ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act, 1998,* s. 35;

AND IN THE MATTER OF an application by PF Resolute Canada Inc. for an order amending the Demand Response Qualification Rules passed by the Independent Electricity System Operator ("**IESO**") on August 26, 2015.

RESOLUTE MATERIALS ON ISSUES DAY

Dated: November 6, 2019

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Counsel for PF Resolute Canada Inc.

TAB 1

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2007-0050

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario;

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

ISSUES DAY - DECISION AND ORDER

Background

The Board held an Issues Day on September 17, 2007. At the hearing the Board received a list of issues to which the parties had agreed and heard submissions on a number of contested issues.

The Board's findings on the contested issues, which are set out below, include some additions to the issues list and some modifications to the agreed issues. Except where a modification has been made to an agreed issue as a result of the Board's conclusions on a contested issue, the Board accepts the agreed issues for inclusion on the Issues List. The Board also notes that at Issues Day the parties agreed to modify agreed issues 3.1, 3.2 and 3.3 to include the phrase "near term and" before the words "interim measures" in each case. The heading for these issues was changed as well. The

Board also accepts this change. The complete approved Issues List appears at Appendix A.

There was some discussion throughout the course of the proceeding as to the purpose of the Issues List. The Board reminds parties that the Issues List has two purposes: 1) it defines the scope of the proceeding; and 2) it articulates the questions which the Board must address in reaching a decision on the application. The Board does not believe it is appropriate to define the Issues List in complete detail. For many of the issues, the Board expects that sub-issues will arise during the course of the proceeding which will need to be addressed in argument and in the final decision. It is not possible to identify all of those detailed issues now so early in the process. The Board is therefore hesitant to include detailed sub-issues on the Issues List if the matters are otherwise included in a broader issue.

The Contested Issues – Project Need and Justification

1.1 Is it appropriate for Hydro One to have relied as it has on the OPA for the need for the project and the route and corridor selection? Further, has Hydro One properly considered the OPA's current 20 year plan?

This issue was proposed by Powerline Connections and was supported by Pollution Probe and the landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One and PWU.

The Board agrees that Hydro One's reliance on the OPA is a relevant consideration, and we note that Hydro One has confirmed that witnesses from the OPA will appear at the hearing. However, the Board will not adopt the issue as proposed. Rather, the following issue will be added: *Has the need for the proposed project been established?* The Board finds that it is appropriate to add this direct question to the list, as suggested by PWU, as this is one of the key issues which the Board will have to address in its decision. The issue is also broad enough to ensure that Hydro One's reliance on the OPA can be explored.

The aspect of the contested issue related to the OPA's current 20 year plan can be explored in the context of project need and alternatives. The Board's findings in respect of issues related to alternatives and the comparison of alternatives follow later in this decision.

SCHEDULE A

HYDRO ONE NETWORKS INC.

EB-2019-0082

APPROVED ISSUES LIST

SEPTEMBER 23, 2019

Hydro One Networks Inc.

2020 to 2022 Transmission Rates Application

Ontario Energy Board

File Number EB-2019-0082

Approved Issues List

A: GENERAL

1. Has Hydro One responded appropriately to all relevant Ontario Energy Board (OEB) directions from previous proceedings?
2. Are the bill impacts resulting from Hydro One's proposed revenue requirement reasonable?
3. Were Hydro One's customer engagement activities sufficient to enable customer needs and preferences to be considered in the formulation of its proposed spending?
4. Is the proposed effective date of January 1, 2020 appropriate?

B: CUSTOM APPLICATION

5. Are all elements of Hydro One's proposed Custom Incentive Rate framework for the determination of revenue requirement appropriate?

C: PRODUCTIVITY IMPROVEMENT AND PERFORMANCE SCORECARD

6. Has Hydro One taken appropriate steps to identify and quantify productivity improvements in all areas of its transmission operations?
7. Are the metrics in the proposed scorecard appropriate and do they adequately reflect appropriate outcomes? Do the outcomes adequately reflect customer expectations?
8. What is the status of Hydro One's joint work with the IESO to explore cost effective transmission line loss reduction opportunities and to report on those initiatives?

D: TRANSMISSION SYSTEM PLAN

9. Are the proposed forecast capital expenditures and in-service additions arising from the transmission system plan appropriate, and is the rationale for planning and pacing choices (including consideration of customer preferences, planning criteria, system reliability, asset condition and benchmarking appropriate and adequately explained?
10. Are the methodologies used to allocate Common Corporate capital expenditures to the transmission business and to determine the transmission Overhead Capitalization Rate appropriate?
11. Is the proposed capitalization of other post-employment benefits (OPEB) for both Hydro One Transmission and Hydro One Distribution appropriate, and if not, what is the appropriate approach for these costs?
12. Does Hydro One's Transmission System Plan sufficiently address the unique rights and concerns of Indigenous customers and rights-holders?

E: OPERATIONS MAINTENANCE & ADMINISTRATION COSTS

13. Are the proposed 2020 OM&A expenditures appropriate and is the rationale for planning choices appropriate and adequately explained?
14. Are the methodologies used to allocate Common Corporate Costs and Other OM&A costs to the transmission business appropriate?
15. Are the amounts proposed to be included in the revenue requirement for income taxes appropriate, including consideration of the Accelerated Investment Incentive (Federal Bill C-97)?
16. Is Hydro One's proposed depreciation expense appropriate?

F: COMPENSATION COSTS

17. Are the compensation related costs appropriate?

G: RATE BASE & COST OF CAPITAL

18. Are the amounts proposed for rate base (including the working capital allowance amounts) reasonable?
19. Is the proposed cost of capital (interest on debt, return on equity) and capital structure reasonable?

H: LOAD & REVENUE FORECAST

20. Is the load forecast methodology (including consideration of CDM impacts) and the resulting load forecast appropriate?
21. Are Other Revenue (including export revenue) forecasts appropriate?

I: DEFERRAL/VARIANCE ACCOUNTS

22. Are the proposed amounts, disposition and continuance of Hydro One's existing deferral and variance accounts appropriate?
23. Are the proposed new deferral and variance accounts appropriate?

J: COST ALLOCATION

24. Is the transmission cost allocation proposed by Hydro One appropriate?

K: EXPORT TRANSMISSION SERVICE RATES

25. Is the Export Transmission Rate of $1.85 and the resulting ETS revenues appropriate?

Ontario Energy Board Act, 1998 Leave to Construct Criteria

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

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

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

1. ***The interests of consumers with respect to prices and the reliability and quality of electricity service***. (emphasis added)

TAB 2

Ontario Energy Board Act, 1998 Leave to Construct Criteria

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

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

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

1. ***The interests of consumers with respect to prices and the reliability and quality of electricity service***. (emphasis added)

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

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.

PROCEDURAL ORDER NO. 1

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* seeking the review of an amendment to the market rules made by the Independent Electricity System Operator (the "IESO") on January 18, 2006. 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 Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "Amendment").

