludes that findings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission's view, this approach is consistent with that prescribed by the Supreme Court in *Housen v. Nikolaisen* and by the Court of Appeal in *Ball v. Imperial Oil.* It is also consistent with the general principle that the trier of fact is better situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact's exposure to the evidence and familiarity with the case as a whole. Accordingly, the review panel finds that assessing errors of fact and inferences

of fact on a balance of probabilities, as proposed by RETA, would be inconsistent with the deference that the courts have stated must be accorded to the original decision-maker.

31 Having regard to the foregoing, the review panel concludes that it should apply the following principles to its consideration of the review applications:

> * First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
>
> * Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
>
> * Third, the review panel's task is not to retry the Heartland application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.

4 Standing of the review applicants

32 Strathcona County and RETA are parties to the Heartland decision and each is directly affected by that decision. Accordingly, the County and RETA have standing to bring a review and variance application under sections 3 and 4(2) of Rule 016.

33 James and Michelle Prins and Aspen Valley Farms were registered participants in the Heartland proceeding. They are parties to the decision and are directly and adversely affected by the decision. Accordingly, James and Michelle Prins and Aspen Valley Farms have standing to bring a review and variance application under sections 3 and 4(2) of Rule 016.

34 William, Trevor and Kenton Prins were not registered participants in the Heartland hearing. In accordance with the plain wording of Section 3 of Rule 016 they do not have standing to bring an application for review and variance based upon an error of law, fact or jurisdiction because they are not parties to the Heartland decision. However, the Commission finds that these individuals are directly and adversely affected by the Heartland decision and have standing to bring a review application on the basis of new facts, or a change in circumstances or facts not previously placed in evidence, namely that they have new evidence regarding the effects of approving route segment 6-3 on adjacent landowners.

5 Errors of law, fact or jurisdiction

35 Strathcona County submitted that the hearing panel made two distinct errors in the Heartland decision. The County alleged that the hearing panel made an error of fact and law by mistakenly attributing evidence from the Heartland applicants about their views on the underground option to RETA. The County alleges that the hearing panel also made an error of fact or law in its assessment of the visual impacts of the Heartland project and in the weight attributed by the hearing panel to the costs of the underground option. The County argued that these two errors, either individually or collectively, create a substantial doubt about the correctness of the hearing panel's decision to reject the underground option.

36 RETA also contended that the hearing panel committed two errors in the Heartland decision. RETA alleged that it made an error of fact and law when it found that "using a kilovolt underground cable system for the Heartland project remains a high risk proposition for reliability, especially during winter, ,...".[13] RETA also alleged that the hearing panel erred in law and fact by relying upon magnetic field calculations prepared by the Heartland applicants in response to a request by Commission Counsel. Specifically, RETA argued that it had no notice that this evidence had been filed and no opportunity to respond to it.

37 The Heartland applicants and the AESO refuted each of the grounds for review raised by the County and RETA premised on errors of fact, law or jurisdiction. ATCO submitted that neither the County nor RETA have alleged errors of law, fact or jurisdiction that raise a substantial doubt as to the correctness of the Heartland decision. ATCO asserted that the record for the proceeding was substantial and that the matters raised by RETA and the County were considered in depth by the Commission. BRUTE's submissions were similar to ATCO's; it submitted that the review applicants failed to raise or demonstrate an error of law, fact or jurisdiction in the Heartland decision. Even if the errors alleged were proven, BRUTE contended that those errors would not result in a variance of Decision 2011-436.

38 In the following sections the Commission specifically considers each of the grounds raised by the RETA and the County under this category of review.

5.1 Strathcona ground one: misapprehension of the applicants' underground evidence

39 The first error alleged by Strathcona County (the County) relates to paragraph 477 of the Heartland decision which states:

> With respect to the proposed underground cable system, RETA pointed out that there is no disagreement among the participants in the hearing about whether the underground option would be technically feasible. RETA submitted that even the applicants would prefer the underground option, except for the additional costs and the perceived risk and complexity associated with being the first 500-kilovolt underground cable of this kind in Alberta. RETA argued that there are many cases of underground transmission line deployment, particularly in Europe, and implied that this should give the Commission some comfort that underground transmission would be feasible for the Edmonton area.

40 The County asserted that this was not simply an argument advanced by RETA but rather an admission by the Heartland team's policy witness, Mr. Watson, as reflected in the following passage from the transcripts in which the Heartland applicants were being examined by Commission counsel:

> Q. So I want to take us back to the specifics here. And so if you had a choice between asking for the Commission to approve the preferred route aboveground or underground and costs were the same, which one would you be requesting the Commission to approve?
>
> A. MR. WATSON: So if we were able to make the costs the same and, you know, I don't see it a technology risk. We've convinced ourselves that we can build and operate either. Then I would say we would be recommending underground.

41 Strathcona County stated that it was not clear in the Heartland decision that the hearing panel was aware that the above was the evidence of the Heartland applicants and not simply an assertion of RETA. The County observed that this was extremely significant evidence and questioned why the only reference to it was in relation to the RETA argument. It also stated that the hearing panel added a qualification to the statement that was not made by Mr. Watson and not found in the RETA materials. Specifically, the County stated that Mr. Watson had not expressed any reservations with respect to the risks associated with the underground option. The County argued that, if the hearing panel properly apprehended this evidence and applied the weight it was due, it could have reasonably led the hearing panel to find that approval of the underground option was in the public interest.

The Heartland Applicants

42 The Heartland applicants argued that there is nothing in Decision 2011-436 that suggests the hearing panel did not consider the evidence in question. However, they observed that because this evidence was based on a hypothetical set of circumstances, i.e., that the costs of the overhead and underground options were the same, it was not surprising that it played no role in the hearing panel's decision.

43 The Heartland applicants argued that there is no support for the County's allegation that the hearing panel did not properly apprehend this evidence. They noted that the evidence in question was referenced in the County's argument and reply argument. They argued that just because the hearing panel's conclusion on this issue does not accord with that of the County does not suggest or otherwise demonstrate that the Commission failed to apprehend this evidence. They concluded that this issue does not give rise to any doubt as to the correctness of the Heartland decision.

The AESO

44 The AESO stated that the error alleged by the County is unclear. It stated that paragraph 477 is simply a summary of one of the party's views and is not a finding of fact or determination made by the hearing panel. The AESO observed that the hearing panel's analysis of the underground option is found in paragraphs 489-504 of the decision. It argued that this analysis was extensive and included a consideration of the practical application of a cable of this size in the operating conditions for the Edmonton area. The AESO submitted that neither the decision nor the evidence on the record support the County's conclusion that the hearing panel misapprehended this evidence. The AESO concluded that this ground had no merit.

5.1.1 Review panel findings

45 The County asserted that this ground includes two separate but related errors. The first error alleged is that the hearing panel either mistakenly characterized the evidence of Mr. Watson as an argument of RETA or it failed to apprehend or give the correct weight to this evidence. The second error alleged is that the reference to this evidence includes qualifications that are not reflected in the evidence of Mr. Watson. The County asserts that this evidence was significant and, had the hearing panel not made the above errors, it could reasonably have led it to find that approval of the underground option was in the public interest.

46 Regarding the first alleged error, the review panel finds no support for the contention that the hearing panel failed to distinguish between the evidence of Mr. Watson and the position of RETA. The context of the impugned passage is important. Paragraph 477 is found in the views of RETA in the section of the decision that addresses the technical feasibility of the underground option. RETA argued that the underground option was technically feasible and relied on the evidence of the Heartland applicants in support of that position. The fact that the hearing panel referenced this evidence here and not elsewhere is not demonstrative of an error of law or fact.

47 As to the weight accorded this evidence, the review panel's job is not to retry or reweigh the evidence considered by the hearing panel. Rather, the review panel must consider whether the hearing panel made an obvious or palpable error in according the evidence the weight it did. In the review panel's view, there is nothing on the record or in Decision 2011-436 to suggest that the hearing panel made such an error when weighing the evidence on the feasibility of the underground option

48 With respect to the second alleged error the review panel agrees that in the passage referred to by the County, Mr. Watson did not qualify his endorsement of the underground option on the basis of the perceived risk of being the first 500 kilovolt underground cable in Alberta. However, the review panel observes that Mr. Watson's response followed a series of questions in which the Heartland applicants were asked to compare the overhead and underground options from a number of perspectives. Earlier in the same line of questioning, another witness for the Heartland applicants, Mr. George Bowden, AltaLink's chief engineer who was responsible for the undergrounding and technical aspects of the Heartland application, stated that that the only other 500 kV cable installations that are similar to the one proposed in the Heartland application are in China and Japan. He also noted that those installations were in tunnels and not in a duct bank, as was proposed for the Heartland underground option.[14]

49 Mr. Bowden acknowledged that the proposed cold weather testing would mark the first time that 500 kilovolt underground cable would be tested at minus 15 degree Celsius. He stated that previous cold weather tests had only been done on 400 kilovolt cable to a temperature of minus five degrees.[15] He stated that the reason that the

Heartland applicants were going ahead with the cold weather testing is that they were not 100 per cent sure that the cables would pass the test.[16]

50 In that same line of questioning Mr. Bowden also commented on the following statement from their reply evidence:

> The applicants are confident that an underground system can be built but emphasize that this would become only the third application of 500 kV underground cable system in the world of this scale, and as such it is not devoid of future risk.[17]

51 The witness compared the reliability of the underground and overhead options. He noted that the biggest difference between the two related to the time duration of forced outages: 4.9 hours is the mean duration for a 500 kilovolt overhead line outage whereas approximately 29 days is the mean duration for a 500 kilovolt underground cable outage. He then stated "But when we look at the forced outage, the serious outage, the consequences on the underground are much more severe in terms of duration for repair than the overhead."[18]

52 The review panel finds that the there was credible and consistent evidence on the record from the Heartland applicants that the underground option was the first project of its kind proposed in Alberta and that it was not without risk. In the review panel's opinion, the hearing panel's decision to summarize or paraphrase the applicants' evidence from this line of questioning was reasonable in the circumstances and does not amount to an error of law or fact.

53 While the review panel has concluded that the County has not demonstrated that the hearing panel made an error of fact or law with respect to this ground, it is of the view that even if the alleged error had occurred, that error does not raise a substantial doubt as to the correctness of the Heartland decision. Two factors are important here. First, notwithstanding Mr. Watson's evidence on the same-cost hypothetical, the Heartland applicants' position in argument was that the underground option was significantly more expensive than the overhead options and that those extra costs were not justified on the basis of health, property value, environmental, safety or visual impacts.[19]

54 Second, the hearing panel did not reject the underground option on the basis of the reliability risk it identified. To the contrary, the hearing panel found that the underground option was technically feasible. The hearing panel rejected the underground option on the basis that the additional costs associated with it ($323 million for stage 1, $549 million for stages 1 and 2), were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[20] Given the basis for the hearing panel's decision to reject the underground option, the review panel concludes that even if it was of the opinion that the hearing panel had made the alleged error (which it was not), the error would not create a substantial doubt as to the correctness of the decision.

5.2 Strathcona ground two: improper assessment of visual impacts and weighing of costs

55 The County argued that the hearing panel's assessment of visual impacts and its reliance upon cost as the primary factor for rejecting the underground option were inconsistent with the hearing panel's ruling on the Commission's public interest mandate. The County focused on the following passages from the Heartland decision:

> In the Commission's view, assessment of the public interest requires it to balance the benefits associated with upgrades to the transmission system with the associated impacts, having regard to the legislative framework for transmission development in Alberta. This exercise necessarily requires the Commission to weigh impacts that will be experienced on a provincial basis, such as improved system performance, reliability, and access, with specific routing impacts upon those individuals or families that reside or own land along a proposed transmission route as well as other users of the land that may be affected.[21]

> The Commission emphasizes that the public interest does not require approval of the least-cost alternative. However, if the local impacts associated with the alternatives being considered are similar, then the cost of the project will play an important role in the Commission's approval of a specific route.[22]

56 The County argued that, in accordance with the above passages, the cost of the project should only play a significant role in the hearing panel's assessment of alternatives when the local impacts of the alternatives are similar. It submitted that, because the visual impacts of the underground option were so much less than the all-overhead preferred east route, the hearing panel must have placed undue weight on the cost of the underground option when it determined that approval of the preferred east route and the rejection of the underground option were in the public interest.

57 The County also asserted that the hearing panel made two errors in its assessment of the visual impacts of the project. First, it mistakenly found that the availability of the transportation and utility corridor (TUC) somehow mitigated the effects of the proposed line on nearby residents. Second, the hearing panel erred by examining which route had the greatest incremental impact rather than considering all relevant factors such as the number of people impacted. The County argued that the Commission appeared to disregard the number of persons impacted when assessing which route was preferred from a visual impacts perspective. Specifically, it asserted that the Commission did not acknowledge that the preferred east route would impact approximately 15 times more residences and persons than the west route would from a visual impacts perspective.

58 The County argued that these errors, either individually or collectively, raise a substantial doubt as to the correctness of the hearing panel's decision to reject the underground option and approve the preferred route.

The Heartland applicants

59 The Heartland applicants argued that this ground is premised upon a mischaracterization of the Commission's public interest test and the hearing panel's interpretation of that test. They also stated that this ground ignores the fact that the hearing panel did not approve the least cost option.

60 The Heartland applicants argued that the hearing panel did not state in the Heartland decision that where local impacts differ costs cannot play a role. Rather the hearing panel stated that where the impacts of two alternatives are similar, costs will play an important role in deciding on an alternative. In their view the essence of the County's argument is that, because the impacts of the overhead and underground options differ, the hearing panel should have ignored the cost differences between the two options. The Heartland applicants argued that such an approach would clearly be contrary to the Commission's public interest mandate.

61 The Heartland applicants submitted that the hearing panel weighed the social, economic and environmental effects of the alternatives applied for, including a comparison of the impacts of the overhead and underground options. They observed that the hearing panel found that the visual impacts of the underground option would be less than the overhead alternatives but ultimately concluded that those impacts did not justify the increased costs for the underground option. The Heartland applicants stated that the Commission applied the correct public interest test. They argued that the hearing panel's application of this test is an exercise of discretion and thus a review of such findings should not be granted lightly.

62 The Heartland applicants observed that the hearing panel's consideration of the social, economic and environmental effects of the project spans 157 pages and included a consideration of health and safety, property impacts, environmental issues, electrical issues and costs. They argued that it is clear that the hearing panel considered its public interest mandate in making the Heartland decision and submitted that the fact that its determination differed from that of the County is not indicative of an error of fact, law or jurisdiction.

63 The Heartland applicants also disagreed with the County's assertion that the hearing panel found that the existence of the TUC mitigated the visual impacts of the Heartland project. They stated that the only mitigation

referenced in this regard was a statement by the hearing panel that no new significant visual impacts will result in that portion of the TUC where the preferred route parallels two existing 240 kilovolt lines.

64 The Heartland applicants stated that the hearing panel expressly acknowledged the visual impacts of the aboveground option in the TUC, and noted that the greatest number of residences and schools will be affected along the portion of the transportation and utility corridor from Highway 14 to Baseline Road. They argued that, in response to this impact, the hearing panel reasonably ordered the use of monopoles along this part of the route to mitigate the visual impacts of the project.

65 The Heartland applicants concluded that the County's allegations with respect to the hearing panel's application of the public interest test have raised no errors of fact, law or jurisdiction that create a substantial doubt as to the correctness of the Heartland decision.

The AESO

66 The AESO argued that the County's public interest argument appears to be premised upon the notion that the hearing panel ought to have made the issue of visual impact paramount to all other considerations when deciding whether approval of the preferred route is in the public interest. The AESO argued that it would be improper to isolate and elevate visual impacts from the other factors considered by the hearing panel. It also argued that such an approach artificially tilts the analysis.

67 The AESO submitted that the hearing panel did not reject the underground option solely on the basis of costs. It noted that the hearing panel concluded that, while technically feasible, the underground option posed some risk in light of outstanding data on cold weather performance and the potential for outages of extended duration.

68 The AESO argued that the County's allegations that the hearing panel concluded that visual impacts of the project would be less for residents adjacent to the transportation and utility corridor is unfounded because the hearing panel made no such finding.

5.2.1 Review panel findings

69 The review panel understands that there are three alleged errors subsumed under this ground of review advanced by the County. First, the hearing panel erred by misapplying its own test for assessing the public interest by placing undue weight on the cost of the underground option. Second, the hearing panel erred when it found that the use of the transportation and utility corridor mitigated the visual impacts of the line on adjacent residents. Third, the hearing panel erred by considering the incremental effects of adding another transmission line to the TUC rather than considering all relevant factors including the number of people impacted visually by approval of the line.