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

Stay of Operation of the Amendment

The Amendment was scheduled to have an effective date of February 10, 2007. AMPCO also applied for an order under section 33(7) of the *Electricity Act, 1998* staying the operation of the amendment pending completion of the Board's review. On February 9, 2007, the IESO filed a letter with the Board indicating the IESO's consent to the stay of the operation of the Amendment. Also on February 9, 2007, the Board issued an Order staying the operation of the Amendment pending completion of the Board's review of the Amendment. A copy of the Order is attached as Appendix A to this Procedural Order.

Interventions and Cost Awards

In accordance with the Notice, interested parties had until Thursday, February 15, 2007 to notify the Board of their intention to intervene in this proceeding. Notices of intervention have been received from the following interested parties: the IESO; the Vulnerable Energy Consumers Coalition ("VECC"); the Association of Power Producers of Ontario ("APPrO"); TransCanada Energy Ltd. ("TransCanada"); Coral Energy Canada Inc. ("Coral Energy"); Ontario Power Generation Inc. ("OPG"); the Electricity Market Investment Group ("EMIG") and Hydro One Networks Inc. ("Hydro One").

In accordance with section 33(6) of the *Electricity Act, 1998*, the Board is required to issue an order that embodies its final decision in this proceeding within 60 days of the date of receipt of AMPCO's Application. In order to meet the statutory deadline, the Board will vary its customary intervention process and will grant intervenor status to all those who requested it. A list of parties to this proceeding is set out in Appendix B to this Procedural Order.

The Board will make cost awards available in this proceeding to eligible intervenors. In its application, AMPCO has requested that an award of costs be payable to it and to other eligible intervenors by the IESO. The following other parties have requested an award of costs in this proceeding: APPrO, VECC and the IESO. In the case of applications, cost awards are typically recovered from the applicant and applicants are, absent special circumstances, not eligible for an award of costs. However, the Board believes that it may be appropriate for cost awards to be recovered from the IESO in cases where the application relates to a review of an amendment to the market rules. The Board would benefit from submissions by the parties on this issue.

Direction to Provide Materials

Materials relevant to this proceeding are maintained by the IESO. The Board considers it expedient to direct the IESO, under section 21 of the *Ontario Energy Board Act, 1998*, to file materials associated with the development and adoption of the Amendment.

The Board considers it necessary to make provision for the following procedural matters. Further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. The issues to be considered in this proceeding shall be those set out in Attachment C to this Procedural Order.

2. Any party that wishes to make written submissions on the issue of cost awards shall file those submissions with the Board on or before Monday, February 26, 2007.

3. AMPCO shall file any additional evidence with the Board on or before Monday, February 26, 2007, and shall deliver a copy of this evidence to all intervenors.

4. The IESO is directed to file the following materials with the Board on or before Monday, February 26, 2007, and to deliver a copy of those materials to AMPCO and to all intervenors:

    i. the Market Rule Amendment Submission relating to the Amendment, including the covering memorandum;

    ii. all written submissions received by the IESO in relation to the Amendment;

    iii. minutes or meeting notes of all meetings of the Market Pricing Working Group or the Stakeholder Advisory Group at which the Amendment or the subject matter of the Amendment was discussed;

iv. a list of all materials related to the Amendment or the subject matter of the Amendment tabled before the Market Pricing Working Group or the Stakeholder Advisory Group;

v. a list of all materials tabled before the Board of Directors of the IESO in relation to the Amendment or the subject matter of the Amendment, and a copy of all such materials other than those already captured by items i to iv above;

vi. a copy of the decision of the Board of Directors of the IESO adopting the Amendment;

vii. any written material on the impact of the Amendment on the price, reliability and quality of electricity service; and

viii. all materials prepared by the IESO in relation to the Amendment or the subject matter of the Amendment, other than materials already captured by items i to vii above.

5. Each intervenor, including the IESO, shall file its evidence with the Board on or before Friday, March 9, 2007, and shall deliver a copy of its evidence to AMPCO and to all other intervenors.

6. A Technical Conference will be held to review the evidence filed by the parties. The Technical Conference will commence at 9:30 a.m. on Thursday, March 22, 2007, and if need be, continue on Friday March 23, 2007 in the Board's West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. At the end of the Technical Conference, parties will have the opportunity to make submissions as to whether oral testimony before the panel is required, or whether the matter can proceed directly to oral argument.

7. An oral hearing will commence at 9:30 a.m. on Thursday, March 29, 2007 in the Board's North Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. The hearing is currently scheduled for up to 2 days. If oral testimony is not required, these dates will be used to hear oral argument.

All filings to the Board noted in this Procedural Order must be in the form of 8 hard copies and must be received by the Board Secretary by **4:45 p.m.** on the stated dates. The Board requests that parties also submit an electronic copy of their filings in searchable, accessible Adobe Acrobat (PDF), if available, or MS Word. Electronic copies should be sent to boardsec@oeb.gov.on.ca, with a copy to the case manager Harold Thiessen at harold.thiessen@oeb.gov.on.ca.

DATED at Toronto, February 16, 2007.

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary

APPENDIX C

to

Procedural Order No. 1
February 16, 2007

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

Issues List

1) Is the market rule amendment inconsistent with the purposes of the *Electricity Act, 1998*?

2) Does the market rule amendment unjustly discriminate against or in favour of a market participant or class of market participants?

TAB 5

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

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by

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CHAPTER 9

Purposive Analysis

INTRODUCTION

§9.1 The modern principle emphasizes the importance of purposive analysis in statutory interpretation. This chapter describes what is entailed in this form of analysis, surveys the ways it is used, and draws attention to certain of its complexities and difficulties.

§9.2 The chapter begins with a brief look at the history of purposive analysis followed by consideration of why an emphasis on purpose is particularly favoured by modern courts. Important factors here are the rise of the modern administrative state, the emergence of new types of legislation and the influence of Charter interpretation. The chapter then looks at what is meant by purpose and the different ways of establishing it. The legal techniques for discovering purpose are examined and the role of cultural norms in this process is considered. Also, the sources and implications of indeterminacy in this area are discussed.

§9.3 ***Propositions underlying purposive analysis.*** A purposive analysis of legislative texts is based on the following propositions:

(1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.

(3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

This approach to statutory interpretation does not necessarily make purpose the most important consideration in interpreting legislation.[1] It merely ensures that the legislature's purposes — including both the purpose of the Act as a whole and the purpose of the particular provision to be interpreted — are identified and taken into account in every case.

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1 See the comparison of purposive analysis to the purposive approach, below at §9.7-9.9.

purposes, the assistance they offer is often quite limited. They typically recite the primary objects of legislation, which are apt to be obvious in any event, while failing to mention secondary purposes. Even purpose statements or preambles that are relatively specific rarely indicate how multiple purposes should be weighed or how competing purposes should be balanced.[63] It is left to the courts to work out the relationship between purposes declared in preambles or purpose statements and the purposes of individual provisions within the legislation, generally through scheme analysis.[64]

§9.48 ***Non-legislative statements of purpose.*** The reports of Law Reform Commissions, Parliamentary Commissions and other similar studies have long been admissible as evidence of the mischief or evil that legislation was designed to overcome.[65] Courts now also accept these and comparable sources as direct evidence of legislative purpose.[66] Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible and may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose.[67] In *Re Application under s. 83.28 of the Criminal Code*, Iacobucci J. relied not only on the preamble to the amending Act, but also on Parliamentary debates and on notes presented before the Committees considering the proposed legislation in the House and the Senate, to determine the purpose of the Act and of s. 83.28 in particular.[68] Statements issued by government departments or agencies involved in the development or administration of legis-

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63 There are, of course, exceptions to this general statement. See, for example, the preamble to the *Youth Criminal Justice Act*, as interpreted by Bastarache J. in *R. v. C.D.*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668, at paras. 34-35 (S.C.C.).

64 For a more detailed discussion of preambles, see Chapter 14, at §14.25*ff.*

65 For discussion of the use of commission reports in statutory interpretation, see Chapter 23, at §23.69-23.71.

66 See *R. v. St-Onge Lamoureux*, [2012] S.C.J. No. 57, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 11 (S.C.C.); *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, 2010 SCC 21, [2010] 1 S.C.R. 721, at paras. 11, 14, 23 (S.C.C.); *United States of America v. Kwok*, [2001] S.C.J. No. 19, [2001] 1 S.C.R. 532, at 557-58 (S.C.C.); *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63, [1997] 2 S.C.R. 403, at 426-27 (S.C.C.).

67 See *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, [2013] 3 S.C.R. 866, at paras. 43-44 (S.C.C.); *Celgene Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 1, 2011 SCC 1, para. 26 (S.C.C.); *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 40 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, at paras. 12-13 (S.C.C.); *H.L. v. Canada (Attorney General)*, [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401, at paras. 105-06 (S.C.C.); *Tataryn v. Tataryn Estate*, [1994] S.C.J. No. 65, [1994] 2 S.C.R. 807, at 814-15 (S.C.C.); *Canada (Attorney General) v. Young*, [1989] F.C.J. No. 634, [1989] 3 F.C. 647, at 657 (F.C.A.); *Lor-Wes Contracting Ltd. v. R.*, [1985] F.C.J. No. 178, [1985] 2 C.T.C. 79, at 84-85 (F.C.A.). For discussion of the use of *Hansard* in statutory interpretation, see Chapter 23, at §23.80*ff.*

68 [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at paras. 37-38 (S.C.C.). See also *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56, 2010 SCC 56, [2010] 3 S.C.R. 281, at paras. 46-47 (S.C.C.); *R. v. Tse*, [2012] S.C.J. No. 16, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 28 (S.C.C.).

lation may also be looked at.[69] In the case of delegated legislation, descriptions of purpose prepared by government ministries have been received by the courts.[70]

§9.49 In numerous cases the courts have adopted descriptions of purpose offered by legal scholars in textbooks, monographs or law review articles. The authority of these accounts depends on the quality of the research and the cogency of the analysis and argument presented by the author. This source is routinely relied on by the Supreme Court of Canada.[71]

§9.50 Finally, the courts rely on descriptions of purpose in previous case law.[72]

§9.51 ***Norms of plausibility.*** In the absence of a relevant description of purpose issuing from an authoritative source, interpreters must rely on inference to

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69 For example, in *R. v. J. (J.T.)*, [1990] S.C.J. No. 88, [1990] 2 S.C.R. 755, at 779 (S.C.C.), L'Heureux-Dubé J. dissenting, relied on descriptions of the purpose of the *Young Offenders Act* appearing in a publication issuing from the Solicitor General's office; in *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, [1990] O.J. No. 104, 65 D.L.R. (4th) 1, at 19 (Ont. C.A.), the Court relied on government guidelines and brochures, as well as materials submitted by the school board; in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625, at 647 (S.C.C.) the Court relied on the description of purpose offered by an Assistant Deputy Minister in the Department of Justice to the Standing Committee on Justice. This type of evidence of legislative intent is discussed in Chapter 23, at §23.103*ff.*

70 For decisions using Regulatory Impact Analysis Statements (RIAS) to describe the purpose of legislation, see *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533, at paras. 45-46, 157 (S.C.C.); *Friesen v. Canada*, [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.); *Apotex Inc. v. Merck Frosst Canada & Co.*, [2011] F.C.J. No. 1664, 2011 FCA 329, paras. 45-48 (F.C.A.), leave to appeal refused [2012] S.C.C.A. No. 29 (S.C.C.); *Canada v. Lehigh Cement Limited*, [2011] F.C.J. No. 515, 2011 FCA 120, at para. 31 (F.C.A.). For discussion of the uses of R.I.A.S. in statutory interpretation, see Chapter 23, at §23.92*ff.*

71 See, for example, *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533 (S.C.C.); *Re Rizzo and Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 42-43 (S.C.C.); *Barrette v. Crabtree Estate*, [1993] S.C.J. No. 37, [1993] 1 S.C.R. 1027, at 1037 and 1041-44 (S.C.C.); *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] S.C.J. No. 83, [1992] 3 S.C.R. 120, at 152-53 (S.C.C.); *Kelvin Energy Ltd. v. Lee*, [1992] S.C.J. No. 88, [1992] 3 S.C.R. 235, at 256 (S.C.C.). For discussion of the use of scholarly publications in statutory interpretation, see Chapter 23, at §23.98*ff.*

72 See, for example, *Peracomo Inc. v. TELUS Communications Co.*, [2014] S.C.J. No. 29, 2014 SCC 29, at para. 24 (S.C.C.) *Celgene Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 1, 2011 SCC 1, para. 27 (S.C.C.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2014] O.J. No. 533, 2014 ONCA 89, at para. 40 (Ont. C.A.); *Okanagan College Faculty Association v. Okanagan College*, [2013] B.C.J. No. 2883, 2013 BCCA 561, at paras. 76-77 (B.C.C.A.); *R. v. Hajivasilis*, [2013] O.J. No. 253, 2013 ONCA 27, at paras. 49-50 (Ont. C.A.); *Robert v. Forster*, [2010] B.C.J. No. 526, 2010 BCCA 67, at para. 21 (B.C.C.A.); *Baird v. Baird*, [2010] B.C.J. No. 2368, 2010 BCCA 431, at para. 16 (B.C.C.A.), leave to appeal refused [2010] S.C.C.A. No. 435 (S.C.C.). For discussion of reliance on precedent in statutory interpretation, see Chapter 23, at §23.126*ff.*

> of government without the necessity of annual appropriations by Parliament. It was intended, for instance, that the salary of the Governor General should not be at the mercy of annual votes in the House of Commons [s. 105]. Similarly, it was recognized that if annual votes were required for the payment of interest on the public debt it would rapidly have become impossible for the government to raise funds through borrowing [s. 104]. Equally, it was recognized that without the authority to expend funds for the collection of taxes, the entire operations of the government could be brought to a standstill [s. 103].
>
> Clearly, therefore, the purpose of s. 103 was to immunize the revenue-collecting machinery of the federal government from the uncertainties of annual appropriations by Parliament. It was never intended to create a legally enforceable right in third parties to receive compensation for revenue-raising duties imposed on them by Parliament.[82]

Lamer C.J. here identifies a common denominator in the series of provisions, a shared rationale, that explains how these provisions fit into the governmental structure created by the Act and what work they were meant to do. Inferences based on analysis of this sort can be highly persuasive. The more closely purpose is tied to the details of the overall scheme, the less room there is for plausible alternative explanations.