70 Regarding the first alleged error, the review panel finds that the County has not demonstrated that the hearing panel committed an error of fact or law by considering the incremental cost of the underground option when deciding whether its approval was in the public interest. While the hearing panel did state in paragraph 101 of the Heartland decision that the cost of various alternatives will play an important role when the impacts of alternatives are similar, it does not follow that the Commission should not have regard for the costs associated with alternatives when the impacts of those alternatives differ. As demonstrated in the table below, the cost of the underground option was far greater than overhead options and that was a factor that the hearing panel was obliged to consider.

Table 1. Route cost comparison[23]

	Total cost ($ million)	Incremental cost ($ million)
Preferred east route	582.7	--
Alternate west route	670.3	87.6
Preferred east route with the underground option (20 km)	906.0	323.3
Preferred east route with underground option, incl. stage 2 (20 km)	1132.0	549.3
Preferred east route with the monopole option (20 km)	657.0	74.3
Preferred east route with the monopole option (6.5 km)	604.2	21.5
Preferred east route with the monopole option (6.5 km + 3.0 km)	609.3	26.6
Preferred east route with the monopole option (6.5 km + 4.5 km)	612.5	29.8
Preferred east route with the monopole option (6.5 km + 6.0 km)	617.3	34.9

[Editor's Note: Note[23] is included in the image above]

71 Section 17 of the *Alberta Utilities Commission Act* requires the hearing panel to consider the social, economic and environmental impacts of approving a proposed project. A review of the decision discloses that the hearing panel undertook a detailed analysis of those effects. The hearing panel concluded that the economic impact of the underground option (i.e. the incremental cost) was not justified by the extent to which the underground option might mitigate other site specific impacts of the project. The hearing panel's weighing of these impacts and the related evidence is entitled to deference. In the review panel's opinion, the County has not demonstrated that the hearing panel made an error of fact or law in the manner in which it assessed the impacts of the alternatives described in the Heartland application or in its conclusion.

72 The remaining two errors alleged by the County under this ground go to the hearing panel's finding of fact that the east preferred route was favoured over the west alternate route from the perspective of visual impacts. The hearing panel made this finding based upon the evidence before it and provided its reasons in paragraphs 774-779, 1060 and 1061 of the decision. Those reasons include:

* the alternate west route was 18 kilometres longer than the preferred east route;

* the alternate west route is located predominantly on rural and agricultural lands;

* the first 20 kilometres of the preferred east route is in the transportation and utility corridor; and

* a portion of the transportation and utility corridor already contains two high voltage transmission lines and also passes through an industrial area.

73 In making this decision the hearing panel specifically noted that the greatest number of residences and schools will be impacted on the portion of the east preferred route between Highway 14 and Baseline Road. In recognition of those visual impacts, the hearing panel directed the use of monopoles rather than lattice towers in this area as a mitigation measure. The hearing panel's determination that the east preferred route was favoured over the west alternate route from the perspective of visual impacts was based on facts and inferences from facts in the evidence before it. The hearing panel's findings of fact and inferences of fact are entitled to deference and, in the review panel's opinion, the County has not demonstrated that the hearing panel committed an error in law or fact in coming to this determination.

74 Having regard to the foregoing reasons, the review panel finds that a review of the Heartland decision is not warranted on the County's second ground.

5.3 RETA ground one: improper assessment of the risks of the underground option

75 RETA asserted that the hearing panel made an error of fact and law when it found that the underground option "remains a high risk proposition for reliability, especially during the winter."[24] RETA argued that this conclusion was not reflective of the evidence filed, including the evidence of the AESO's experts, Cable Consulting Inc. (CCI), and the applicants that the underground option was technically feasible.

76 In support of this position, RETA observed that it was the applicants' evidence that they favoured the preferred east route over the west alternate route, regardless of the technology used on the preferred east route. RETA also noted that the outstanding cold weather testing for the selected underground cables and joints should now be complete. It argued that any misgivings that the Commission may have had could now be resolved by reference to the test results.

The Heartland applicants

77 The Heartland applicants argued that the hearing panel had evidence upon which to base its conclusion on the reliability of the underground option. They argued that RETA has not demonstrated that the hearing panel made a palpable or overriding error in making this finding of fact. The Heartland applicants observed that the hearing panel found that the underground option was technically feasible subject to cold weather testing. They noted that the hearing panel's concern about the reliability of the underground option was based upon the evidence before it, including evidence from the AESO and their experts, CCI. The Heartland applicants pointed out that the AESO had concerns with the underground option given that the technology was relatively new and there was limited operating experience.

78 The Heartland applicants observed that the hearing panel thoroughly reviewed all of its concerns with the underground option in the Heartland decision. They stated that the concerns identified included scheduling issues and operational issues. They also noted that the hearing panel took into account many other factors when it decided to reject the underground option and noted that the Commission described this assessment in paragraphs 1081 to 1086 of the decision. In these paragraphs, they noted, the hearing panel considered the costs of the underground option in relation to its potential benefits from the perspectives of heath and safety, visual impacts, property impacts and environmental impacts.

The AESO

79 The AESO argued that RETA's submission depends upon only one paragraph of the study and ignores the rest of CCI's evidence which discussed the remaining risks associated with an underground option. The AESO also argued that RETA has confused the issue of feasibility with the issue of reliability. It notes that the hearing panel considered the number of faults per year for an underground and overhead system in this respect -- a factor that goes to reliability and not feasibility. The AESO pointed out that while it certified that the technical aspects of the underground option would meet the requirements of its long term plan it also encouraged the hearing panel to keep in mind the technical risks which included limited operating experience, the need to complete cold weather testing, and greater repair time. The AESO concluded that this ground does not raise a substantial doubt as to the correctness of the decision.

5.3.1 Review panel findings

80 The hearing panel conducted a detailed analysis of the technical feasibility of the underground option. The hearing panel considered the evidence of the interveners, CCI and the Heartland applicants on the underground option with respect to the issues of feasibility, reliability, transmission losses, project scheduling, project uncertainties, construction methods, etc. The hearing panel made the following findings of fact in respect of the underground option:

> * The Heartland project would be the largest duct bank deployment of a 500-kilovolt transmission underground cable in the world;

* The operational reliability of the 500 kilovolt underground cables and joints had not been demonstrated for winter operating conditions in Edmonton however, cold weather testing was scheduled for the proposed cables;

* The predicted outage rate for the underground option is slightly higher than an overhead line;

* The predicted outage duration for the underground option is much higher than for an overhead line. The mean duration of a 500-kilovolt overhead line outage is 4.9 hours. The average recorded repair time for the underground option was estimated to be 29 days.

81 The hearing panel ultimately concluded that the proposed underground option was technically feasible. However, it found that the underground option remained a "high risk proposition for reliability, especially during winter, and provides no advantages over the all-overhead line configuration in terms of power losses or reliability."[25] In the review panel's view this conclusion was based on findings of fact and inferences of fact based on the evidence. As noted previously, the hearing panel's findings of fact and inferences of fact are entitled to deference; the review panel's role is not to reinterpret or reweigh the evidence that was before the hearing panel, absent an obvious or palpable error. Having considered the positions of the parties and the record, the review panel can discern no such error on behalf of the hearing panel when it made this finding.

82 While the review panel has concluded that RETA has not demonstrated that the hearing panel made an error of fact or law with respect to this ground, it is of the view that even if the alleged error had occurred, it does not raise a substantial doubt as to the correctness of the Heartland decision. As noted earlier, the hearing panel found that the underground option was technically feasible and did not reject the underground option on the basis of the reliability risks it identified. The hearing panel rejected the underground option on the basis that the additional costs associated with it ($323 million for stage 1, $549 million for stages 1 and 2), were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[26] Given the basis for the hearing panel's decision to reject the underground option, the review panel concludes that even if it was of the opinion that the hearing panel had made the error alleged (which it was not), the error would not have created a substantial doubt as to the correctness of the Heartland decision.

83 Having regard to the foregoing, the review panel finds that a review of the Heartland decision is not warranted on RETA's first ground.

5.4 RETA ground two: incorrect or incomplete magnetic field calculations

84 RETA argued that the hearing panel committed an error of law and fact by improperly relying upon incorrect or incomplete magnetic field estimates provided by the Heartland applicants during the hearing at the request of Commission counsel. The evidence that RETA objected to was a table prepared by the Heartland applicants that showed magnetic field estimates at various schools, daycares and residences along the preferred and alternate routes, and for the underground option (Exhibit 974). RETA stated that this evidence was filed late in the proceeding and asserted that the process in which it was filed did not properly allow interveners and their experts to review or present evidence on these estimates.

85 RETA asserted that it was not clear whether the modelling that produced the estimates in Exhibit 974 was done on the basis of transmission of electricity at a frequency of 60 Hz. It also noted that the evidence did not estimate magnetic fields based on peak or heavy loads, nor did it address the effects of high frequency electrical pollution.

The Heartland applicants

86 The Heartland applicants stated that they filed accurate electric and magnetic field evidence throughout the proceeding. They noted that modeling evidence on electric and magnetic fields was filed with their application and that the Commission, RETA and others asked information requests on that modeling evidence. The Heartland applicants stated that the tool they used for electric and magnetic field modeling was tested against real world measurements, and observed that the differences between the estimates and measurements were small.

87 The Heartland applicants stated that Exhibit 974 was provided as supplementary electric and magnetic field information to that already filed with the Commission. They stated that the magnetic field values were based on data included in the Heartland application that was filed in September 2010. They stated that the 1000 MVA (post 2027) magnetic field levels and the 3000 MVA contingency levels were included in their responses to the Commission's information requests. They also noted that the fact that alternating current on transmission lines changes directions 60 times per second was explained on the first page of appendix K-3 of the Heartland application.

88 The Heartland applicants stated that their counsel entered Exhibit 974 orally on the record at the hearing and uploaded it to the Commission's electronic proceeding system which gives notice to all registered parties that the document had been filed. They also noted that RETA had an opportunity to cross-examine the Heartland applicants after Exhibit 974 had been filed but did not do so, nor did RETA address this evidence in its own direct evidence.

89 The Heartland applicants stated that RETA was incorrect when it stated that Exhibit did not provide information about peak loads. They noted that they included loading at three different levels, including peak contingency loading at 3000 MVA. The Heartland applicants also observed that RETA's expert, Dr. Blank, testified that the field levels in the exhibit were consistent with what he expected based upon his knowledge of figures produced by the Bonneville Power Administration.

The Heartland applicants noted that the electric and magnetic field estimates that RETA is now objecting to were generated using an algorithm that the hearing panel found to be well known and accepted. They argue that the evidence on electric and magnetic fields contained in the disputed table was uncontroverted by any party. The Heartland applicants concluded that RETA had not demonstrated that the hearing panel had committed an error of law or fact in its request for, or consideration of, this evidence.

5.4.1 Review panel findings

90 RETA argued that the hearing panel made an error of law by allowing Exhibit 974 to be filed during the course of the proceeding and by relying upon that evidence when making its decision. The essence of RETA's argument on this ground is that it did not have a fair opportunity to meet the case against it with respect to this evidence. For the reasons that follow, the review panel finds that RETA has not demonstrated that the hearing panel made an error of law by allowing this evidence to be filed or by relying on this evidence when making the Heartland decision.

91 The Heartland applicants filed magnetic field estimates at various distances from the proposed lines and for various locations along the applied-for routes in their application, and in their answers to information requests from the Commission and an intervener group (HALO). The magnetic field estimates provided to the Commission were provided for different locations, under different operating conditions and for different transmission structures (lattice towers and monopole towers) than the magnetic field estimates provided to HALO.

92 During the course of the hearing, the Heartland applicants applied to amend their application by moving the preferred route within the transportation and utility corridor. The effect of the amendment was that some of the locations for which magnetic field estimates had been provided by the Heartland applicants were now further away from the source of the magnetic field. Commission counsel requested the Heartland applicants to consolidate their magnetic field estimates into a single table under three operating conditions so that the estimates were based upon consistent locations and operating conditions and reflected the recent route amendment.[27]

93 The evidence in question was requested by Commission counsel in a letter to the Heartland applicants dated April 27, 2011 (Exhibit 960.01). That letter was posted to the Commission's electronic proceeding system and notice of the filing of the letter was sent to all registered participants, including RETA, on April 28, 2011. The Heartland applicants filed their response to this request (Exhibit 974.01) in the electronic proceeding system on April 29, 2011. As a registered participant, RETA would have received notice, through the electronic proceeding system, that the Heartland applicants had filed a document described as "response to the AUC -examination

requests of April 27". Counsel for the applicants also stated on the record that they were filing a response to a request from Commission counsel seeking "additional information from the applicants to assist the Commission's examination of the applicants' witness panel".[28]

94 Exhibit 974 was filed on April 29, 2011, while the Heartland applicants' witness panel was still testifying. RETA cross-examined the Heartland panel on May 3, 2011, but asked no questions about Exhibit 974. Commission counsel examined the Heartland applicants' witnesses on Exhibit 974 on May 4, 2011, and RETA's own witness, Dr. Dennis, on May 5, 2011. On May 12, 2011, Commission counsel also examined Dr. Blank, an expert witness on the health effects of magnetic fields that was shared by RETA, the County and the City of Edmonton. Dr. Blank reviewed the magnetic field estimates in Exhibit 974 and concluded that they were consistent with estimates published by the Bonneville Power Administration and they were what he would expect.[29]

95 Section 42.3 of *AUC Rule 001: Rules of Practice* provides that Commission staff may examine witnesses. The review panel finds that the questions posed by Commission counsel to the Heartland applicants were questions that Commission counsel was entitled to ask in accordance with Section 42.3 of Rule 001. In the review panel's view, the goal of the questions was to provide an up-to-date table of consistent and comparable magnetic field estimates for various locations along the applied-for routes. The review panel finds that the fact that these questions were asked in a letter prior to Commission counsel's examination of the Heartland applicants rather than during his examination of the witnesses does not make the questions less valid or improper. The review panel finds that RETA has not demonstrated that the hearing panel committed an error of law by allowing Commission counsel to ask these questions prior to his examination of their witnesses.

96 The review panel finds that RETA had effective notice, through the electronic proceeding system, of Commission counsel's request for the magnetic field information and of the filing of that information by the Heartland applicants on April 28 and 29 respectively. Even if the review panel did not consider the electronic proceeding system notifications to be effective notice, it finds that RETA should have been aware of this evidence as of May 4, 2011, when Commission counsel examined the Heartland applicants' witness panel on Exhibit 974. RETA must have been aware of this evidence by May 5, 2011, when Commission counsel examined RETA's witness, Dr. Dennis, on Exhibit 974.

97 RETA was represented by counsel throughout the proceeding. Had it been concerned about the contents of Exhibit 974, or the way in which it was put on the record, it had at least three procedural options: it could have applied to have Exhibit 974 excluded, it could have cross-examined the Heartland applicants on Exhibit 974, and/or it could have asked for an opportunity to file additional evidence in response to Exhibit 974. RETA could also have requested an adjournment to allow it to pursue any or all of these options. RETA could have made such a request when the evidence was filed or after Commission counsel's examination of the Heartland witnesses or Dr. Dennis. RETA took no such steps at any time during the proceeding.

98 RETA stated that it suspected that it knew what the answer to a request to file additional information would have been (i.e. negative), based on an exchange between the chair of the hearing panel and the president of RETA, who was also a RETA witness. However, the Commission notes that this exchange took place on May 11, 2011, many days after Exhibit 974 was entered into evidence and some time after Commission counsel examined RETA's expert, Dr. Dennis, on this exhibit.

99 In the review panel's view, RETA has not established that the Commission made an error of law by allowing this evidence to be filed or by relying upon this evidence when making its decision on the Heartland application. The request for the information by Commission counsel was proper and consistent with the Commission's rules of practice. The opportunity existed for RETA to request a range of relief from the hearing panel to address this evidence in the hearing but RETA made no such request.

100 Further, the review panel finds that the Heartland applicants described the method and formula they used for estimating the magnetic fields produced by the proposed alternatives in the Heartland application. It is clear that RETA was aware of this evidence because it asked the Heartland applicants a number of information requests on

their modeling results.[30] Had RETA been concerned about the modeling approach or assumptions made by the Heartland applicants it could have asked additional information requests on the topic to the Heartland applicants or cross-examined the Heartland applicants on this at the hearing. RETA did not do so.

101 The review panel concludes that the hearing panel's decision to accept the Heartland applicants' evidence about the accuracy of its magnetic field modeling was based on findings of fact based upon uncontroverted evidence. The fact that RETA now wishes to challenge the Heartland applicants' evidence and the hearing panel's conclusion on this evidence does not amount to an error of fact or law on the part of the hearing panel.

102 The review panel therefore finds that a review of the Heartland decision is not warranted on RETA's second ground.

6 New facts, change in circumstances, evidence not previously available

103 Strathcona County and RETA both submitted that there are new facts, changed circumstances or evidence that was not available to the hearing panel when it made the Heartland decision that could lead the Commission to materially vary the decision to reject the underground option. RETA's grounds for this argument relate to alleged new evidence available with respect to magnetic field health effects, electric and magnetic field shielding and the financial implication of closing the Colchester school. RETA asserted that one or all of these new facts or evidence could lead the Commission to materially vary its decision to reject the underground option.