§9.59 ***Purpose inferred from external context — the mischief to be cured.*** Because of the rule in *Heydon's Case*, legislative purpose is often thought of in terms of the mischief or social ill it is designed to remedy or the problem it is meant to address. This mischief or problem may be identified in an authoritative source such as the preamble to legislation, a Commission report or a scholarly text. It may also be inferred by matching provisions in the legislation to conditions which existed at the time of enactment and to which the provisions are a plausible response.[83]

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82 *Ibid.*, at 473. See also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] S.C.J. No. 68, [1989] 1 S.C.R. 1722 (S.C.C.), where, after reviewing the powers conferred on the C.R.T.C. by ss. 334-340 of the *Railway Act*, the Supreme Court of Canada concluded, at 1740, that "[i]t is obvious from the legislative scheme set out in the *Railway Act* ... that the appellant has been given broad powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable". See also *R. v. C.D.*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668, at para. 39 (S.C.C.); *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] S.C.J. No. 4, [1999] 2 S.C.R. 961 (S.C.C.); *R. v. Chartrand*, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864 (S.C.C.); *Waldick v. Malcolm*, [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456 (S.C.C.).

83 In *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 202 (S.C.C.), Lebel and Deschamps JJ. wrote, under the heading "Purpose of the Provisions": "The words of the statute itself can of course be of assistance in the identification of the purpose of impugned provisions. However, the context of the enactment of the statute often reveals as much as, if not more than, the words used. It is both appropriate and necessary to review the context as part of the statutory interpretation process, in constitutional as well as in other matters...".

also wish to fill gaps or correct problems that it has detected without the benefit of a judgment from the courts.[88] In other instances, legislation is enacted to cure constitutional invalidity declared by the courts.

§9.62 In *AstraZeneca Canada Inc. v. Canada (Minister of Health)*,[89] for example, the Supreme Court of Canada inferred the purpose for an amendment to the *Patent Act* by focusing on the mischief to be cured. The Court was particularly concerned with the scope of a new regulation-making authority conferred on the Governor in Council. Binnie J. wrote:

> The [regulations to be interpreted] lie at the intersection of two regulatory systems with sometimes conflicting objectives. First, is the law governing approval of new drugs, which seeks to ensure the safety and efficacy of new medications before they can be put on the market. The governing rules are set out in the *Food and Drugs Act*.... The achievement of this objective is tempered by a second and to some extent overlapping regulatory system created by the *Patent Act* ....
>
> The problem perceived by Parliament in 1993 was that if a generic manufacturer waits to begin its preparation of a copy-cat medicine for regulatory approval until the patent expires, the *FDA* approval process will likely add at least two years to the effective monopoly of the patent owner, which is two years of monopoly longer than the *Patent Act* contemplates. On the other hand, if the generic manufacturer tries to work the patented invention *prior* to the expiry of the patent, even if solely to satisfy the *FDA* requirements for [approval], it will infringe the patent, thus inviting litigation by the patent owner....
>
> The solution arrived at by Parliament in Bill C-91 (1993) was to introduce an exemption from the owner's patent rights which permits the generic manufacturers to work the patented invention within the [patent] period ... to the extent necessary to obtain [FDA approval] at the time the patent(s) expire....[90]

Having identified the purpose of the amendment, the Court then concluded that the Governor in Council was authorized to make regulations only for the limited purpose of preventing infringements by manufacturers seeking to take advantage of the new exemption.

§9.63 ***Shifting purpose.*** Strictly speaking, the circumstances from which purpose is inferred — the mischief — must have existed or at least been anticipated at the time of enactment. In a number of early Charter cases, it was suggested that the original purpose of legislation might evolve in response to changing social conditions. This possibility was firmly rejected by the Supreme Court of Canada. In *R. v. Big M Drug Mart Ltd.*, Dickson C.J. wrote:

Capital (Regional District) v. Heinrich, [1981] B.C.J. No. 1510, 130 D.L.R. (3d) 709, at 710 (B.C.C.A.); *Weavers Estate v. Biseau*, [1992] O.J. No. 701, 8 O.R. (3d) 781, at 783 (Ont. Gen. Div.), affd [1997] O.J. No. 1456, 32 O.R. (3d) 480 (Ont. C.A.).

88 See, for example, *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13, at para. 43 (S.C.C.); *Air Canada v. British Columbia*, [1989] S.C.J. No. 44, [1989] 1 S.C.R. 1161 (S.C.C.).

89 [2006] S.C.J. No. 49, [2006] 2 S.C.R. 560 (S.C.C.).

90 *Ibid.*, at paras. 12-14.

> [T]he theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of 'Parliamentary intention'. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.[91]

In other words, the purpose of legislation is an historical fact — no less than the mischief or evil the legislation is designed to address. If the duty of courts is to give effect to the actual intent of the legislature, it must attempt to reconstruct the original purpose(s) of the legislation by relying on historically accurate information.

§9.64 Although the courts have rejected the possibility of a shifting purpose, they have also acknowledged that judicial understanding of legislative purpose and its implications may evolve over time as a result of evolving assumptions, values and social conditions. In *R. v. Butler*, for example, the Supreme Court of Canada found that the original purpose of the *Criminal Code*'s provisions on obscenity was to repress the harm to society caused by the publication of obscene materials. While this purpose has remained constant over the years, the understanding of the harm to be repressed has evolved. The emphasis on public morality that prevailed when the legislation was first enacted has given way to concerns about violence against women and children.[92]

§9.65 ***Purpose inferred from tracing legislative evolution.*** Another way of establishing legislative purpose is to trace the evolution of legislation from its inception, through successive amendments, to its current formulation.[93] Tracing may reveal past decisions by the legislature to adopt a new policy or strike out in a new direction;[94] it may reveal a gradual trend or evolution in legislative pol-

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91 [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 335 (S.C.C.). See also *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at paras. 64-65 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at 761 (S.C.C.); *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 973-74 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.), vard [2013] S.C.J. No. 72 (S.C.C.); *R. v. B.E.*, [1999] O.J. No. 3869, at paras. 48-49 (Ont. C.A.); *Canadian Newspapers Co. v. Victoria (City)*, [1989] B.C.J. No. 2023, 46 C.R.R. 271 (B.C.C.A.).