104 The County also argued that the Government of Alberta's decision to review its approach to two other critical transmission infrastructure projects, the Western Alberta Transmission Line (WATL) and the Eastern Alberta Transmission Line (EATL) was a new fact or change of circumstances. RETA also requested a review of the Heartland decision on this ground.

105 The Heartland applicants responded specifically to each of the grounds raised by the County and RETA. The AESO also responded specifically to the allegation by RETA and the County that the Government's review of the WATL and EATL projects was a new fact or change in circumstance that could lead the Commission to materially vary or rescind the Heartland decision. ATCO responded more generally to these grounds and stated that the review applicants simply express disagreement with a number of determinations made by the Commission and have asked the Commission to reconsider its decision based on the same factual record and law.

106 In the following sections the Commission specifically considers each of the grounds raised by the RETA and the County under this category of review.

6.1 RETA ground three: new health study/ shielding evidence/ magnetic field estimates

107 RETA alleged that a new study related to the health effects of magnetic field exposure had been published on August 1, 2011, after the record for the Heartland hearing had closed. The study, which followed up a previous study by the same authors, looked at rates of asthma in children whose mothers were exposed to magnetic fields. RETA reported that the study concluded that there was a more than 3.5 fold increased risk of asthma in offspring if mothers were exposed to magnetic fields levels of more than 2 milligaus. RETA said that it was important to note that the women who took part in this study had their exposure to magnetic fields measured over a 24 hour period with the measurement devices showing maximum dosage.

108 RETA noted that thousands of people, including pregnant women, commute between Strathcona County and Edmonton on the Sherwood Park freeway and the Baseline Road. RETA observed that these commuters will be exposed to a magnetic field of 63 milligaus each time they travel directly under the transmission line. RETA asserted that the new findings it referenced demonstrate that high magnetic field exposures of short duration were associated with increased risk of several adverse health outcomes including miscarriage, poor sperm quality and the risk of asthma in children. RETA submitted that using annual average magnetic field levels when assessing health effects would mask the shorter but much higher magnetic field levels that could be detrimental to health.

RETA therefore argued that magnetic field estimates for the maximum, 95th, 90th, 80th, 70th, 60th, and 50th percentiles should be provided when assessing adverse health effects.

109 RETA submitted that the author of the study would be able to provide evidence to the AUC on this health issue. RETA also noted that it is possible to shield or significantly reduce the magnetic fields produced by an underground transmission line. RETA stated that it could provide new expert evidence on how shielding could be done to mitigate magnetic fields emitted from the underground lines where they intersect the Sherwood Park Freeway and Baseline Road. RETA also proposed to introduce new evidence to challenge the completeness and veracity of the table of magnetic field estimates prepared by the Heartland applicants. RETA asserted that the new evidence it proposed to call, either individually or collectively, could lead the Commission to materially vary or rescind the Heartland decision.

The Heartland applicants

110 The Heartland applicants argued that the study referenced by RETA in its review and variance request is not a new fact or circumstance because the study is a follow-up to an earlier study. They noted that the original study was conducted in 2002 and stated that RETA was aware of that study because that study was referenced in RETA's filed materials. The Heartland applicants noted that the study was also discussed in their own expert report, which described it as:

> ...a nested case-control study of women who miscarried compared to their late-pregnancy counterparts (Li et al., 2002). Both studies reported that women who miscarried were more likely to have high peak magnetic-field exposures; no differences were reported, however, in the average magnetic-field exposures of women who miscarried, compared to those who did not. The scientific panels that have considered these studies concluded that the possibility of bias precludes making any conclusions about the effect of magnetic fields on miscarriage (NRPB, 2004b; FPTRPC, 2005a; WHO, 2007); the WHO categorized the data as "inadequate." [emphasis added in the Heartland applicants' submission][31]

111 The Heartland applicants submitted that RETA had mischaracterized the study as the conclusions drawn do not relate to short term exposure, but rather the median electric and magnetic field exposure of pregnant women in a 24 hour period extrapolated to represent a typical day.

112 The Heartland applicants stated that evidence relating to the potential effects of magnetic fields on the health of pregnant women and their children is not new. They noted that both they and RETA referenced studies on the effects of magnetic fields on pregnancy and reproduction.

113 The Heartland applicants argued that even if the study referenced by RETA is considered new, it would not reasonably cause the Commission to vary or rescind the Heartland decision. It submitted that the effect of electric and magnetic fields on health has been closely monitored by national and international health agencies for the past 40 years. It observed that hundreds of studies have been undertaken on the topic and that none of the reviews of this research performed for these health agencies has concluded that electric and magnetic fields pose any likely health effect.

114 The Heartland applicants emphasized that the new study is an epidemiology study. They noted that an important limitation of epidemiology studies is that even if an association is measured it does not tell scientists how the exposure is truly related to the disease. They stated that this limitation was explained in their evidence for the proceeding. They also emphasized that no conclusion about the impact of magnetic fields on human health can be reached by looking at a single study. They argued that if the release of a single epidemiological study satisfied the test to permit a review of the Heartland decision, there would be no regulatory certainty or finality for the application.

115 The Heartland applicants pointed out that there was evidence before the hearing panel that household implements such as hairdryers produce magnetic fields in the hundreds of milligaus. It also observed that other sources of significant magnetic field exposures include distribution lines and household wiring.

116 The Heartland applicants stated that the new evidence RETA intends to introduce on magnetic field shielding is not new. They noted that RETA's president, Mr. Johnson, spoke to the issue of shielding in his evidence and that RETA cross-examined the AESO's CCI witnesses on this topic as well.

117 The Heartland applicants asserted that the electric and magnetic field evidence that RETA seeks to introduce is not a new fact or circumstance or evidence that was previously unavailable to RETA. They submitted that RETA has not identified any exposure produced by transmission lines that has not already been considered. The Heartland applicants stated that RETA had the opportunity in the Heartland hearing to test their evidence on electrical effects or bring its own such evidence and chose not to.

6.1.1 Review panel findings

118 The study that RETA relies upon in support of this ground was published in August 2011, after the record for the Heartland proceeding closed. While the report is a follow-up to an earlier study and uses data generated in that earlier study, the review panel accepts that this is new evidence as contemplated by Section 4(2) of AUC Rule 016. The question the review panel must therefore answer is whether there is a reasonable possibility that this new evidence could lead to a material variance or rescission of the Heartland decision, in accordance with Rule 016. For the reasons that follow, the review panel concludes that RETA has not established a reasonable possibility that the new report could lead to a material variance or rescission of the Heartland decision, as required by Section 4(2) of Rule 016 in order to meet the test for a variance.

119 RETA, the Heartland applicants and many other participants filed extensive evidence on the health effects of electric and magnetic fields. The record of the Heartland hearing includes numerous studies and reports on the subject, including the 2007 comprehensive review by the World Health Organization (WHO) of the subject and an update to the WHO report prepared by the Heartland applicants' experts, Exponent. Literally, hundreds of studies on the subject were summarized and or referenced in the materials filed.

120 Two experts on the health effects of magnetic fields appeared at the Heartland hearing; Dr. Bailey on behalf of the Heartland applicants and Dr. Blank on behalf of RETA, Strathcona County and the City of Edmonton. Dr. Bailey and Dr. Blank stressed the importance of looking at all the evidence on an issue and looking carefully at all of the studies before drawing a conclusion on the health effects of magnetic fields.[32]

121 In answers to information requests from the Commission, Dr. Blank cautioned against reliance on epidemiology studies because they can only establish correlation and estimate risk.[33] He noted that epidemiology studies frequently reach different conclusions and that conclusions based on pooled analysis or meta-analysis generally carry more weight.[34] Dr. Blank stated: "epidemiology and animal studies are helpful, but in trying to assess the health implications of EMF exposure, basic science studies are far more reliable and certainly a reasonable basis for precautionary measures."[35]

122 Dr. Bailey also cautioned against reliance upon a single study when drawing conclusions about health risks from magnetic fields. In his report he stated "Statements about health risks that are based on a single study or a select group of studies, on the other hand, should not guide decisions about health risks."[36] Doctor Bailey also noted that an important limitation of epidemiology studies is that "even if an association is measured it does not tell scientists if and how the exposure is truly related to the disease."[37] Doctor Bailey described the weight of evidence approach as follows:

> The evidence used to evaluate any health risk is the cumulative body of research published in the peer-reviewed literature. The individual research studies can be thought of as puzzle pieces. When all of the research is placed together, we have some understanding of possible health effects; however, no conclusions can be reached by looking at only one study, just as no picture can be formed with just one puzzle piece. Each study provides a different piece of information because of its unique strengths and

> weaknesses--if the study used valid methods and had no obvious sources of bias, it may provide a wealth of information or, if the study was not well done, it may provide little (if any) information.[38]

123 In its 2007 report, the WHO emphasized the need to adopt a weight of evidence approach to assessing the health risks of electric and magnetic fields, and stated as follows:

> All studies, with either positive or negative effects, need to be evaluated and judged on their own merit, and then all together in a weight of evidence approach. It is important to determine how much a set of evidence changes the probability that exposure causes an outcome. Generally, studies must be replicated or be in agreement with similar studies. The evidence for an effect is further strengthened if the results from different types of studies (epidemiology and laboratory) point to the same conclusion.[39]

124 The hearing panel found as follows with respect to the WHO 2007 report:

> The evidence discloses that the World Health Organization's report was a comprehensive, weight-of-evidence review of peer-reviewed epidemiological, animal and cellular studies related to the health effects associated with magnetic fields. The evidence before the Commission was that the review was performed by a large working group and was subject to independent review. The Commission accepts Dr. Bailey's evidence that that the review methodology for the study was sound and the conclusions and recommendations were reasonable and based upon the best evidence available.[40]

125 The approach described by the WHO above and endorsed by both Dr. Blank and Dr. Bailey is reasonable and practical. The new study relied upon by RETA is a single epidemiological study. There was no evidence before the review panel to suggest that the study has been evaluated or judged by other scientists or scientific bodies, nor that it has been replicated or evaluated as part of a larger weight-of-evidence approach. In the review panel's opinion, the existence of this one new epidemiological study does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision.

126 RETA also proposed to provide new evidence on magnetic fields and other electrical effects associated with the Heartland transmission line and on the shielding of magnetic fields on underground cables. In the review panel's opinion, this additional evidence proposed by RETA does not meet the test provided in AUC Rule 016 because RETA has failed to demonstrate that the additional evidence is new or previously unavailable. The record demonstrates that RETA was aware of the magnetic field estimates and information filed by the applicants in its application because it asked information requests on them. If RETA had concerns about that evidence it could have pursued that by filing its own evidence on the subject or cross-examining the Heartland applicants on their evidence. It chose not to. Further, the record also demonstrates that RETA was cognizant of the issue of underground shielding for magnetic fields as it cross-examined the CCI witnesses on this issue and gave anecdotal evidence on this as well. In the review panel's view, RETA has failed to demonstrate that the new evidence it seeks to introduce on shielding and on electric and magnetic field estimates is new or previously unavailable.

6.2 RETA ground four: financial impact of Colchester School closure

127 RETA noted that many of its members expressed concerns about the continued viability of the Colchester school if the underground option was rejected and the preferred east route was approved. It stated that these viability concerns have now been realized as there are plans to move the students of Colchester school to a new school or a refurbished existing school. RETA referenced a December 14, 2011, letter from the Elk Island Public Schools in support of this submission. RETA also stated that the cost of such a move was estimated by the Elk Island Public Schools to be in the range of $20 million. RETA argued that the Commission did not include these additional financial costs when considering the Heartland application. It argued that the inclusion of these extra costs when comparing the overhead and underground options could lead the Commission to materially vary or rescind the Heartland decision.

<u>The Heartland applicants</u>

128 The Heartland applicants argued that the December 14, 2011, letter from the Elk Island Public School Board could not reasonably cause the Commission to materially vary or rescind the Heartland decision because it contains no new fact or circumstance for the Commission to consider. They noted that neither the views of the Colchester Parent's Association nor the prospect that the school might close represented new information for the Commission.

129 The Heartland applicants asserted that there is no reason to close the school as a result of the Heartland project. They noted that the Commission concluded that it did not expect that the construction or operation of the project would result in material change to the electric and magnetic fields at the Colchester School yard or within the school itself. They observed that they were ordered by the Commission to conduct post-construction measurement at those locations to confirm this conclusion.

130 The Heartland applicants argued that even if the Commission were to consider the $20 million school relocation costs in its assessment of the project, those costs were greatly outweighed by the $323 million incremental cost for the underground option.

6.2.1 Review panel findings

131 The record of the Heartland proceeding shows that the continued viability of the Colchester school was a significant issue considered by the hearing panel in the Heartland hearing.

132 The evidence of the Colchester Parents Association and Elk Island Public Schools was very clear. At the Sherwood Park Community session, Mr. Gabriel Chemello and Ms. Cheryl Przybilla, who represented the Colchester Parents Association, each stated that the parents of Colchester will not allow their children to attend the school if the project was built on overhead lines as proposed by the Heartland applicants.[41] A representative of the Elk Island Public Schools, Mr. Scott McFadyen, also spoke at the Sherwood Park evening session. Mr. McFadyen told the hearing panel that even if a small percentage of families were to withdraw their children it would have a significant impact on the viability of the school.[42]

133 During the formal hearing Ms. Przybilla testified that, in a recent survey of Colchester parents, "95 percent of parents indicated that if the power lines were built above ground beside our school they would not allow their children to go to that school."[43] In its final argument RETA also stated that the viability of Colchester Elementary School is in jeopardy if the project is built above ground and referenced the survey described by Ms. Przybilla. The hearing panel acknowledged that the viability of the school was an issue in paragraph 1096 of the Heartland decision.

134 Having regard to the foregoing, the review panel is of the opinion that the information provided by RETA about the possible closure of Colchester Elementary School and the relocation of its students is not new evidence or a change of circumstances. The record clearly demonstrates that the Commission considered this issue.

135 While the review panel does not consider this information to be new evidence or a change of circumstances, it is of the view that even if it did meet that test it does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision. The Heartland decision reflects that the hearing panel was aware that the viability of the school was an issue of concern to some individuals and took that into account when deciding to approve the routing of the Heartland project and reject the underground option. As noted previously in this decision, the hearing panel rejected the underground option because it concluded that the additional costs associated with it were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.

136 For the reasons provided above, the review panel finds that a review of the Heartland decision is not warranted based on RETA's fourth ground, namely that the information regarding the possible closure of the Colchester Elementary School is not new and, in any event, that information does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision.

6.3 Strathcona ground three/RETA ground five: the Government's review of WATL and EATL

137 Strathcona County noted that the Commission received correspondence from the Minister of Energy on October 21, 2011, stating that the Government of Alberta was reviewing its approach to three critical transmission infrastructure projects, the Heartland project, the WATL project and the EATL project. While the Minister later withdrew his request for the Commission to suspend its consideration of the Heartland project, the County asserted that the ongoing review of the WATL and EATL projects was an important new circumstance. The County argued that, as a result of the review, WATL, EATL or both, may not proceed and that this may have financial implications for the Heartland project.

138 The County argued that the following paragraphs from the Heartland decision demonstrated that the hearing panel took into account the costs associated with the EATL and WATL projects when it decided not to proceed with the underground option:

> 165. In the Heartland hearing, the most controversial evidence from this perspective was the evidence led by the Shaw group. Amongst other things, the witnesses for these interveners provided evidence on the social and economic implications of approving the roster of transmission projects described in the Alberta Electric System Operator's long-term plan, including the Heartland project. This evidence included testimony from various representatives of industrial and commercial operations, farmers, and health care/senior care providers.
>
> 166. In the Commission's view, this evidence is relevant to the Commission's consideration of the Heartland application to the extent that it helps assess the economic implications of the transmission alternatives described in the Heartland application. One factor that the Commission may take into account when considering the routing and technology alternatives described in the Heartland application is the cost of those alternatives. Accordingly, the Shaw group's evidence regarding the social and economic implications of the Heartland project may influence the Commission to choose the lowest cost alternative. However, the Commission could not, on the basis of this information, decide that approval of the Heartland project is not in the public interest because of the social and economic implications of approving any double-circuit 500-kilovolt transmission line from the Edmonton area to the Redwater-Gibbons area. Such a determination would be contrary to clear wording of the statutory scheme and the intent of the legislature.[44]

139 The County stated that, based on the foregoing, the hearing panel clearly took into account the costs of other projected large transmission projects when it concluded that the underground option was not in the public interest. The County argued that, had the hearing panel been aware during the hearing that EATL and WATL may not proceed, it may not have been as influenced by cost considerations when considering the underground option.

140 The County submitted that the Government's announcement of a review of two of the projects addressed in the Shaw group's evidence is a change in circumstance that could lead the Commission to materially vary or rescind the Heartland decision. Specifically, it suggested that if the costs of the EATL and WATL projects are not taken into account, approval of the underground option becomes a more reasonable prospect.

141 RETA supported the County on this ground but did not materially add to the submissions of the County.

<u>The Heartland applicants</u>

142 The Heartland applicants stated that this ground relies on the assumption that, had the hearing panel known that the Government review of WATL and EATL was going forward, it may have decided the Heartland application differently. They argued that there is no basis for this assertion and no evidence that the hearing panel took into account the costs of the WATL or EATL projects when it made its decision to reject the underground option.

143 The Heartland applicants note that the hearing panel's only discussion of WATL and EATL was in paragraphs 165-166 of the Decision. They argue that the reference here is an acknowledgement of the evidence respecting the impacts of transmission projects generally on ratepayers. They argue that there is no support for the County's suggestion that the hearing panel may have been more inclined to approve an underground option if it was aware that EATL and WATL might not go ahead.

144 The Heartland applicants note that the need for the project is prescribed by the Alberta Legislature. They argue that the new facts alleged by RETA and the County do not change the determination of need or the basis upon which the Heartland application would have been considered. They concluded that the Government's review of the WATL and EATL projects is not a change in circumstance that could reasonably lead the Commission to materially vary or rescind the Heartland decision.

The AESO

145 The AESO submitted that this ground for review must fail as it is premised upon the false assumption that the hearing panel took into account the costs of EATL and WATL when it decided not to approve the underground option. The AESO stated that the hearing panel only said that it may take these costs into account. The AESO also pointed out that the hearing panel did not pick the lowest cost alternative.

6.3.1 Review panel findings

146 The County asserts that the Government of Alberta's review of the EATL and WATL projects are new circumstances that raise a reasonable possibility that the Commission could substantially vary or rescind its decision by approving the underground option. The County asserts that one of the reasons that the Commission may have rejected the underground option was its incremental cost. It argues that if the EATL and WATL projects did not go ahead, the Commission would be more amenable to the incremental costs of the underground option because of the avoided costs of the other two projects.

147 The County argues that support for its proposition is found in paragraphs 165 and 166 of the Heartland decision. The review panel disagrees. The context of these two paragraphs is important. They are located in a section of the decision in which the hearing panel discussed generally the evidence that it could consider when deciding the Heartland application having regard to the legislative framework for applications for critical transmission infrastructure.

148 In paragraph 165, the hearing panel gave a broad description of the evidence presented by the Shaw group. In paragraph 166 the hearing panel stated what use it may make of that evidence. The Commission's conclusion on this matter was simply that the "Shaw group's evidence regarding the social and economic implications of the Heartland project may influence the Commission to choose the lowest cost alternative."[45] The hearing panel did not state in this section of the decision what use it did make of the Shaw group's evidence.

149 The hearing panel's reasons for rejecting the underground option comes much later in the decision and follows a detailed analysis of the impacts of the route alternatives proposed in the application, including the underground option. Those reasons are found in paragraphs 1080 to 1086 and reflect that the Commission did not reject the underground option simply because it considered it to be too expensive. Rather, the Commission found that the additional costs associated with underground option as reflected in Table 1, above, were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[46] There is nothing in this section to suggest that the costs associated with the EATL, WATL, or any other anticipated transmission project influenced the hearing panel's decision to reject the underground option.

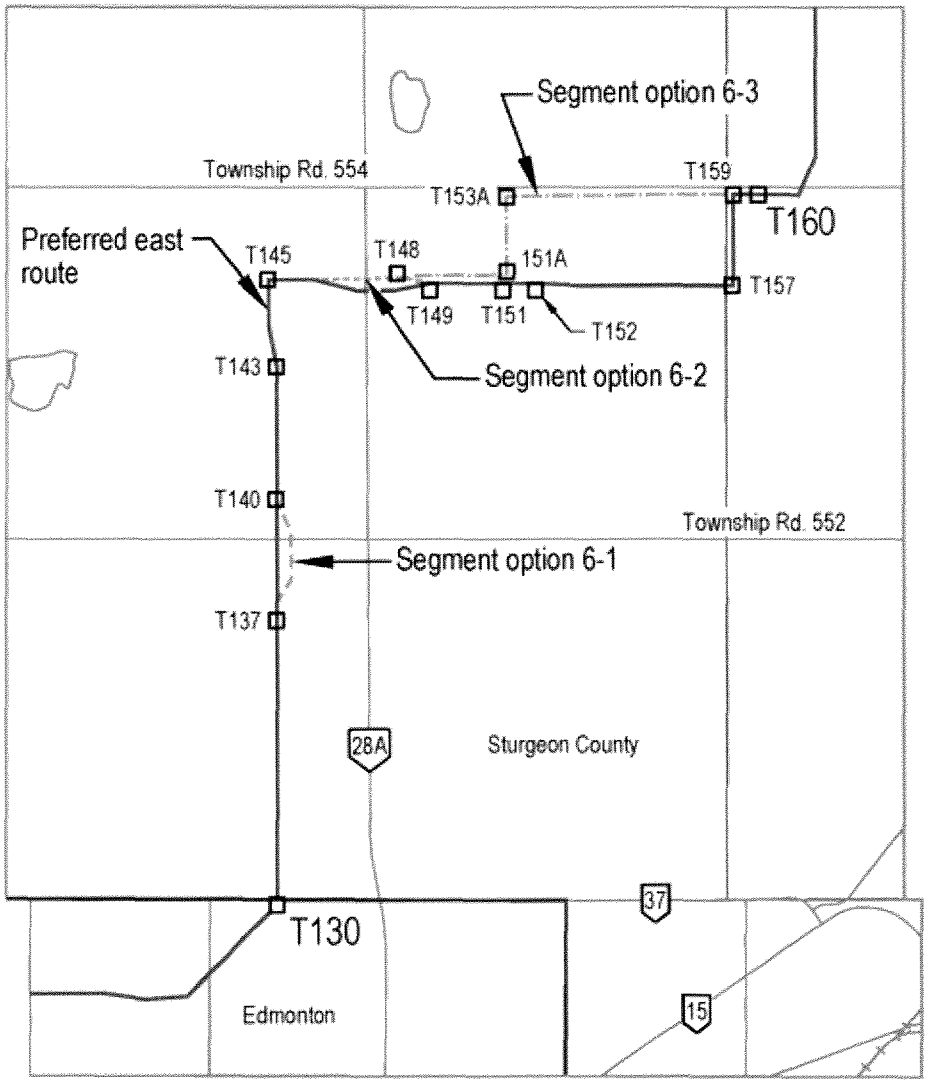
150 The review panel also notes that the hearing panel would have been aware of the Government's intention to review the WATL and EATL projects as the Government's request was received on October 21, 2011,

approximately ten days prior to the issuance of the Heartland decision. The review panel presumes that this fact was taken into account when the hearing panel issued its decision in which it rejected the underground option.

151 The review panel finds that the County has failed to demonstrate that the Government's review of the WATL and EATL projects are new circumstances that raise a reasonable possibility that the Commission could materially vary or rescind the Heartland decision and finds that a review of the Heartland decision is not warranted on this ground.

7 Route Segment 6-3

Figure 2 Map of route segment 6 and segment option 6-3



7.1 James and Michelle Prins

152 James and Michelle Prins own and reside upon lands adjacent to route segment 6-3 between towers T 153A and T 159(see map). Route segment 6-3 was a short optional route segment proposed by the Heartland applicants on the preferred route north of the City of Edmonton.

153 The Prins filed a short statement of intention to participate on October 12, 2010, accompanied by a picture showing their residence and proposed subdivision in relation to route segment 6-3 (Exhibits 68.01 and 68.02). The Prins stated that they did not attend the hearing because representatives of the Heartland applicants told them that their attendance would be unnecessary because they were on an alternate route. They stated that the Commission provided three methods of participating in the Heartland proceeding and that they chose to participate by filing a written submission. They also stated that they were unable to attend the hearing because of work obligations. It was their view that the hearing panel gave more weight to the concerns expressed by persons who attended the hearing and gave direct evidence than it did to their written submission. In this respect they noted that the concerns expressed by persons living on the preferred route were very similar to the concerns they expressed in their written submissions.

154 The Prins questioned the correctness of the hearing panel's decision to approve route segment 6-3 rather than the preferred route in segment 6. They argued that route segment 6-3 is inferior to the Heartland applicants' preferred route as there are more residences within metres of route segment 6-3 and it also has more subdivided but undeveloped acreages.

The Heartland applicants

155 The Heartland applicants argued that this application for review must be dismissed because the grounds raised by James and Michelle Prins do not meet the Commission's test for granting a review. They submit that James and Michelle Prins were registered participants in the Heartland proceeding and received the Notice of Hearing for the proceeding. They observed that the notice indicated that route segment 6-3 was under consideration.

156 The Heartland applicants submitted that the concerns expressed by James and Michelle Prins are the same as those expressed in their statement of intention to participate. They argued that the Commission considered these concerns extensively in its decision. They concluded that the Prins review request should be dismissed because they had identified no error of law, fact or jurisdiction in the Commission's decision.

7.1.1 Review panel findings

157 James and Michelle Prins were registered participants in the Heartland proceeding. Mr. Prins confirmed that he was receiving emails from the Commission's electronic proceeding system and that he knew there was a hearing.[47] Mr. Prins explained that they did not attend the hearing because he was working and because he chose to participate by filing a written submission.

158 James and Michelle Prins did not request a review on the basis of new evidence, a change of circumstances or evidence that was previously unavailable. Rather, they challenged the correctness of the Commission's decision on the basis that there are more residences and subdivided acreages within 800 metres of route segment 6-3 than there are on the Applicants' preferred route, which the hearing panel did not select. They also questioned the weight given by the Commission to their submission as compared to the weight given to the submissions of persons who attended the hearing.

159 In the review panel's view, the concerns of James and Michelle Prins are best characterized as allegations of errors of law regarding the Commission's interpretation of the evidence. Read broadly, their review application suggests that the Commission failed to take into account relevant evidence about the number of residences and undeveloped acreages within 800 metres of alternative route segment 6-3. They also suggest that the Commission either ignored their written submission or failed to give it the same weight as the oral submissions of those who attended the hearing.

160 The review panel finds that James and Michelle Prins have failed to demonstrate that the hearing panel committed either of the errors alleged in their review application. A review of the Heartland decision discloses that

the hearing panel reviewed the route assessment provided in the Heartland application for the preferred route and route segment 6-3 and was aware that route segment 6-3 has more residences within 800 metres than the preferred route.[48] In the review panel's view, there is nothing on the record or in the submissions of James and Michelle Prins to suggest that the Commission misunderstood or misapprehended the evidence regarding the local impacts of choosing route segment 6-3 over the Heartland applicants' preferred route.

161 The review panel also finds that there is nothing on the record of the proceeding or in the submissions of James and Michelle Prins that demonstrates that the hearing panel ignored their written submissions on route segment 6-3. In paragraph 97 of the Heartland decision the hearing panel stated as follows:

> In reaching the determinations set out in this decision, the Commission considered all relevant materials comprising the record of this proceeding, including the evidence and submissions provided by each party. References in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record as it relates to that matter.[49]

162 In Decision 2011-436 the hearing panel stated as follows with respect to segment option 6-3: "The Commission considers that segment option 6-3, as proposed by the Pasnaks and which crosses at the back of their lands, is the better route as it helps to mitigate the concerns of the Pasnaks." One of the concerns expressed by Mr. Prins was that the hearing panel gave more weight to oral submissions than it did to the written submission filed by Mr. Prins. The review panel observes that the Pasnak's information regarding segment option 6-3 was also contained in a written submission, albeit one that was read out by their neighbor at the hearing. As stated previously, the weight assigned by the hearing panel to evidence is entitled to considerable deference and, in the review panel's opinion, there is nothing on the record of the proceeding or in the submissions of James and Michelle Prins that indicates the Commission made an error when it found that approval of route segment 6-3 was in the public interest.

163 Having regard to the foregoing, the review panel therefore finds that a review of the Heartland decision is not warranted based upon the grounds advanced by James and Michelle Prins.

7.2 William, Kenton and Trevor Prins

164 William, Kenton and Trevor Prins also own land adjacent to route segment 6-3. They asked the Commission to review the Heartland decision on the basis that the Commission's choice of route segment 6-3 represented the path of least resistance. They argued that the Heartland applicant's preferred route was superior to route segment 6-3 and stated that the Commission failed to have regard for how its choice of route segment 6-3 would affect the landowners across the road from it. William, Trevor and Kenton Prins also expressed frustration about the lack of compensation available to them despite the fact they must bear the burden of having the line so close to their lands.

165 At the review and variance hearing Trevor Prins spoke on behalf of William and Kenton Prins. Trevor Prins stated that they chose not to participate in the Heartland project hearing for two reasons. First, they were under the impression that the preferred route would be chosen. Second, they rent farm land from individuals that live on the preferred route. They were concerned that their opposition to the alternate route segment could affect their business relations with their landlords. They also noted that they had lived in the area for over 45 years and that the people living on the preferred route were their neighbors. They were concerned that the effect of the application was to pit neighbor against neighbor.

166 Trevor Prins stated that if the preferred route was not chosen, a better alternative would be to run the line along the quarter section line so that the owners on both sides of the line could receive compensation for its impacts. He stated that they own land elsewhere along the preferred route where this occurred and he considered it to be a better approach.

<u>The Heartland applicants</u>

167 The Heartland applicants argued that this application for review must be dismissed because the grounds raised by William, Kenton and Trevor Prins do not meet the Commission's test for granting a review. They argue that this application, like that of James and Michelle Prins, merely expresses dissatisfaction with the Commission's decision to approve route segment 6-3. They stated that there is nothing on the record to suggest that these persons were not notified of the proceeding or were denied an opportunity to participate in the proceeding.

168 The Heartland applicants stated that the only issue raised by William, Kenton and Trevor Prins is that of compensation for impacts to property value and future development plans. They submitted that such issues were dealt with extensively by the Commission. They argued that these persons have not alleged that the Commission's findings on these issues are incorrect in fact or law or should be adjusted on the basis of new facts or circumstances. They concluded that the review application of William, Kenton and Trevor Prins should be dismissed.

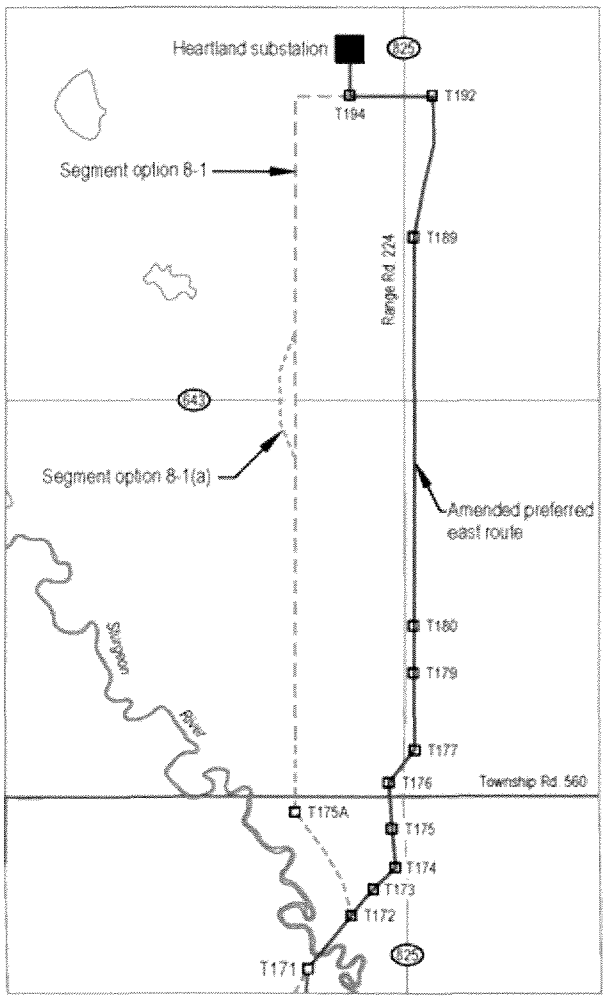
7.2.1 Review panel findings

169 The review panel finds that William, Kenton and Trevor Prins were aware that the Commission was going to hold a hearing on the Heartland application and chose not to participate. While the review panel understands that they made this decision in part to maintain good relations with their neighbors and their landlords, it must emphasize that the purpose of the Commission's review process is not to provide a second chance to parties who, for whatever reason, chose not to participate in the first instance.

170 The review panel finds that the concerns raised by Trevor, William and Kenton Prins do not meet the Commission's test for granting a review. These review applicants have not demonstrated that there are new facts, changed circumstances or previously unavailable evidence. In the review panel's view, the primary concern expressed by these review applicants relates to compensation, a matter over which the Commission has no jurisdiction. The Commission concludes that a review of the Heartland decision is not warranted based upon the grounds advanced by William, Kenton and Trevor Prins.