92 See *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 24 (S.C.C.); *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 494-96 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2012] O.J. No. 1296, 2012 ONCA 186, at paras 191-193 (Ont. C.A.).

93 For an explanation of how to trace the evolution of a provision, see Chapter 23, at §23.25.

94 See, for example, *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at para. 10 (S.C.C.); *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at 451 (S.C.C.); *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 549-50 (S.C.C.); *Crupi v. Canada (Employment and Immigration Commission)*, [1986] F.C.J. No. 204, [1986] 3 F.C. 3, at 10 (F.C.A.).

icy;[95] or it may reveal the original purpose of legislation and show that this purpose has remained constant through successive amendments to the present.[96]

§9.66 In *Belay v. Saskatchewan Government Insurance*,[97] for example, the issue was whether s. 62 of Saskatchewan's *Automobile Accident Insurance Act* precluded a person who claimed benefits under Part III of the Act from initiating action in an Ontario court. Section 62 provided that "an action to recover benefits or insurance money shall be taken in the court". Section 61 defined "court" in Part III to mean Her Majesty's Court of Queen's Bench for Saskatchewan. A literal reading of these provisions certainly suggested that all actions had to be initiated in Saskatchewan. However, relying in part on the purpose of the provision, the court reached a different conclusion. Feldman J. wrote:

> A review of the legislative history of s. 62 reveals that in the 1953 version of the Act it was the District Court of Saskatchewan where all actions were required to be tried, regardless of the amount involved. In 1957, this provision was amended to give concurrent jurisdiction to the District and Queen's Bench Courts, depending on the amount claimed.... The current provision was enacted in 1979-80 when the two courts in Saskatchewan were merged....
>
> In my view, the historical purpose of this section has been to designate which court in Saskatchewan has been given jurisdiction to adjudicate Part III claims.[98]

Given this limited purpose, the section could not be read as expressing an intention on the part of the Saskatchewan legislature to preclude injured persons from initiating claims in the courts of other provinces.

USES OF PURPOSIVE ANALYSIS

§9.67 ***Introduction.*** In *McBratney v. McBratney*, Duff C.J. wrote:

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute ...; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agree-

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95 See, for example, *Zeitel v. Ellscheid*, [1994] S.C.J. No. 38, [1994] 2 S.C.R. 142 (S.C.C.); *R. v. Chaulk*, [1989] S.C.J. No. 52, [1989] 1 S.C.R. 369, at 375-76 (S.C.C.). See also *R. v. Nabis*, [1974] S.C.J. No. 109, [1975] 2 S.C.R. 485 (S.C.C.).

96 See, for example, *Martin v. Alberta (Workers' Compensation Board)*, [2014] S.C.J. No. 25, 2014 SCC 25, at paras. 28-35 (S.C.C.); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at paras. 19-22, 34 (S.C.C.); *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439, at 461*ff.* (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 at 132*ff.* (S.C.C.); *R. v. Jacob*, [2009] O.J. No. 303, 2009 ONCA 73, at paras. 40-44 (Ont. C.A.), leave to appeal refused [2009] S.C.C.A. No. 293 (S.C.C.).

97 [1992] O.J. No. 1435, 10 O.R. (3d) 371 (Ont. Gen. Div.).

98 *Ibid.*, at 375.

TAB 6

Consolidated Maybrun Mines Limited and J. Patrick Sheridan *Appellants*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* CONSOLIDATED MAYBRUN MINES LTD.

File No.: 25326.

1998: January 29; 1998: April 30.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Validity of order — Collateral attack on administrative order in penal proceedings — Circumstances in which person charged with failing to comply with administrative order can collaterally attack validity of order — Applicable principles.

Environmental law — Offences — Defences — Validity of administrative order — Order made under provincial environmental protection statute to prevent risk of contamination — Persons to whom order directed not availing themselves of right to appeal under statute and ignoring order — Persons charged with failing to comply with order — Whether these persons can raise validity of order by way of defence — Environmental Protection Act, R.S.O. 1980, c. 141, ss. 17, 146(1a).

The appellant company owns a gold and copper mine and the appellant P.S. is the guiding mind of the company. After inspecting the mine, employees of the Ontario Ministry of the Environment concluded that it was abandoned and that transformers containing PCBs presented a risk of environmental contamination. Despite numerous efforts to have the company take corrective action, the condition of the site did not change. In 1987, the Ministry's Regional Director issued an order, under s. 17 of the *Environmental Protection Act*, and required the appellants, *inter alia*, to construct a storage area for the transformers, to clean the concrete stained by spillage of contaminated oil, and to drum the contaminated material. The appellants did not appeal to

Consolidated Maybrun Mines Limited et J. Patrick Sheridan *Appelants*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. *c.* CONSOLIDATED MAYBRUN MINES LTD.

N° du greffe: 25326.

1998: 29 janvier; 1998: 30 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci et Bastarache.

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

Droit administratif — Validité d'une ordonnance — Contestation incidente d'une ordonnance administrative dans le cadre d'une procédure pénale — Dans quelles circonstances une personne accusée de ne pas s'être conformée à une ordonnance administrative peut-elle en soulever la validité de façon incidente? — Principes applicables.

Droit de l'environnement — Infraction — Moyen de défense — Validité d'une ordonnance administrative — Arrêté pris en vertu d'une loi provinciale sur la protection de l'environnement pour prévenir un risque de contamination — Personnes visées par l'arrêté ne se prévalant pas des mécanismes d'appel prévus à la loi et ignorant l'arrêté — Personnes accusées de ne pas s'être conformées à l'arrêté — Ces personnes peuvent-elles soulever comme moyen de défense la validité de l'arrêté? — Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 17, 146(1a).

La compagnie appelante est propriétaire d'une mine d'or et de cuivre et l'appelant P.S. est la tête dirigeante de cette compagnie. Après avoir visité la mine, les employés du ministère de l'Environnement de l'Ontario ont conclu qu'elle était abandonnée et que des transformateurs contenant des BPC présentaient un risque de contamination pour l'environnement. Malgré de multiples démarches pour que la compagnie remédie à la situation, l'état des lieux est demeuré inchangé. En 1987, un directeur régional du ministère a pris un arrêté, en vertu de l'art. 17 de la *Loi sur la protection de l'environnement*, et ordonné notamment aux appelants de construire un abri pour entreposer les transformateurs, de nettoyer le solage de béton souillé par des écoule-

the Environmental Appeal Board and basically elected to disregard the order. When charged by the Ministry with failing to comply with the order, the appellants submitted by way of defence that the order was invalid. They argued that there were no reasonable and probable grounds, as required by s. 17(2) of the Act, to believe that the situation at the mine constituted an environmental risk. After examining the evidence, the trial judge concluded that only the order to drum and store the contaminated material was valid and ordered the appellants to pay a fine. The Ontario Court (General Division) allowed the respondent's appeal with respect to the counts relating to the failure to construct a storage area and to clean, and dismissed the appellants' appeal of the conviction. The court held that by reviewing the validity of the order, the trial judge had exceeded his jurisdiction under the *Environmental Protection Act* and encroached on the Environmental Appeal Board's functions. The Court of Appeal affirmed that judgment.