8 Route Segment 8 - Aspen Valley Farms

Figure 3 Map of Route Segment 8



171 Aspen Valley Farms is owned by William Procinsky and his wife Beverly Durnin. This farm is located on Segment 8 of the preferred route, on three quarter sections of land that are bisected by the Sturgeon River. Towers T 171 to T 125 are all located on land owned By Aspen Valley Farms. In its review application Aspen Valley Farms stated that a review of the Heartland decision was warranted because the proposed tower placements on its lands will interfere with farming operations. Aspen Valley Farms proposed two alternate routes that would lower the impact of the project upon its farming operations. Aspen Valley Farms also expressed concern that it had initially intended to participate in the proceeding by giving a short submission at a community session in Fort Saskatchewan. It stated that its ability to participate was limited when the Commission decided not to go ahead with the Fort Saskatchewan session due to lack of registered participants.

172 Aspen Valley Farms provided an extensive review of its history of dealings with the Heartland applicants. It expressed concern with the consultation process between it and the Heartland applicants and reported difficulty in getting answers from the Heartland applicants and their agents and representatives. Aspen Valley Farms submitted that its owners had been "bullied" into signing an agreement with the Heartland applicants which allowed the project to cross its lands.[50]

173 Aspen Valley Farms advised the Commission that it believed it could not participate in the proceeding because a landman acting on behalf of the Heartland applicants stated that, by signing the right-of-way agreement, the

owners of the farm were no longer entitled to participate in the proceeding. It stated that the landman that negotiated with them was the same landman who was later fired for inappropriate conduct when dealing with landowners.

174 Aspen Valley Farms noted that a condition of the Heartland approval related to the potential amendment of the location of tower 176 which is immediately adjacent to its lands. It stated that a change to this tower location could impact its lands because tower 175 which is on its lands is currently a tangent tower with a footprint of 13 metres. It stated that depending upon what happens with Tower 176, Tower 175 may have to be converted to an angle tower that has a much larger footprint (25 metres).

175 Aspen Valley Farms submitted that the approved route zigzags across its lands and argued that better routes exist that would limit the impacts to its farming operations.

176 Aspen Valley Farms also expressed frustration with the tower siting process on its land. It stated that it was originally led to believe that the towers on its land would be smaller than they are. Specifically it stated that given the change in tower size it was concerned that it would be unable to get its air-seeder or sprayer between the towers.

177 Aspen Valley Farms stated that it would like to see one of two things happen: (1) be compensated for property devaluation or (2) be bought out under the new buyout policy.

178 Aspen Valley Farms submitted additional information to the Commission in its letter of January 31, 2012. Included in that information were documents that showed the Heartland Applicants' initial written offer of compensation for placing transmission structures on the farm dated August 11, 2010. Aspen Valley Farms explained that after it received the August 11, 2011, offer the Heartland applicants hired a company to do a real estate appraisal of the two sections upon which structures were proposed. Following receipt of that appraisal, the Heartland applicants adjusted their offer. Aspen Valley Farms explained that, after further negotiations, they agreed on the final consideration payable and signed the right of way agreement on April 1, 2011. The following table summarizes the compensation offered and ultimately accepted by Aspen Valley Farms.

Initial offer (August 11, 2010)	**Consideration**
SE 32-55-22 W4M	153,500.00
NE 32-55-22 W4M	159,440.00
Signed agreement (April 1, 2011)	
SE 32-55-22 W4M	191,460.00
NE 32-55-22 W4M	108,650.00

179 In addition to the consideration described above, it was Aspen Valley Farms' evidence that it received a $10,000 signing bonus for each quarter. The documents submitted by Aspen Valley Farms indicated that it would also receive annual structure payments of $1,250 per structure on cultivated land and $500 per structure on uncultivated land.

The Heartland applicants

180 The Heartland applicants argued that the review application filed by Aspen Valley Farms raises no particular allegations of error(s) in fact, law or jurisdiction nor does it assert that there are new facts, a change in circumstances or facts not previously placed in evidence. They observed that Aspen Valley Farms was a registered

participant in the Heartland proceeding. They also pointed out that while this intervener filed a statement of intention to participate and was granted standing, it ultimately agreed to the routing of the heartland project across its lands.

181 The Heartland applicants argued that the concerns expressed in Aspen Valley Farms' review application were similar to those expressed in its statement of intention to participate and in its submissions to the Commission at the pre-hearing process meeting. They asserted that the concerns raised by Aspen Valley Farms with respect to agricultural impact are based on incorrect information with respect to the size of the tower footprints on the farm.

182 The Heartland applicants noted that the cancellation of the Fort Saskatchewan community session did not preclude Aspen Valley Farms from making submissions to the Commission. It noted that Aspen Valley Farms could have made a presentation at the Sherwood Park community session or in the formal proceeding.

183 The Heartland applicants acknowledged that AltaLink has a right-of-way agreement with Aspen Valley Farms. They stated that the Commission considered the route alternatives for segment 8 and that consideration included agricultural impacts on lands adjacent to those owned by Aspen Valley Farms, and the need to access nearby industrial lands to decrease the overall impact on agricultural lands in the area. They argued that the approved route was the best route in the area, particularly given potential impacts on surrounding agricultural lands, and noted that one of the routes proposed by Aspen Valley Farms required three crossings of the Sturgeon River as compared to one crossing on the approved route.

184 During the hearing, the Heartland applicants addressed the allegation of Aspen valley Farms regarding its ability to participate in the Heartland hearing. They explained that there is a clause in their agreement with Aspen Valley Farms that states "Power line Route - I/we have no objection to the proposed transmission line and its general routing as shown on the attached Schedule A. I/We have no objection to the Alberta Utilities Commission granting a permit and license to construct and operate the transmission line."[51]

185 The Heartland applicants stated that the additional submissions filed by Aspen Valley Farms do not allege an error of law, jurisdiction or fact and do not point to new facts, a change in circumstances or facts not previously in evidence. They noted that the preferred relief proposed by Aspen Valley Farms is a re-route of the transmission line across its lands. The Heartland applicants stated that the alternative relief proposed by Aspen Valley Farms, namely more compensation or a buy-out, are matters outside of the Commission's jurisdiction. They also stated that they remain prepared to discuss compensation with Aspen Valley Farms. They also described some accommodations offered to address concerns about interference with farming operations.

8.1 Review panel findings

186 Aspen Valley Farms stated that it intended to provide a brief submission to the hearing panel at a community session in Fort Saskatchewan. However, it expressed concern that its ability to participate in the proceeding was compromised when the Commission cancelled the Fort Saskatchewan session due to lack of interest. Aspen Valley Farms also states that it did not participate in the hearing because it was told by an agent of the Heartland applicants that it could not because of the right of way agreement it signed.

187 The review panel finds that Aspen Valley Farms had notice of the Heartland hearing and could have participated in that hearing had it chosen to do so. The owners of Aspen Valley Farms confirmed at the review hearing that they attended portions of the hearing in Edmonton and if they had questions about their ability to participate in the proceeding it was open to them to seek information from the Commission directly or indirectly by asking Commission staff. In the review panel's view, the fact that Aspen Valley Farms had signed an agreement with the Heartland applicants in which it agreed not to object to the transmission line or the route was not a barrier to their participation in the hearing from the Commission's perspective. Indeed, the Heartland applicants acknowledged that, as registered participants, the owners of Aspen Valley farms could have made submissions to the hearing panel at the Sherwood Park Community Session or in the formal hearing.[52]

188 The concerns expressed by Aspen Valley Farms were not framed in the language of the Commission's test for

a review. In other words, this review applicant has not alleged an error of law, fact or jurisdiction or the existence of new facts changed circumstances or previously unavailable evidence. Rather its primary concerns relate to the approved route for the Heartland transmission line across its lands. It argues that the current route interferes with farming operations and submits that the route should either be changed or that it should be better compensated for the associated impacts.

189 Aspen Valley Farms consented to the route location on its land by executing a right-of-way agreement with the Heartland applicants and accepting compensation for this agreement, as described above. In accordance with the right-of-way agreement this intervener agreed to the line routing on its lands and did not object to it in the Heartland hearing. The fact that Aspen Valley Farms now has misgivings about that routing constitutes neither an error of law, fact or jurisdiction, nor new facts, a change in circumstances or previously unavailable evidence sufficient to create a reasonable possibility that the Commission could materially vary or rescind the Heartland decision. Further, the Commission lacks the jurisdiction to address the matters of compensation raised by Aspen Valley Farms.

190 Having regard to the foregoing, the review panel finds that a review hearing is not warranted based upon the application for review filed by Aspen Valley Farms.

9 Conclusion

191 For the foregoing reasons it is the review panel's opinion that none of the review applicants have raised a substantial doubt as to the correctness of the Heartland decision due to an error of fact, law or jurisdiction. Further, it is the review panel's opinion that none of the review applicants have raised a reasonable possibility that there are new facts, a change in circumstances, or facts not previously placed in evidence that could lead the Commission to materially vary or rescind the Heartland decision. The review panel therefore dismisses the review applications of Strathcona County, RETA, James and Michelle Prins, William, Kenton and Trevor Prins and Aspen Valley Farms.

Dated on May 14, 2012.

The Alberta Utilities Commission

<original signed by>
Carolyn Dahl Rees
Vice Chair

<original signed by>
Mark Kolesar
Vice Chair

<original signed by>
Bill Lyttle
Commission Member

* * * * *

Appendix 1 - 2011-12-19 AUC Ruling

on Heartland Suspension

ELECTRONIC NOTIFICATION

December 19, 2011

To all interested parties:

Re: Proceeding 1592, Motion to suspend Decision 2011-436

Ruling on a motion by Strathcona County to suspend the operation of Decision 2011-436

Introduction

1. Strathcona County (the County) filed an application requesting the Commission to review and vary its decision on the Heartland transmission project application (Decision 2011-436) and a motion to suspend the operation of that decision pending the outcome of its review request. The Commission established a process and schedule for its consideration of the County's motion which included the filing of written submissions and an opportunity to provide oral argument.
2. In this ruling the Commission must decide whether to suspend the operation of Decision 2011-436. For the reasons that follow the Commission has denied the County's motion.

Background

3. The Heartland application was filed on September 27, 2010. The application included a preferred east route and an alternate west route for the Commission's consideration. Additionally, the application included an underground option for the preferred east route. The underground option was proposed for the first 20 kilometres of the preferred east route within the Edmonton transportation and utility corridor, from the Ellerslie substation to the vicinity of Baseline Road. Strathcona County and some other interveners supported the approval of the preferred east route with the underground option.
4. On November 1, 2011, the Commission issued Decision 2011-436 in which it approved, subject to conditions, the application for the Heartland transmission project. Specifically, the Commission approved the preferred east route described in the application using a combination of lattice and monopole towers. The Commission rejected the underground option for the reasons provided in Decision 2011-436.
5. Strathcona County filed its request to review and vary Decision 2011-436 and its motion to suspend the operation of that decision on November 25, 2011. The County's request to review and vary decision 2011-436 is based upon the following four grounds:
   (a) the Commission erred in fact or law by misapprehending the evidence of the Heartland applicants as it related to the underground option being proposed;
   (b) the Commission erred in law in its determination of what is in the public interest;
   (c) the Commission erred in fact or law in its considerations and findings regarding the East TUC; and
   (d) the Minister of Energy has made various directions related to the Critical Infrastructure Projects in Alberta. These directions are new facts, a change in circumstances or facts not previously in evidence that were not known to parties, including the Commission, at the time of the hearing, and which could lead the Commission to materially vary or rescind Decision 2011-436.
6. On November 30, 2011, the Commission received a second request to review and vary Decision 2011-436 from James and Michelle Prins.
7. On November 8, 2011, the Commission wrote to interested parties and established a process and schedule for its consideration of the County's motion and for its consideration of the review and variance requests. Submissions on the suspension motion were received on December 12, 2011, from ATCO Electric, The Alberta Electric Systems Operator (the AESO), Blackland ranches, Inc., and AltaLink

Management Ltd. and EPCOR Distribution & Transmission Inc. (the Heartland applicants). Attached to the Heartland applicants' submission was an affidavit sworn by Mr. Darrin Watson, an officer of AltaLink Management Ltd. (Altalink).

8. On December 13, 2011, the County wrote to the Commission and requested the opportunity to examine Mr. Watson on his affidavit. The Commission found the County's request to be reasonable and amended its schedule to allow the County to cross-examine Mr. Watson on December 14, 2011. As a result, oral argument was rescheduled from December 14, 2011, to December 15, 2011.

Strathcona County's suspension motion: the application of the three-part suspension test

9. The County asked the Commission to suspend the operation of Decision 2011-436 pending its decision on the County's application to review and vary that decision. The County stated that it was making the motion under section 10(3) of the *Alberta Utilities Commission Act* and section 9(1) of AUC Rule 001.

10. The County argued that the correct test to apply to an application to suspend the operation of one of the Commission's decision is the three-part test described by the Supreme Court of Canada in *RJR MacDonald v. Canada (Attorney General)*[1]. This test requires that the person seeking the suspension, in this case the County, must demonstrate:

    (a) there is a serious issue to be argued;

    (b) that it will suffer irreparable harm; and

    (c) the balance of convenience (or inconvenience) favours granting the suspension.

11. The County asserted that a suspension is warranted because it has satisfied all three parts of the *RJR MacDonald* test. It contended that its application to review and vary the Heartland decision raises serious issues regarding the Commission's interpretation of new legislation relating to the public interest. It argued that irreparable harm to the County and ratepayers will result if the suspension is not granted and that the balance of convenience favours the granting of the suspension.

12. The County's suspension motion was supported by Responsible Electricity Transmission for Albertans (RETA). The motion to suspend was opposed by the AESO, ATCO Electric, Blackland Ranches Inc., Morris and Evelyn Presisniuk and the Heartland applicants.

13. The AESO, ATCO Electric and the Heartland applicants all agree that the three part test set out in the *RJR MacDonald* decision is the correct test to apply when considering a suspension request under section 10(3) of the *Alberta Utilities Commission Act*. These parties all noted that the Commission recently issued a ruling on a suspension request related to AUC Decision 2011-389 (the BP suspension ruling) in which it endorsed and applied the three part *RJR MacDonald* test and stated:
    While the test was developed with respect to an application to stay proceedings or for an interlocutory injunction before the courts, the Commission agrees that the RJR MacDonald three-part test is the proper analytical tool for the Commission to apply to a consideration of the Motion and in determining whether to grant a suspension or stay pursuant to section 10(3) of the *Alberta Utilities Commission Act*.[2]

14. The *RJR MacDonald* decision makes it clear that the onus is on the suspension applicant, in this case Strathcona County, to satisfy the Commission that it has satisfied each element of the three-part test.

15. Morris and Evelyn Presisniuk own lands located on the preferred east route north of the City of Edmonton. They did not address the application of the three-part test for a suspension. However, the Presisniuks did explain the effects of a suspension of the decision on their own interests. The Presisniuks stated that they had come to an agreement with the Heartland applicants regarding the purchase of their lands for the Heartland project. They explained that delay of the project would result in further uncertainty, anxiety and stress for them as they cannot relocate until the permits and licenses for the Heartland project are issued. They stated that if a suspension is granted, it should be limited to those lands which are the focus of the County's review request while having construction commence on the remainder of the east preferred route.

They argued that this would allow them to proceed with their relocation plans and would bring to an end the uncertainty about their future that they have been living with.

16. Mr. David Loren also filed a brief submission on the suspension motion on behalf of his family and his business, Blackland Ranches Inc. Mr. Loren stated that he owns land immediately adjacent to the preferred east route upon which his business and residence are located. He explained that he has taken substantial measures to adjust the business operations and his residence to accommodate the transmission line. He stated that there would be financial and moral burdens imposed upon his business and his family if the suspension is granted.

Serious issue to be argued

17. The County contends that, to answer this question, the Commission must make a preliminary assessment of the merits of the County's review and variance request. The County argues that, in accordance with the *RJR MacDonald* decision, the threshold for this assessment is a low one. It notes the Supreme Court's direction that, if the decision maker is satisfied that the application is neither frivolous or vexations he or she should proceed to consider the second and third parts of the test.

18. The County stated that its application is neither frivolous nor vexatious. It observed that Decision 2011-436 marks the Commission's first consideration of new legislation for critical transmission infrastructure. It also noted that the application was novel as the transmission towers applied for would be the largest ever constructed in Alberta and the proposed underground option would be the first of its kind in Alberta. The County reviewed these arguments in the oral hearing and emphasized the Supreme Court's direction that this is not intended to be a prolonged examination of the merits.

19. The AESO submitted that the County has failed to demonstrate that its application to review and vary the Heartland decision raises serious questions to be argued. The AESO argued that there is no evidence to support the County's argument that the Commission misapprehended or failed to properly evaluate the evidence before it. The AESO also submitted that the County's arguments regarding new facts or change in circumstances are without merit.

20. ATCO Electric (ATCO) argued that, notwithstanding the *RJR MacDonald* decision, the threshold for demonstrating that there is a serious question to be tried is higher when the relief sought is to restrain a public authority. In support of this position ATCO relied upon *Metz v. Prairie Valley School Board*[3] a case of the Saskatchewan Court of Queen's Bench.

21. While the Heartland applicants acknowledged that the threshold for satisfying the first test was low they argued that it is doubtful that the County had met that threshold. However, the Heartland applicants stated that it is unnecessary to consider this issue in detail because it is clear that the County has failed to establish irreparable harm or that the balance of convenience favours a suspension.

Commission ruling -- Serious issue to be argued

22. The law on this part of the three-part test is clear; there is a low threshold for establishing a serious issue to be argued. The Supreme Court of Canada in *RJR MacDonald* tells us that if the decision maker is satisfied that the issues raised are neither frivolous nor vexatious he or she should proceed to consider the second and third tests.[4]

23. In the Commission's view, the grounds raised by the County in its review request are neither frivolous nor vexatious. The Heartland application was the first critical transmission infrastructure project considered by the Commission under new legislation enacted specifically to address such infrastructure. The issues raised in the County's review raise questions of fact and law that relate, in part, to the Commission's interpretation of that legislation and its public interest mandate for critical transmission infrastructure. Given the low threshold for this part of the three-part test, the Commission is satisfied that the County's review

application raises serious issues to be argued. In making this determination on the motion, the Commission is in no way making a determination of the merits of the review application itself.

Irreparable harm if the suspension motion is denied

24. Strathcona County adopted the Supreme Court's definition of irreparable harm from the *RJR MacDonald* decision: "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[5]

25. The County initially asserted two types of harm that may arise if the suspension is denied. First it argued that if the stay is not granted and construction commences, the Heartland applicants will incur costs that must ultimately be paid for by the electricity consumers of Alberta. The County argues that the fact that such costs have been incurred may influence the Commission's decision to review and vary Decision 2011-436 so as to avoid treating those costs as "thrown-away" costs. Second, the County argues that the electricity consumers of Alberta would be responsible for the payment of any thrown-away costs and that there is no mechanism by which they could recover these costs. During oral argument, the County refined this argument by clarifying that this harm would occur specifically to the County as a ratepayer and to its residents that are also ratepayers. The County asserted that it was acting for its constituents, who are also ratepayers.

26. In the County's supplemental submissions filed on December 12, 2011 it described a third type of harm should its motion be denied. It argued that landowners adjacent to the Edmonton transportation and utility corridor would be exposed to increased noise, traffic restrictions and other negative impacts if the suspension is not granted. It also noted that many individuals living along the approved transmission line will be harmed by the stress and anxiety caused by these activities.

27. The AESO argued that the granting of a suspension is an extraordinary form of relief which requires the applicant to demonstrate that it is threatened with irreparable harm. The AESO submitted that the harm asserted by the County lacks the certainty required to meet the test of irreparable harm. The AESO noted that the Federal Court of Appeal has found that the evidence of irreparable harm must be clear and not speculative.[6] The AESO observed that the County has submitted no evidence to support its claim that construction costs incurred by the Heartland applicants would be thrown away or what the impacts of such costs would be on rate-payers.

28. At the oral hearing the AESO emphasized that it is necessary for a suspension applicant to provide evidence to establish the probability of irreparable harm. The AESO recognized that the decision by the Commission to suspend one of its own decisions is discretionary. However, it argued that to exercise that discretion when there is no evidence of irreparable harm would be an abuse of that discretion and a jurisdictional error.

29. ATCO argued that the County's review and variance application is nothing more than a request to reconsider the Heartland decision based upon the same factual record that was before the Commission in the first instance. ATCO submitted that there are no new facts, no change in circumstances and no facts not previously placed in evidence.

30. The Heartland applicants emphasized that evidence of irreparable harm must be clear and not speculative and cannot be inferred. They argued that the harms asserted by the County are vaguely defined and not specific to the County itself. Like the AESO, the Heartland applicants asserted that there is simply no evidence that the County or its residents will be irreparably harmed if the suspension is not granted. The Heartland applicants stated that the irreparable harm asserted must be to the County's own interests and cannot be based upon irreparable harm suffered by third parties.[7]

31. The Heartland applicants argued that the irreparable harm asserted by a suspension applicant must be identifiable and probable and cannot be founded on speculation or assumption. They stated that the County's assertion that denial of the suspension application would impact the Commission's determination

on the accompanying review and variance request was without, merit, speculative and founded on fear. They stated that this 'harm' was not identifiable, self-evident or certain.

32. At the oral hearing the County stated that it is not opposed to having its suspension apply only to segment one, as described in the affidavit of Mr. Watson, Altalink's Vice President Major Projects -- North (Exhibit 016.03), and as proposed by Mr. and Mrs. Presisniuk. This segment of the line represents the area wherein the County submitted that the underground option should be approved. The County noted that, based upon the affidavit filed by Mr. Watson on behalf of the Heartland applicants, the work to be performed in segment one during this winter season was limited in scope and expense.

33. The County acknowledged that its concerns about thrown away costs were alleviated to some degree when it learned that the costs for segment one would be between one and two million dollars during the upcoming winter construction period. The County stated that if the Commission is not prepared to grant the suspension, an alternative remedy would be for the Commission to specifically state in its ruling that it is relying upon the evidence filed by the Heartland applicants and is directing them to abide by the construction schedule described in Mr. Watson's affidavit.

Commission ruling - irreparable harm

34. The County argues that three species of irreparable harm will result if its motion is denied. First, the costs incurred by the Heartland applicants for construction will be thrown away costs that must be paid by ratepayers, including the County and its residents, if the County's review request is successful. Second, the fact that costs have been incurred at the expense of ratepayers may influence the outcome of the County's review request. Third, residents within Strathcona County will be disturbed as a result of construction activities which will result in stress, anxiety and inconvenience. The Commission will first review the law as it relates to irreparable harm and then address each of these concerns in turn.

35. The court in the *RJR MacDonald* decision described irreparable harm as follows:
At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other...

36. In *Dreco Energy Services Ltd. V. Wenzel*, the Alberta Court of Appeal stated "the test for irreparable harm has a high threshold and only relates to the party seeking the injunction..."[8]

37. The Federal Court recently described the onus that rests upon the suspension applicant to meet the irreparable harm test:
The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd.* 2005 FC 815, (2005), at para.59, aff'd 2005 FCA390, 44 C.P.R. (4th) 326.

That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.[9] (Emphasis in the original)

38. In the BP suspension ruling the Commission reviewed the position of the parties and their respective authorities and concluded that "in order for harm to be considered irreparable it must be identifiable, self evident, certain and not capable of being rectified by damages alone".[10]
i. Harm resulting from potential for thrown away costs

39. The County claims that if its review is ultimately successful but a suspension is denied, any construction costs incurred in the meantime will be thrown away at the expense of ratepayers including the County and its residents. The Commission finds that this is not irreparable harm as the courts have described it because the harm alleged is speculative and uncertain. It is harm that may occur, not harm that will occur. In the Commission's view this does not satisfy the high threshold of the irreparable harm test.

40. Further, and as discussed in the oral hearing, there is a remedy available to ratepayers to challenge the prudence of such costs within the context of the applicants' tariff applications. Such costs may be reviewed by the Commission upon the application of an interested party. As a remedy is available to the County and its residents, the harm alleged is not irreparable.

41. The Commission observes that the County expressed some comfort in the fact that the work contemplated for segment one during the 2011/2012 winter season, as described in Mr. Watson's affidavit, would be of a limited scope and cost. The Commission expects that the Heartland applicants' construction activities within segment one during the 2011/2012 construction season will be consistent with those described in Mr. Watson's affidavit.

ii. Harm in the form of prejudice to the County's review application

42. The County essentially alleges that if construction costs are incurred prior to the Commission's determination of the review application, the Commission will be inclined to deny the review application to avoid the prospect of thrown away costs. The Commission finds that this is also not irreparable harm as defined by the courts. The County's assertion that this constitutes irreparable harm fails for several reasons.

43. First, it is premised upon the notion that the Commission's decision on the review request would be compromised by an improper consideration. This notion is contrary to the Commission's public interest mandate and to the statutory duty of care created by section 6 of the *Alberta Utilities Commission Act* that requires each Commissioner to act honestly, in good faith and in the public interest.

44. Second, this form of harm is also speculative and uncertain as the County provided no evidence to suggest that the Commission would not decide the review request in a fair, impartial and independent manner.

45. Third, specific harm alleged by the County is not based on the specific circumstances of the Heartland case, rather it is premised upon the review process itself, which is established by statute. The Commission's governing legislation does not prohibit a permit-holder from commencing construction of transmission facilities pending the outcome of a review application. Rather, it gives the Commission the discretion to suspend a decision based upon the circumstances of each case. If the Commission were to accept this as irreparable harm it would lead to a conclusion that irreparable harm could arise anytime a party sought to review and vary one of the Commission's decisions on a transmission line or facility.

46. Finally, in the event that the County decides that the Commission premised its decision on the review request upon an improper consideration its remedy is to seek leave to appeal that decision. In that sense the harm alleged would not be irreparable.

iii. Harm to Strathcona County residents from construction activities and ongoing stress

47. In support of this type of harm the County referred to the findings of the Commission in Decision 2011-436 regarding the concerns expressed by several interveners regarding health and safety, property value and negative visual impacts. The County observed that the construction activities will result in noise, dust and other disturbances which will impact area residents. It submitted that as a result of these activities the ongoing the stress and anxiety associated with the project would be exacerbated if construction commences and noted that this could be avoided by suspending the decision.

48. The County has provided no evidence that such harm will arise should its motion for a suspension be denied. In this respect, it did not provide an affidavit from its client, the County, nor from any of the County residents in support of this assertion. In the Commission's view it is not sufficient to assert this type of harm based solely upon a general reference to the Commission's findings in Decision 2011-436. In the Commission's view this type of harm, like the two that precede it, is hypothetical and uncertain. Further, as

discussed at the hearing, this type of harm is transitory and Decision 2011-436 specified or approved mitigation measures that are designed to minimize these impacts.

Conclusion on irreparable harm

The Commission finds that the County has failed to establish that, based upon the evidence before the Commission, irreparable harm as alleged will occur if the suspension is not granted. In the Commission's view the harms alleged by the County do not meet the criteria set out in the *RJR MacDonald* Case and adopted by the Commission in the BP suspension ruling. Specifically the harms alleged by the County are not identifiable, self evident or certain.

Balance of Convenience

49. As explained above, an applicant for a stay must satisfy each element of the three-part test set out in the *RJR MacDonald* decision if it is to be successful in its motion to stay a Commission decision. In light of the findings of the Commission above that Strathcona County has failed to satisfy the second test (demonstrating irreparable harm), a consideration of the third test (balance of convenience), is therefore not necessary.

Conclusion

50. For the reasons provided above Strathcona County's motion to suspend the operation of Decision 2011-436 is denied.

The Alberta Utilities Commission

(*original signed by*)
Carolyn Dahl Rees
Vice-Chair

* * * * *

Appendix 2 - 2012-01-24 Ruling on first Review and Variance Application

Electronic Notification

jp.mousseau@auc.ab.ca

Writer's direct line

(403) 592-4452

January 24, 2012

Mr. Jim Graves
Graves Engineering Corporation
11461 University Avenue
Edmonton, Alberta T6G 1Y9

Dear Mr. Graves:

EPS Proceeding No. 1592
Ruling on the application by FIRST to review and vary Decision

2011-436

I. Overview and nature of the issue to be decided

1. On January 16, 2012, Mr. Jim Graves of Graves Engineering Corporation filed what appears to be an application to review and vary Decision 2011-436 with the Alberta Utilities Commission (AUC or Commission). The application was made on behalf of the FIRST group (FIRST stands for "First Peoples, Indian Reserves and Street peoples"). Accompanying that application was a letter from the Papaschase First Nations supporting the FIRST application.
2. In this ruling the Commission must decide whether to consider the application for review and variance filed by FIRST. The Commission has made a decision on the application and instructed me to provide its reasons for its decision.

II. Background

3. The Heartland application was filed on September 27, 2010. The application included a preferred east route and an alternate west route for the Commission's consideration. Additionally, the application included an underground option for the preferred east route.
4. FIRST made numerous applications for standing to participate in the Heartland hearing many of which were supported by correspondence from or on behalf of the Papaschase First Nations.[1] FIRST asserted standing on two grounds. First, that its members had First Nations and or Aboriginal rights arising from the *Canada Act, 1982*, treaty rights, and other rights that may be directly and adversely affected by the Commission's decision on the application. FIRST also argued that it had members that lived within 800 metres of the proposed heartland transmission line.
5. On February 16, 2011, the Commission denied FIRST's request for standing based upon Aboriginal or First Nations rights. The Commission found as follows:

   24. In the *Dene Tha'* decision[2], the Alberta Court of Appeal recognized that it is reasonable for the Commission to require those asserting an aboriginal or treaty right in support of a request for standing to demonstrate "some degree of location or connection between the work proposed and the right asserted".

   25. FIRST asserts that standing should be granted to 15 of its members on the basis of traditional rights. However, FIRST provided no elaboration on the source and nature of those rights or how those rights may be directly and adversely affected by the Commission's decision on the Heartland application. Absent this information the Commission lacks the requisite degree of location or connection between the work proposed and the right asserted to determine the standing for these 15 members.[3]

6. However, the Commission granted FIRST standing to participate in the Heartland proceeding subject to the condition that it could file information with the Commission that demonstrated that one or more of its members own or reside property within 800 metres of the proposed transmission line.
7. On March 14, 2011, Mr. Graves wrote to the Commission to inquire whether FIRST had satisfied the Commission's condition and could therefore have standing to participate in the hearing. The Commission responded to Mr. Graves on March 15, 2011 and stated that the condition had not been met as FIRST had not filed any information demonstrating that one or more of its members owned or resided upon property within 800 metres of the proposed transmission line. The Commission stated that if FIRST did not obtain standing the Commission would be prepared to exercise its discretion to allow FIRST to make a brief statement in the hearing.[4]
8. On April 3, 2011, the Commission received additional correspondence from Graves Engineering Corporation on behalf of FIRST. In that letter FIRST requested the Commission to reconsider its application for standing based upon a direct and adverse impact of the project on the traditional rights of its

members. FIRST provided the Commission with additional information about the rights asserted. The Commission considered the additional evidence and found as follows in a letter to FIRST dated April 8, 2011:

> 21. The Commission has reviewed the information submitted by FIRST and considered its request for standing. While it is not expressly stated in the information provided, the Commission understands that the rights asserted by Mr. Goodstriker and Mr. Bruneau are rights under section 35 of the *Constitution Act 3*. Based on the information filed, it is not clear to the Commission the basis upon which Mr. Bruneau or Mr. Goodstriker is entitled to assert these rights.
>
> 22. Further, the Commission finds that the information provided by FIRST does sufficiently demonstrate how the rights asserted may be directly and adversely affected not by the Commission's decision on the Heartland application. FIRST does not provide information and explanation on the nature of these rights or the degree of location or connection between the proposed Heartland transmission project and these rights. Without the necessary connection between the rights asserted and the potential direct and adverse impact on FIRST's members, the Commission finds that FIRST has failed to demonstrate that its members may be directly and adversely affected by the Commission's decision on the Heartland application.[5]

9. The Heartland hearing commenced on April 11, 2011 and concluded on May 17, 2011.

10. On April 11, 2011, Mr. Calvin Bruneau filed a statement of intention to participate in the Heartland hearing on behalf of the Papaschase First Nations. Mr. Bruneau refiled his statement of intention to participate on May 20, 2011. Neither Mr. Bruneau nor the Papaschase First Nations participated further in the Heartland proceeding other than to file additional materials in support of FIRST's numerous applications for standing to participate in the hearing.

11. On April 14, 2011, FIRST wrote to the Commission and provided additional information regarding two of its members who were seeking standing on the basis of traditional rights and one of their members, Mr. Glen Brown, who sought standing on the basis of the proximity of his residence to the Heartland project. The Commission responded to FIRST on April 28, 2012 and found, once again, that FIRST's claim for standing based on traditional rights did not establish the necessary "degree of location or connection between the work proposed and the right asserted" as required by the Dene Tha decision".[6] The Commission also found that FIRST had provided no information supporting its claim that Mr. Brown lived in close proximity to the proposed project.