ments d'huile contaminée, et de mettre dans des barils les matériaux contaminés. Les appelants n'ont pas interjeté appel devant la Commission d'appel de l'environnement et ont choisi, pour l'essentiel, d'ignorer l'arrêté. Accusés par le ministère de ne pas s'être conformés à cet arrêté, les appelants ont soulevé son invalidité comme moyen de défense. Ils ont soutenu qu'il n'existait pas de motifs raisonnables et probables, tel que requis par le par. 17(2) de la Loi, de croire que la situation à la mine présentait un risque pour l'environnement. Après examen de la preuve, le juge du procès a conclu que seule l'ordonnance relative à la mise en barils et au remisage des matériaux contaminés était valide et il a condamné les appelants à une amende. La Cour de l'Ontario (Division générale) a accueilli l'appel de l'intimée concernant les chefs d'accusation relatifs au défaut de construire un abri et de nettoyer, et a rejeté l'appel des appelants relatif à leur déclaration de culpabilité. La cour a statué que le juge du procès avait, en examinant la validité de l'arrêté, excédé la compétence que lui confère la *Loi sur la protection de l'environnement* et usurpé les fonctions confiées à la Commission d'appel de l'environnement. La Cour d'appel a confirmé ce jugement.

Held: The appeal should be dismissed.

Arrêt: Le pourvoi est rejeté.

The question of whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made. The best way to decide this question, taking both the integrity of the administrative process and the interests of litigants into account, is to focus the analysis on the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. The wording of the statute from which the power to issue the order derives, the purpose of the legislation, the availability of an appeal, the nature of the collateral attack taking into account the appeal tribunal's expertise and *raison d'être*, and the penalty on a conviction for failing to comply with the order are all important, but not exhaustive, factors for determining the legislature's intention. In this case, a review of the *Environmental Protection Act* leads to the conclusion that the trial judge lacked jurisdiction to rule on the validity of the order. Persons charged with failing to comply with an order made under this legislation may not collaterally attack the validity of the order after failing to avail themselves of the appeal mechanisms provided by the Act.

La question de savoir si un tribunal pénal peut, de façon incidente, se prononcer sur la validité d'une ordonnance administrative dépend de la loi dont découle l'ordonnance. La façon appropriée de trancher cette question, compte tenu à la fois de l'intégrité du processus administratif et des intérêts des justiciables, est de placer au centre de l'analyse la recherche de l'intention législative quant au forum approprié. Ce faisant, il faut présumer que le législateur n'a pas voulu priver une personne visée par une ordonnance de l'occasion de faire valoir ses droits. Les termes de la loi dont découle le pouvoir de rendre une ordonnance, l'objectif de la loi, l'existence d'un droit d'appel, la nature de la contestation eu égard à l'expertise de l'instance d'appel et à sa raison d'être, et la sanction imposable pour le non-respect de l'ordonnance, sont des facteurs importants, mais non exhaustifs, qui permettent de cerner l'intention législative. En l'espèce, l'examen de la *Loi sur la protection de l'environnement* amène à conclure que le juge du procès n'avait pas compétence pour se prononcer sur la validité de l'arrêté. La personne accusée de ne pas s'être conformée à un arrêté pris en vertu de cette loi ne peut, en défense, chercher à attaquer de façon incidente la validité de l'ordonnance alors qu'elle ne s'est pas prévalue des mécanismes d'appel prévus par la Loi.

The purpose of the Act is primarily to prevent contamination of the province's environment. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal board designed to counterbalance those powers by affording affected individuals an opportunity to present their points of view and to assert their rights as quickly as possible. Permitting a person to whom an order is directed to collaterally attack the order at the stage of penal proceedings would encourage conduct contrary to the Act's objectives and would tend to undermine its effectiveness. In this connection, the appellants cannot raise their right to make full answer and defence since there is no indication that the Act's appeal process is inadequate or that the Board was powerless to remedy the deficiency that they raise against the order.

With respect to the factor regarding the nature of collateral attack, whether the issue is lack of jurisdiction *ab initio* or loss of jurisdiction is irrelevant. What is important is on whom the legislature intended to confer jurisdiction to hear and determine the question raised. Since in this case the legislature set up a specialized tribunal to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated, permitting a penal court to answer such questions in lieu of the Environmental Appeal Board, which was established precisely for this purpose, would undermine the scheme set up by the Act. Lastly, the penal consequences provided by the Act — fines — do not justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction.

Cases Cited

Distinguished: *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9; **referred to:** *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Domm* (1996), 31 O.R. (3d) 540, leave to appeal refused, [1997] 2 S.C.R. viii; *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273; *McGee v. United States*, 402 U.S. 479 (1971); *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Commission des accidents du travail du Québec v. Valade*, [1982] 1 S.C.R. 1103; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna*

L'objectif premier de la Loi est de prévenir la contamination de l'environnement dans la province. Cet objectif se reflète à la fois dans l'étendue des pouvoirs conférés au directeur et dans la création d'une instance d'appel qui vise à contrebalancer ces pouvoirs en accordant aux personnes touchées l'occasion de faire connaître leur point de vue et de faire valoir leurs droits dans les plus brefs délais. Le fait d'autoriser une personne visée par un arrêté à attaquer l'ordonnance de façon incidente au stade du processus pénal encouragerait un comportement contraire aux objectifs de la Loi et tendrait à miner son efficacité. À cet égard, les appelants ne peuvent opposer leur droit à une défense pleine et entière puisque rien n'indique que le processus d'appel établi par la Loi est inadéquat ou que la Commission n'est pas habilitée à remédier au défaut que les appelants invoquent à l'encontre de l'arrêté.

Quant au facteur relatif à la nature de la contestation, il importe peu que soit invoquée l'absence de compétence *ab initio* ou la perte de compétence. Ce qui importe c'est de savoir qui le législateur a voulu habiliter à entendre et à trancher la question soulevée. Puisqu'en l'espèce le législateur a mis sur pied une instance spécialisée pour entendre les questions relatives à l'environnement et adopter les mesures appropriées pour prévenir sa contamination, permettre que ces questions soient tranchées par un tribunal pénal plutôt que par la Commission d'appel de l'environnement, créée à cette fin, porterait atteinte au régime mis en place par la Loi. Enfin, les conséquences pénales prévues par la Loi — des amendes — ne permettent pas de conclure que l'intention du législateur était d'autoriser des contestations incidentes, au détriment des objectifs poursuivis par la Loi et de la compétence de la Commission.