12. On May 6, 2011, Mr. Graves again wrote to the Commission and explained that Graves Engineering Corporation, on behalf of FIRST, had been retained to represent Ms. Lorelei Hamilton, an individual who resides within 800 metres of the right of way of the preferred east route. On May 12, 2011, the Commission received further correspondence from Mr. Graves outlining FIRST's intended participation on behalf of Ms. Hamilton. The Commission responded to Mr. Graves on May 16, 2011 and stated:

    FIRST's latest request for standing was received four weeks after the hearing commenced and contains very little information regarding how Ms. Hamilton may be directly and adversely affected by the Commission's decision on the Heartland application. Specifically, the Commission finds that FIRST has provided insufficient information regarding the nature of the constitutional rights asserted by Ms. Hamilton and how those rights may be directly and adversely affected by the Commission's decision on the application. In the Commission's view, the concerns expressed on behalf of Ms. Hamilton do not establish the necessary "degree of location or connection between the work proposed and the right asserted" as required by the Dene Tha decision (*Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* 2005 ABCA 68.

    However, because Ms. Hamilton resides within 800 metres of the proposed right-of-way, the Commission will allow her to make a short presentation of no more than 30 minutes to explain how she may be directly and adversely affected by the Commission's decision on the Heartland application. The Commission will also allow FIRST to participate in argument on her behalf. Given the timing of FIRST's latest request for standing, the Commission is not prepared to require the applicants and the AESO to respond to the information requests filed by FIRST.

13. Ms. Hamilton did not make a submission at the Heartland hearing.

14. Mr. Graves filed argument and reply argument for FIRST. While Ms. Hamilton was briefly mentioned in the argument but there was no description or explanation of how or why the Commission's decision on the Heartland application might directly and adversely affect her rights. Instead, the focus of the FIRST argument was the issues of constitutional, aboriginal and property rights. In Decision 2011-489 (the Heartland Cost Decision) the Commission expressed the opinion that the FIRST arguments "were not advanced on behalf of Ms. Hamilton, rather they were made on behalf of individuals that the Commission had previously ruled did not have standing to participate in the hearing."[7]

15. On November 1, 2011, the Commission issued its decision on the Heartland transmission application (Decision 2011-436).

16. On December 8, 2011, the Commission wrote to interested parties and set a process and schedule for the consideration of all review and variance applications of the Heartland decision in a single proceeding, which was assigned as Proceeding ID No. 1592. The Commission stated as follows:

    20. The Commission has received two requests to review the Heartland decision. In accordance with the two-stage process described above, the Commission must first decide whether there are grounds to review the Heartland decision. The Commission has established the following amended process for its first stage consideration of such requests. This amended process takes into account the fact that the deadline for requests to review and vary Decision 2011-436 is January 2, 2011.

17. On December 14, 2011 Graves Engineering Corporation registered to participate in proceeding 1592.

18. On January 16, 2011, Mr. Graves filed what appears to be an application for review and variance of the Heartland decision on behalf of FIRST. The application asserted that the Commission made an error of law by failing to issues and arguments about the treaty, constitutional and other rights asserted by FIRST on behalf of its members.

III. Commission Ruling

19. In accordance with section 10 of the *Alberta Utilities Commission Act* the Commission may review one of its own decisions in accordance with the rules made by the Commission. The Commission's rules for reviewing its decisions are found in *AUC Rule 016, Review and Variance of Commission Decisions* (Rule 016).

20. Section 3 of Rule 016 provides that the Commission may review one of its decisions on the basis of an error of fact law or jurisdiction. This section states that such an application may only be made by a party to the decision within 60 days of the issuance of the decision. In accordance with section 12 (a)(i) of Rule 016, the Commission must grant a review under this section if it is of the opinion that the applicant has raised a substantial doubt as to the correctness of the decision.

21. The correspondence from Graves Engineering Corporation is dated January 13, 2012, the date set by the Commission as the deadline for filing submissions in support of, or objecting to, the five Heartland review and variance applications. However, neither the letter from Graves Engineering Corporation nor the attached letter of support from the Papaschase First Nations, supports or objects to the five review and variance applications that constitute Proceeding 1592. Instead, this correspondence is clearly a request for review and variance based upon an error of law. The error of law asserted was not raised in any of the five applications for review and variance that constitute Proceeding 1592.

22. The application by FIRST for review and variance of Decision 2011-436 was not filed within the 60 day time period specified in Rule 016 despite the fact that on December 8, 2011, the Commission notified all interested parties and their representatives, including Mr. Graves, that the deadline for filing a review and variance request was January 2, 2012.

23. In addition to being out of time, the Commission finds that FIRST is not a party to Decision 2011-436. In Decision 2011-464 the Commission recently decided that an intervener group that was denied standing to

participate in a hearing was not a party to the decision resulting from that hearing. The Commission found that, because the review applicant was not a party to the decision, as required in section 3 of Rule 016, the review applicant was not entitled to apply to review the decision.

24. The Commission never granted standing to FIRST to participate in the Heartland hearing. Rather, the Commission allowed Graves Engineering Corporation, in its capacity as agent to file argument on behalf of a single individual, Ms. Hamilton, with the purpose of explaining how she may be directly and adversely affected by the Commission's decision on the Heartland application.

25. The issues raised in FIRST's review request are the same issues raised by it in support of its request for standing on behalf of those of its members who were asserting various forms of First Nations or Aboriginal rights. The Commission ruled on a number of occasions that FIRST lacked the necessary standing to assert these issues in the proceeding. There is nothing in the FIRST submission to suggest that the late application for review and variance was filed on behalf of the only member of FIRST who had standing to participate in the hearing, Ms. Hamilton. In the Commission's view, FIRST's application for review and variance was filed on behalf of persons who had no standing to participate in the first instance.

26. Having regard to the foregoing, the Commission has dismissed FIRST's application for review and variance for two reasons: first, because it was filed out of time and second, because FIRST is not a party to Decision 2011-436.

Yours truly,

<original signed by>-
JP Mousseau
Commission Counsel

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1 Decision 2011-436, paragraph 1084

2 *AltaGas Utilities Inc. v. Alberta Energy and Utilities Board,* (2008) ABCA 46

3 Supra, paragraphs 39 to 40

4 *Talisman Energy Inc. v. Energy Resources Conservation Board*, [2010] ABCA 258

5 The ERCB's test for review and variance, is identical to the test employed by the AUC

6 ERCB Review Application No. 1626260, Decision, Dated June 23, 2010, (exhibit 0041.03, Proceeding 1592)

7 *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33

8 *Ball v. Imperial Oil Resources Limited*, 2010 ABCA 111

9 *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33 at paragraph 6

10 *Supra*, at paragraphs 22 and 23

11 *Ball v. Imperial Oil Resources Limited*, 2010 ABCA 111

12 *Supra*, at paragraph 28

13 Decision 2011-436, paragraph 504

14 Exhibit 838.02, Applicants' reply evidence, paragraph 248, Transcript Volume 14, page 3169 (Proceeding 457)

15 Transcript Volume 14, page 3173 (Proceeding 457)

16 Transcript Volume 14, Page 3174 (Proceeding 457)

17 Transcript Volume 14, Page 3176 (Proceeding 457)

18 Transcript Volume 14, pages 3178 to 3179 (Proceeding 457)

19 Exhibit 1240.01, Applicants' argument, paragraph 108 (Proceeding 457)

20 Decision 2011-436, paragraphs 1080-1086

21 Decision 2011-436, paragraph 116 (excerpted from AUC Decision 2009-028)

22 Decision 2011-436, paragraph 101

23 Decision 2011-436, paragraph 138

24 Decision 2011-436, at paragraph 504

25 Supra note 8

26 Decision 2011-436, paragraphs 1080-1086

27 Exhibit 960.01, April 27, 2011 letter from Commission Counsel to the Heartland applicants (proceeding 457)

28 Transcript Volume 12, page 2654 (Proceeding 457)

29 Decision 2011-436, paragraph 569

30 Exhibit 468.01, Applicants responses to RETA IR requests numbers 34, 35 and 36 (Proceeding 457)

31 Exhibit 246.02 Exponent Report, Appendix K-3, pages 48 and 49 (Proceeding 457)

32 Dr. Bailey -- Exhibit 246.00, Application, Appendix K-3, pages 6 to 14; Dr. Blank -- Transcript, volume 21, pages 5448-5450 (Proceeding 457)

33 Exhibit 800.01 RETA answers to information requests, AUC-RETA-23 (Proceeding 457)

34 Exhibit 800.01 RETA answers to information requests, AUC-RETA-24, Transcript, Volume 21, page 5447 and 5448 (Proceeding 457)

35 Exhibit 800.01 RETA answers to information requests, AUC-RETA-28 (Proceeding 457)

36 Exhibit 246.00 Application, Appendix K-3. Page 10 (Proceeding 457)

37 Exhibit 246.00 Application, Appendix K-3. Page 8 (Proceeding 457)

38 Exhibit 246.00 Application, Appendix K-3. Page 6 and 7 (Proceeding 457)

39 Exhibit 1119.01 -- Environmental health Criteria 238, Extremely Low Frequency Fields World Health organization Page xiii (Proceeding 457)

40 Decision 2011-436, paragraph 592

41 Transcript, Sherwood Park, April 20, 2011, pages 44 and 48 (Proceeding 457)

42 Transcript, Sherwood Park, April 20, 2011, pages 72 (Proceeding 457)

43 Transcript, Volume 22, page 5509 (Proceeding 457)

44 Decision 2011-436, paragraphs 165-166

45 Decision 2011-436, paragraph 166

46 Decision 2011-436, paragraphs 1080-1086

47 Transcript Volume 2, page 186, (Proceeding 1592)

48 Decision 2011-436, paragraph 1167

49 Decision 2011-436, paragraph 97

50 Transcript, Volume 2, Page 203, (Proceeding 1592)

51 Transcript, Volume 2, pages 292 to 293 (Proceeding 1592)

52 Exhibit 0041.02, AML and EDTI Submissions, paragraph 128 (Proceeding 1592)

1 *RJR MacDonald v. Canada (Attorney General)* [1994] 1. S.C.R. 11 (*RJR MacDonald*)

2 Commission Ruling on Motion for Suspension of Decision 2011-160, July 21, 2011, at paragraph 19

3 *Metz v. Prairie Valley School Board,* 2007 CarswellSask 473 at paragraph 22 (QB)

4 *RJR MacDonald*, at paragraph 50

5 *RJR MacDonald*, at paragraph 59

6 *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34, at 45-46 (F.C.A.)

7 *RJR MacDonald*, at paragraph 58, *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290 at paragraph 33, *Canada (Attorney general) v. Amnesty International Canada*, 2009 FC 426, at paragraph 34

8 *Dreco Energy Services Ltd. V. Wenzel*, [2008] A.J. No. 944, at paragraph 33

9 Canada (Attorney General) v. Amnesty International Canada [2009] F.C.J. No. 545, at paragraphs 29 and 30

10 BP suspension ruling, at paragraph 40

1 The Commission's rulings on FIRST's numerous applications for standing are found in Decision 2011-436 in Appendices 3a, 3c, 3f, 3i, 3j, and 3k.

2 Dene Tha' First Nation v. Alberta Energy and Utilities Board, 2005 ABCA 68

3 Exhibit 513.01

4 Exhibit 759.01

5 Exhibit 854.01

6 Exhibit 973.01

7 Decision 2011-436, paragraph 157

End of Document

TAB 17

Assn. of Major Power Consumers in Ontario v. Ontario (Energy Board), [2007] O.J. No. 2982

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

S.E. Greer J.

Heard: May 31, 2007.

Judgment: July 3, 2007.

Court File No. 207/07

[2007] O.J. No. 2982 | 228 O.A.C. 11

Between Association of Major Power Consumers in Ontario, Appellant, and Ontario Energy Board, Independent Electricity System Operator, Association of Power Producers of Ontario, Coral Energy Canada Inc., Electricity Market Investment Group, Hydro One Networks Inc., Ontario Power Generation Inc., TransAlta Energy Corp., TransAlta Cogeneration L.P., TransCanada Energy Ltd. and Vulnerable Energy Consumers Coalition, Respondents

(36 paras.)

Case Summary

Civil procedure — Appeals — Stay of proceedings pending appeal — Serious issue to be tried — Application by appellant for a stay of an order of the Ontario Energy Board pending disposition of its appeal dismissed — Upon application by the appellant, the Board declined jurisdiction to review issues of natural justice and procedural fairness related to the governance of the provincial electricity grid and the implementation of a market rule amendment — The court found that there was no urgency or sufficient seriousness to the issues under consideration that warranted a stay — The appellant also failed to succeed on the issues of irreparable harm and the balance of convenience.

Administrative law — Public utilities — Application by appellant for a stay of an order of the Ontario Energy Board pending disposition of its appeal dismissed — Upon application by the appellant, the Board declined jurisdiction to review issues of natural justice and procedural fairness related to the governance of the provincial electricity grid and the implementation of a market rule amendment — The court found that there was no urgency or sufficient seriousness to the issues under consideration that warranted a stay — The appellant also failed to succeed on the issues of irreparable harm and the balance of convenience.

Natural resources law — Hydro-electricity — Regulation — Application by appellant for a stay of an order of the Ontario Energy Board pending disposition of its appeal dismissed — Upon application by the appellant, the Board declined jurisdiction to review issues of natural justice and procedural fairness related to the governance of the provincial electricity grid and the implementation of a market rule amendment — The court found that there was no urgency or sufficient seriousness to the issues under consideration that warranted a stay — The appellant also failed to succeed on the issues of irreparable harm and the balance of convenience.

Counsel

Freya Kristjanson and Elissa Goodman, Counsel for the Appellant ("AMPCO").

Alan Mark and Kelly Freedman, Counsel for the Independent Electricity System Operator, a Respondent ("IESO").

Elisabeth DeMarco and Robert Frank, Counsel for the Association of Power Producers of Ontario, a Respondent ("APPrO").

Martine Band and Donna E. Campbell, Counsel for the Ontario Energy Board, Respondent ("OEB").

George Vegh, Counsel for the Respondents Coral Energy Canada Inc. ("CORAL") and TransCanada Energy Ltd. ("TEL"), two of the Respondents.

Matthew Clarke, Counsel for Electricity Market Investment Group, Respondent ("EMIG").

No one appearing for: Hydro One Networks Inc. and Vulnerable Energy Consumers Coalition.

REASONS

S.E. GREER J.

1 The parties before me are all involved in the energy business or its regulation and sale. For ease of reference, I have, in the style of cause where counsel are listed, set out the acronyms that each is known as in their energy circles. I will use these acronyms throughout these Reasons.

2 At the opening of the Motion before me, EMIG moved to amend the style of cause in this matter, as several of the players are now off the Record. The Motion was on consent of the parties and I have signed that Order accordingly, removing the following from the style of cause:

1. Electricity Market Investment Group;
2. Ontario Power Generation Inc.;
3. TransAlta Energy Corp.
4. TransAlta. Cogeneration L.P.

3 The Appellant ("AMPCO") seeks a stay of the Order and Decision of the Ontario Energy Board ("OEB" or the "Board") issued on April 10, 2007 and corrected on April 12, 2007 ("the Order"), pending the disposition of AMPCO's Appeal from the Order of the Board, regarding a Market Rule Amendment.

4 Motion took a full day to be heard and the materials filed by all counsel are both thorough and extensive.

5 AMPCO says a stay of the Board's Order is required, as there is a serious question to be tried, namely the interpretation of the OEB's jurisdiction under section 33 of the Electricity Act, 1998 (the "Act") and whether the Board erred in holding it lacked the jurisdiction to consider the natural justice and procedural fairness issues under section 33 of the Act. AMPCO also says that the balance of convenience favours the granting of the stay since it and its members would suffer irreparable harm if the stay were not granted. It further says that there is no urgency in implementing the Board's decision, which it now has under appeal.

6 The Respondents, who now remain on the record in this matter, including the OEB, oppose the issuing of a stay, and say it is an ill-conceived move on the part of AMPCO. Further, they say, there is no serious issue to be tried. They say that the appeal is bound to fail.

7 The Respondents also say that the Act is explicit as to the scope of the Board's review of such Market Rule Amendments. They further say the Board's role is explicitly to consider whether the amendment is inconsistent with the purposes of the Act or unjustly discriminates against, or in favour of, a market participant or class of market participants. Finally, they say that the scope of the Board's power does not include examining the rule-making process.

8 Respondents say that the balance of convenience favours not granting the stay requested, as they say they are the ones who would suffer irreparable harm if the stay is granted.

Some background information

9 The Respondent, IESO, is a statutory non-profit corporation with a public interest mandate to direct the operation of Ontario's electricity transmission grid and to operate the electricity market in Ontario. It is also a corporation continued pursuant to section 4 of the Act. Under section 32 of the Act, it has legislative authority to make rules governing the electricity grid and markets relating to electricity and ancillary services ("Market Rules"). It also has the power to amend those Rules.

10 The objectives of these Rules are to govern the grid and to establish and govern "efficient, competitive and reliable markets for the wholesale sale and purchase of electricity and ancillary service in Ontario". The Board oversees the Market Rules and may look at the power given to IESO under the Act to make such amendments. The Board also has the power to revoke a Market Rule Amendment, either on its own Motion or upon Application.