Jurisprudence

Distinction d'avec l'arrêt: *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9; **arrêts mentionnés:** *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. Domm* (1996), 31 O.R. (3d) 540, autorisation de pourvoi refusée, [1997] 2 R.C.S. viii; *Everywoman's Health Centre Society (1988) c. Bridges* (1990), 54 B.C.L.R. (2d) 273; *McGee c. United States*, 402 U.S. 479 (1971); *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Commission des accidents du travail du Québec c. Valade*, [1982] 1 R.C.S. 1103; *Abel Skiver Farm Corp. c. Ville de Sainte-Foy*, [1983] 1 R.C.S. 403; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *R. c.*

v. Procureur général du Québec (1984), 10 Admin. L.R. 210; *R. v. Rice*, [1980] C.A. 310; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25; *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237; *R. v. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225; *Yakus v. United States*, 321 U.S. 414 (1944); *McKart v. United States*, 395 U.S. 185 (1969); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *R. v. Wicks*, [1997] 2 W.L.R. 876; *Director of Public Prosecutions v. Head*, [1959] A.C. 83; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

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APPEAL from a judgment of the Ontario Court of Appeal (1996), 28 O.R. (3d) 161, 89 O.A.C. 199, 133 D.L.R. (4th) 513, 105 C.C.C. (3d) 388, 19 C.E.L.R. (N.S.) 75, [1996] O.J. No. 881 (QL), affirming a judgment of the Ontario Court (General Division) (1993), 86 C.C.C. (3d) 317, 12 C.E.L.R. (N.S.) 171, [1993] O.J. No. 2935 (QL), which had allowed the respondent's appeal and dismissed the appellants' appeal from a judgment of the Ontario Court (Provincial Division) (1992), 73 C.C.C. (3d) 268 and 76 C.C.C. (3d) 94. Appeal dismissed.

Edward L. Greenspan, Q.C., and *Marie Henein*, for the appellants.

Lori Sterling and *Jerry Herlihy*, for the respondent.

English version of the judgment of the Court delivered by

Sharma, [1993] 1 R.C.S. 650; *Khanna c. Procureur général du Québec* (1984), 10 Admin. L.R. 210; *R. c. Rice*, [1980] C.A. 310; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *R. c. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25; *R. c. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237; *R. c. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225; *Yakus c. United States*, 321 U.S. 414 (1944); *McKart c. United States*, 395 U.S. 185 (1969); *United States c. Mendoza-Lopez*, 481 U.S. 828 (1987); *R. c. Wicks*, [1997] 2 W.L.R. 876; *Director of Public Prosecutions c. Head*, [1959] A.C. 83; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048.

Lois et règlements cités

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1996), 28 O.R. (3d) 161, 89 O.A.C. 199, 133 D.L.R. (4th) 513, 105 C.C.C. (3d) 388, 19 C.E.L.R. (N.S.) 75, [1996] O.J. No. 881 (QL), qui a confirmé un jugement de la Cour de l'Ontario (Division générale) (1993), 86 C.C.C. (3d) 317, 12 C.E.L.R. (N.S.) 171, [1993] O.J. No. 2935 (QL), qui avait accueilli l'appel de l'intimée et rejeté l'appel des appelants contre un jugement de la Cour de l'Ontario (Division provinciale) (1992), 73 C.C.C. (3d) 268 et 76 C.C.C. (3d) 94. Pourvoi rejeté.

Edward L. Greenspan, c.r., et *Marie Henein*, pour les appelants.

Lori Sterling et *Jerry Herlihy*, pour l'intimée.

Le jugement de la Cour a été rendu par

1 L'HEUREUX-DUBÉ J. — This case raises the question whether and, if so, in what circumstances a person charged with failing to comply with an administrative order can collaterally attack the validity of the order. Although this is an important question, Canadian courts have, until now, had very few opportunities to pronounce upon it.

LE JUGE L'HEUREUX-DUBÉ — Le présent litige soulève la question de savoir si et, le cas échéant, dans quelles circonstances une personne accusée d'avoir fait défaut de se conformer à une ordonnance administrative peut soulever de façon incidente la validité de l'ordonnance. Il s'agit d'une question importante à l'égard de laquelle les tribunaux canadiens n'ont eu cependant jusqu'ici que très peu d'occasions de se prononcer.

2 It should be noted at the outset that this Court has already spoken on the possibility of collateral attacks on the validity of court orders (*Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223). In *Litchfield*, at p. 349, Iacobucci J. stated the basis of the rule against collateral attacks on court orders as follows:

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro* [(1988), 42 C.C.C. (3d) 485 (Sask. C.A.)], at p. 497).

On notera au départ que notre Cour s'est déjà exprimée sur la possibilité d'attaquer de façon incidente la validité d'ordonnances judiciaires (*Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223). Dans l'affaire *Litchfield*, à la p. 349, le juge Iacobucci exprimait en ces termes le fondement de la règle empêchant les contestations incidentes à l'encontre d'ordonnances judiciaires:

> La règle repose sur un solide raisonnement: elle vise à maintenir la primauté du droit et à préserver la considération dont jouit l'administration de la justice. L'incertitude résulterait si on permettait aux parties de gérer leurs affaires suivant la perception qu'ils ont de questions comme la compétence du tribunal qui rend l'ordonnance. De plus, [TRADUCTION] «l'administration ordonnée et pratique de la justice» exige que les ordonnances judiciaires soient considérées comme définitives et ayant force exécutoire à moins d'être annulées en appel (*R. c. Pastro* [(1988), 42 C.C.C. (3d) 485 (C.A. Sask.)], à la p. 497).

3 For this reason, it is also settled that, as a general rule, a superior court will not be justified in reviewing the validity of a court order in respect of which a contempt charge has been laid — see, *inter alia*: *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), leave to appeal refused, [1997] 2 S.C.R. viii; *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.).

Pour cette raison, il a également été établi que, de façon générale, une cour supérieure ne sera pas justifiée de procéder à l'examen de la validité de l'ordonnance judiciaire pour laquelle une accusation d'outrage a été portée — voir, notamment: *R. c. Domm* (1996), 31 O.R. (3d) 540 (C.A.), permission d'en appeler refusée, [1997] 2 R.C.S. viii; *Everywoman's Health Centre Society (1988) c. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.).

4 The question raised by the case at bar is whether this same immunity should be conferred on administrative orders in light of the major differences that can exist between these two types of orders in relation, *inter alia*, to their legal nature and the

La question soulevée par le présent litige est celle de savoir si la même immunité devrait être conférée aux ordonnances administratives compte tenu des différences importantes qui peuvent exister entre ces deux types d'ordonnances, notamment

position within the state structure of the institutions that issue them.

I. Facts

The appellant Patrick Sheridan is the guiding mind of the Consolidated Maybrun company, which owns a gold and copper mine in Northern Ontario. After operating for a few years in the early 1970s, the mine was shut down until 1975 due to low ore prices. It was then reopened for 18 months before being shut down once again. Operations at the mine have not been resumed since that time.