11 AMPCO applied to the OEB to review, on two grounds, an IESO Market Rule Amendment MR-00331-R00 promulgated on January 17, 2007, namely:

(a) the IESO had breached the rules of natural justice and procedural fairness, in particular the rule against bias and breach of legitimate expectations, and

(b) substantive issues relating the Market Rule Amendment.

The OEB held that it did not have jurisdiction to consider failures of procedural fairness and natural justice by the IESO in the course of a section 33 statutory review. IESO says that the Board found that these are questions for judicial review, best reserved for the courts upon application for judicial review of the decision. IESO says that the words of the statute are "crystal clear" and there is no serious issue to be tried, because the Board correctly construed the scope of its authority.

12 The parties differ on what they see as the result of the Market Rule Amendment. AMPCO says that its members will be faced with increased costs, whereas IESO says that the likely result is that there will only be a de minimus increase, if there is any increase at all, but the more likely scenarios is that there will be an average decrease in consumers' overall electricity bills. (See: pp. 23 and 25 of the Board's Decision.) The Amendment, which was passed by IESO, dealt with the changes in the ramp rate multipliers, and this change was upheld by the Board.

13 IESO also says that a stay of the Board's Decision will not legally prevent the implementation of the Market Rule Amendment pending appeal, since the Board refused to revoke the Amendment and refused to stay the operation of the Amendment pending appeal to this Court. It found the Amendment to be consistent with the purposes of the Act. (See: p. 26 of the Decision.) While the Board was hearing the Application, there was a stay during the 60 days given to the Board to hear the matter and reach its decision.

14 At the hearing, there were a number of Intervenors allowed to make submissions. They are among the Respondents before me in this Motion for a stay. The Board's Decision is 29 pages in length and examines, in great detail, the position of all the parties before it. The Board found that the old 12x ramp rate multiplier "distorts the wholesale market price downwards and engenders adverse consequences for the marketplace in the form of generation and demand side inefficiencies." It agreed with the IESO Amendment changing the ramp rate multiplier to 3x. It refused to refer the Amendment back to the IESO for further consideration, and it then lifted the stay when its Decision was released.

15 AMPCO has a statutory right of Appeal under the Act.

The Test for granting a stay

16 The test for granting a stay of the Amendment, pending appeal, is the same as that for the granting of an injunction, as set out by the Supreme Court of Canada in R.J.R. MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p. 334. It is a three-part test as follows:

(a) At the first stage of the test, the Applicant must demonstrate that there is a serious question or issue to be tried.

17 AMPCO asks for a stay of the Amendment to the Market Rules, since it says it will be prejudiced by the change in the ramp rate multiplier now effected by the Board's decision, while waiting for its Appeal to be heard, if a stay is not granted.

18 The Respondents say that there is no prejudice, which will result if such a stay is not granted, or if there is any, it is de minimus, and that a stay under these circumstances is not warranted, as there is no serious issue to be tried.

19 The threshold of determining whether there is a serious issue to be tried, is a low one. The Respondents point out that in certain instances, the moving party must prove that there is a "strong prima facie case" before the other two branches of the test are even examined. This is also the position of APPrO, where it says, facts are not substantially in dispute in the Decision reached by the Board. See: Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 at para. 11 (Ont. H.C.) and see also, R.J.R. MacDonald, supra.

20 It seems to me that the issues, which AMPCO says are to be dealt with, namely whether an error of law or jurisdiction occurred, or whether the Board failed to apply principles of statutory interpretation to the question of its jurisdiction to consider these issues, have no urgency to them, which would require that a stay be granted. These are legal issues, really not much affected by the facts of the case.

21 Further, CORAL and TEL point out that AMPCO has not provided a strong case for a stay, adopting the principles as noted above in Mosher, supra. AMPCO's proposition that the OEB has the equivalent of the power of judicial review over the IESO, is not a plausible proposition, they say. Secondly, they say that in requesting a stay, AMPCO is asking the Court to exercise a power that it does not have in these circumstances. They point to the fact that the OEB's authority to review the IESO rules is entirely statutory and argue that if the IESO rule meets the statutory requirements, the OEB's review is complete.

22 Finally, CORAL and TEL say that an application for an OEB review of an amendment does not stay the amendment unless the Board, itself, orders a stay pending its review of the amendment. Here the Board lifted the earlier stay, pending its Decision, and therefore, CORAL and TEL say, I should not consider the stay.

23 I am not, however, convinced that the issues in question are so serious that a stay should be granted, pending Appeal. Nor am I satisfied that a strong case for a stay has been made out by AMPCO. See: Ontario (Minister of

Natural Resources) v. Mosher (2003), 41 C.P.C. (5th) 66 at para. 7 (Ont. C.A.). Even if I am wrong in this regard, AMPCO still must meet the other two branches of the test.

(b) At the second stage of the test, the applicant is required to demonstrate that irreparable harm will result if the relief is not granted.

24 The question of what is irreparable harm and its effect, has been analyzed in Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441; (1985), 18 D.L.R. (4th) 481; 12 Admin. L.R. 16; [1985] 13 C.R.R. 287; 1985 CanLII 74 (S.C.C.), in which the Court examines the principles as set out in Injunctions and Specific Performance (1983) by Professor Robert Sharpe, as he then was. On pp. 30-31, Professor Sharpe (now Sharpe J.A.) states that all injunctions are future looking in the sense that they are intended to prevent or avoid harm. There can be no evidence as to the nature of the harm, since it has not yet occurred, but there must be a "high degree of probability that the harm will in fact occur."

25 The Board has limited jurisdiction to deal with the Amendment, if it finds it inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or class of market participants. It may revoke the Amendment or send the Amendment back to the IESO under subsection 33(9)(b) of the Electricity Act, which it had the authority to do, after hearing the Application. The Board took neither of these steps. (See: Decision of the Board pp. 9-10.)

26 AMPCO says that a refusal to grant the stay could "... so adversely affect AMPCO's interest and that the harm could not be remedied if it is eventually successful on appeal." They say that the term "irreparable" refers to the nature of the harm, rather than its magnitude. It is harm that cannot be compensated for monetarily or, which cannot be cured.

27 As I have noted earlier, AMPCO and the Respondents are very far apart on the monetary impact, which the Amendment will have on users of energy. AMPCO is sure that there will be huge monetary amounts collected under the new ramp rate, whereas the Respondents see any such monetary increase in amounts, if any, as de minimus.

28 AMPCO says if such amounts are collected while it waits for the Appeal to be heard, there would be no way of refunding such amounts, if the Appeal is allowed. The Respondents, on the other hand, see this as an unrealistic step, given the way the Market Rate Amendment operates. APPrO says that there are factual findings of the Board, which indicate that this Amendment may benefit electricity consumers and result in a decrease in electricity costs. It sees the harm as arising if the 12x ramp rate multiplier is left in place, if a stay is granted. It says such harm includes, inter alia:

> ... increased and uneconomic exports; distortion of price and related market signals; impeding customers from realizing and responding to the true cost of electricity that they consume, prejudicing customers and generators that seek to respond to market signals, diminishing market responsive conservation, and demand management programs; dampening natural volatility and diminishing demand responsiveness.

29 IESO says the 12x ramp rate multiplier was a temporary fix in the first place. It sees the scope of the Board's mandate as much narrower than does AMPCO. The irreparable harm would fall to the Respondents, they say, if such a stay is granted. Even if any such harm does occur, I agree with IESO that it would still not tip the balance in favour of AMPCO. The Board found that the Amendment furthers the objectives of the Act, and it cannot be said on Motion for a stay, that this finding can be ignored in reviewing the issue of harm.

30 CORAL and TEL support the positions of IESO and APPrO on the other two branches of the test, and say that AMPRO has not met those tests either.

31 I find that AMPRO has not met the second branch of the test in proving that it will suffer irreparable harm if the

stay is not granted. On the contrary, it is the Respondents who may be harmed if the stay is granted.

(c) At the third stage of the test, the Court is required to assess the parties' situations to see who the balance of convenience favours.

32 As for the balance of convenience, I find that it weighs in favour of the public interest as put forward by IESO, and AMPCO. I do not see this as a case where the status quo must be preserved, pending the outcome of the Appeal. Nor, is this a Charter case. The IESO is charged, by statute, with making and amending the market rules under the Act. The question then must be asked whether AMPCO has shown whether there are "... public interest benefits which will flow from the granting of the relief sought." That is, is there a public benefit, if a stay is granted? See: R.J.R. MacDonald, supra.

33 IESO says there are no such benefits if a stay is granted. On the other hand, the balance favours IESO's position, given that the Board, itself, found the Amendment to be in the public interest. The Board accepted the Respondents' position that the Amendment will lead to "... improvements in the economic efficiency of the electricity system in Ontario", which will "... promote adequacy and reliability of supply by providing more accurate price signals and triggering more appropriate price responsive behaviour."

34 APPrO says that there are "... many and significant negative impacts on Ontario electricity stakeholders, including the consumers and the public", which result from the 12x ramp rate multiplier continuing to be used if the stay is granted. Their interests, they say, are better served by "prompt implementation" of the Market Rage Amendment. The balance of convenience, they say, favours the consumers and public in not granting a stay. I agree with this and hold that the balance of convenience favours the Respondents. AMPCO has not met the third branch of the test.

35 All Respondents say there is urgency to getting the Appeal heard, as noted by the Market Surveillance Panel's report, which was before the Board.

Conclusion

36 AMPCO's Motion for a stay of the Board's Decision, is dismissed for the reasons set out herein. If the parties cannot otherwise agree on Costs, the parties may submit brief written submissions to me on such Costs, within 30 days of this Order. Order to go that AMPCO's Appeal be expedited.

S.E. GREER J.

TAB 18

Injunctions and Specific Performance

ROBERT J. SHARPE

LOOSELEAF EDITION

2.540 It seems clear that the other factors influence the weight to be given to balance of convenience. If the plaintiff's case looks very strong, he or she may well succeed, although the injunction would cause greater inconvenience to the defendant than withholding preliminary relief would cause the plaintiff.[316] Where the plaintiff's case looks weak, the balance of convenience may tilt in favour of the defendant.[317] On the other hand, where an assessment of the case is impracticable and the damages question balanced, an assessment of balance of convenience will be determinative. It is impossible to develop a precise calculus or calibration of such a question beyond restating the nature of the risk-balancing exercise that is involved.[318] In some cases, a balance of convenience may be achieved by a detailed order. For example, in an Ontario case involving the break-up of a law firm and disputed files removed by the departing members of the firm, the court crafted a detailed order, dealing with matters such as access to the files, client directions and payment of fees rather than bluntly ordering or refusing to order the return of all files.[319]

(8) Preservation of the status quo

2.550 This phrase is frequently used[320] to describe the purpose of an interlocutory injunction although it adds little or nothing to the analysis and, in fact, may produce a possible source of confusion.[321]

Soowahlie Indian Band v. Canada (Attorney General) (2001), 209 D.L.R. (4th) 677 (F.C.A.); *Computer Science Canada, Inc. v. 1142543 Ontario Inc.* (2000), 37 R.P.R. (3d) 123 (Ont. S.C.J.); *Yaghi v. WMS Gaming Inc.*, [2004] 2 W.W.R. 657, 18 Alta. L.R. (4th) 280 (Q.B.); *B.X. v. Secretary of State for the Home Department*, [2010] 1 W.L.R. 2463 (C.A.); *Burke v. Cape Breton (Regional Municipality)* (2011), 302 N.S.R. (2d) 297, 955 A.P.R. 297 (S.C.). See also *infra*, para. 3.1260 for discussion of the importance of the public interest factor in constitutional cases.

315 *Kosub v. Cultus Lake Park Board* (2007), 392 W.A.C. 160, 52 R.P.R. (4th) 187 (B.C.C.A.); *Easyhome Ltd. v. Casey* (2009), 20 Alta. L.R. (5th) 199, 184 A.C.W.S. (3d) 495 (Q.B.), this paragraph cited with approval in: *Chase Bryant Inc. v. Polymicron Technologies Inc.* (2011), 372 Sask. R. 129 at para. 22, 18 C.P.C. (7th) 296 (Q.B.); *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.* (2011), 199 A.C.W.S. (3d) 262 at para. 40, 2011 SKQB 66, affd [2011] 9 W.W.R. 757, 525 W.A.C. 136 (Sask. C.A.); *Rattray v. Goodine* (2011), 374 N.B.R. (2d) 290 at para. 20, 965 A.P.R. 290 (Q.B.); *SWN Resources Canada Inc. v. Claire* (2013), 1069 A.P.R. 239, 411 N.B.R. (2d) 239 (N.B.Q.B.), citing this paragraph at para. 17.

316 *W-K Trucking Inc. v. Bidulock Oilfield Service Ltd.* (1998), 234 A.R. 363 at p. 408, 26 C.P.C. (4th) 400 (Q.B.).

317 *Rand v. Anglican Synod of the Diocese of British Columbia* (2008), 84 B.C.L.R. (4th) 108, 167 A.C.W.S. (3d) 384 (S.C.), leave to appeal to B.C.C.A. refused 432 W.A.C. 279, 84 B.C.L.R. (4th) 124.

318 *Coates v. Mount Allison University* (2011), 378 N.B.R. (2d) 320, 973 A.P.R. 320 (Q.B.), citing this passage at para. 41.

319 *Grillo v. D'Angela* (2009), 306 D.L.R. (4th) 370, 174 A.C.W.S. (3d) 271 (Ont. S.C.J.).

320 For a thorough discussion of the historic underpinning of the *status quo* factor and

Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial.[322] In many ways *status quo* is an inappropriate, and potentially misleading, description of this principle. It has been described by the Supreme Court of Canada as being "of limited value in private law cases" and as having "no merit" in constitutional cases.[323] A literal application of the *status quo* principle would suggest that a plaintiff who sues *quia timet*[324] should always succeed. Similarly, if the defendant has already embarked upon the course of conduct of which the plaintiff complains, the *status quo* at the time of the application would preclude relief. Plainly, neither of these propositions can stand: interlocutory *quia timet* injunctions are frequently and properly refused, and the *status quo* has been defined as relating to the situation before the defendant commenced his or her course of conduct.[325] The proper application of the *status quo* factor, then,

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the interaction between the courts of law and equity, see Leubsdorf, *op. cit.*, footnote 58, at pp. 527-40.

321 The use of "*status quo*" as a factor is criticized in Wright and Miller, *Federal Practice and Procedure* (St. Paul, West Publishing Co., 1995), t2948, pp. 137-8. See also "Injunctions", Developments in the Law (1965), 78 Harv. L. Rev. 994, at p. 1058: "The concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial." See also Leubsdorf, *op. cit.*, at p. 546:

> Emphasis on preserving the status quo is a habit without a reason. To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate. The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it.

For an example of the unhelpfulness of the concept, see *Babic v. Milinkovic* (1972), 25 D.L.R. (3d) 752 (B.C.C.A.).

322 *Manos Foods International Inc. v. Coca-Cola Ltd* (1997), 74 C.P.R. (3d) 2 at p. 25 (Ont. Ct. (Gen. Div.)); *Anderson v. Evans* (2005), 231 N.S.R. (2d) 26, 137 A.C.W.S. (3d) 619 (S.C.); *Zeo-Tech Enviro Corp. v. Maynard* (2005), 355 W.A.C. 93, at p. 99, 17 C.P.C. (6th) 181 (B.C.C.A.); *Pusateri's Yorkville Ltd. v. Toronto (City)* (2013), 111 L.C.R. 228, 17 M.P.L.R. (5th) 216 (Ont. S.C.J.), citing this passage at para. 15.

323 *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311.

324 *Supra*, 1.660 *et seq.*

325 *Fellowes & Son v. Fisher*, [1976] Q.B. 122 (C.A.), at p. 141, *per* Sir John Pennycuick; Gray, *op. cit.*, footnote 63, at pp. 336-7; *Ethical Funds Inc. v. Mackenzie Financial Corp.* (2000), 6 C.P.R. (4th) 92 (F.C.T.D.); *Alfred Dunhill Ltd. v. Sunoptic S.A.*, [1979] F.S.R. 337 (C.A.), at p. 376, *per* Megaw L.J.:

> For that [consideration of the *status quo*] to be of any help, it is necessary to answer the question: Existing when? Before what point of time? For the answer may be different, according as you look at the existing state of things at the date when the defendant did the act, or the first act which is alleged to have been wrongful; or the date when the plaintiff first learned of that act, or the date when

ONTARIO ENERGY BOARD

ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO

APPLICATION TO REVIEW AMENDMENTS TO THE MARKET RULES MADE BY THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

EB-2019-0242

IESO BOOK OF AUTHORITIES IN RESPONSE TO AMPCO'S REQUEST FOR A STAY

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