In 1985, employees of the Ontario Ministry of the Environment inspected the mine. They found that the facilities had been vandalized, windows broken, chemicals strewn about inside the laboratory, water had penetrated and was obstructing the mine, and access to the facilities was not controlled. They also observed traces of oil contaminated with polychlorinated biphenyls ("PCBs") from a number of electrical transformers located both outside and inside the buildings. Based on these observations, they concluded that the mine was abandoned and that the transformers presented a risk of environmental contamination.

The Ministry of the Environment accordingly contacted the appellant company to have it take corrective action. Despite a meeting with the appellant's electrician, Mr. Vernon, an inspection by Ministry employees in 1986 revealed that the condition of the site had not changed. Subsequent attempts by the Ministry to communicate with the appellant in writing and by telephone were also fruitless. In these circumstances, the Ministry's Regional Director gave the appellants notice on April 22, 1987 of his intention to issue an order requiring that the contaminated oil stains be cleaned up, that the transformers be stored in a secure building constructed for that purpose and undergo a triple rinse procedure, and finally that access to the site be secured. The notice also invited the appellants to respond to the Director's intention

quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique.

I. Les faits

5 L'appelant Patrick Sheridan est la tête dirigeante de la compagnie Consolidated Maybrun, propriétaire d'une mine d'or et de cuivre située dans le nord de l'Ontario. Après quelques années d'exploitation au tout début des années 70, la mine est fermée jusqu'en 1975 en raison de la baisse du prix du minerai. Elle est alors rouverte pour une période de 18 mois, puis fermée à nouveau. La mine n'a jamais été rouverte depuis.

6 En 1985, des employés du ministère de l'Environnement de l'Ontario visitent la mine. Ils constatent que les installations ont été vandalisées, que des vitres ont été brisées, que des produits chimiques sont répandus à l'intérieur du laboratoire, que de l'eau s'est infiltrée et obstrue la mine et que l'accès aux installations n'est pas contrôlé. Ils remarquent également des traces d'huile contaminée aux biphényles polychlorés («BPC») provenant de plusieurs transformateurs électriques se trouvant à l'extérieur comme à l'intérieur des bâtiments. Sur la base de ces observations, ils concluent que la mine est abandonnée et que les transformateurs présentent un risque de contamination pour l'environnement.

7 Suite à ce constat, le ministère de l'Environnement communique avec la compagnie appelante afin qu'elle remédie à la situation. Malgré une rencontre avec l'électricien de l'appelante, M. Vernon, une visite du site en 1986 par des employés du ministère révèle que l'état des lieux est demeuré inchangé. Les tentatives subséquentes du ministère de communiquer par écrit et par téléphone avec l'appelante sont également vaines. Dans ces circonstances, le 22 avril 1987 le directeur régional du ministère avise les appelants de son intention de rendre un arrêté afin d'ordonner que les taches d'huile contaminée soient nettoyées, que les transformateurs soient entreposés dans un édifice sécuritaire construit à cette fin puis soumis à un triple rinçage et, enfin, que l'accès au site soit fermé. En outre, l'avis invite les appelants à répondre à l'in-

and make submissions concerning the proposed order within 15 days. As with the earlier letters, the notice went unanswered, and an inspection of the mine on May 7, 1987 confirmed that no action had been taken. The appellant did not respond until May 11; it did so through Mr. Sheridan, who expressed the opinion that the measures proposed by the Ministry were "ridiculous" and that it was up to the Ministry to clean up the PCBs.

tention du directeur et à lui faire des soumissions quant à l'ordonnance envisagée dans les 15 jours. Tout comme les lettres précédentes, l'avis demeure sans réponse et une inspection de la mine le 7 mai 1987 confirme qu'aucune mesure n'a été prise. L'appelante ne répond que le 11 mai, par la voix de M. Sheridan, qui exprime l'opinion que les mesures suggérées par le ministère sont [TRADUCTION] «ridicules» et qu'il appartient au ministère de procéder au nettoyage des BPC.

8 On June 2, 1987, the Director issued an order under s. 17 of the *Environmental Protection Act*, R.S.O. 1980, c. 141 (now R.S.O. 1990, c. E.19). At the same time, he informed the appellants of their right under s. 122 of the *Environmental Protection Act* to appeal to the Environmental Appeal Board within 15 days of receiving the order, which required the appellants Sheridan and Consolidated Maybrun to take measures that can be summarized as follows:

Le 2 juin 1987, le directeur rend un arrêté fondé sur l'art. 17 de la *Loi sur la protection de l'environnement*, L.R.O. 1980, ch. 141 (maintenant L.R.O. 1990, ch. E.19). Il avise du même coup les appelants de leur droit, en vertu de l'art. 122 de la *Loi sur la protection de l'environnement*, d'en appeler à la Commission d'appel de l'environnement dans les 15 jours de la réception de l'arrêté, lequel enjoint les appelants Sheridan et Consolidated Maybrun de prendre des mesures pouvant être résumées comme suit:

1 — Construct a storage area for the contaminated transformers in accordance with specifications set out in the order;

2 — Clean or chip out the concrete surfaces where there is evidence of spillage of liquids contaminated with PCBs;

3 — Bag and drum the contaminated material (soil, wood and metal) and place the drums in a storage area on the property;

4 — Secure and prevent entry to the areas where the transformers are located, within seven days; and

5 — Upon completion of the storage area, carry out the triple rinse procedure on the transformers.

1 — Construire, conformément à certaines exigences indiquées dans l'arrêté, un abri pour entreposer les transformateurs contaminés;

2 — Nettoyer ou ciseler («*chip*») les surfaces de béton présentant des traces de déversement de liquide contaminé aux BPC;

3 — Mettre dans des sacs puis dans des barils les matériaux (sol, bois, métal) contaminés et entreposer les barils dans un abri sur la propriété;

4 — Verrouiller et bloquer l'accès aux endroits où se trouvaient les transformateurs dans les sept jours;

5 — Après construction de l'abri, procéder au triple-rinçage des transformateurs.

9 The appellants basically elected to disregard the order. The only action they took was to secure the areas where the transformers were located and put up signs indicating that access to the site was prohibited, although this was not done within the prescribed time. None of the other requirements of the order were met, no appeal was filed with the Board

Pour l'essentiel, les appelants choisissent d'ignorer l'arrêté. La seule mesure prise est de clôturer les lieux où se trouvent les transformateurs et d'apposer des enseignes indiquant que l'accès au site est interdit. Cette mesure n'est toutefois pas complétée dans le délai imparti. Aucune des autres exigences de l'arrêté n'est satisfaite, aucun appel

and no application was made for judicial review of the order.

After the appellants failed to act, the Ministry had the site cleaned up and a storage area constructed for the transformers, at a cost of $131,000. The Ministry also decided to lay charges under s. 146(1a) of the *Environmental Protection Act*, as amended by S.O. 1986, c. 68, s. 14(1) (now s. 186(2)). These charges comprised four separate counts: failure to construct a storage area for the transformers, failure to drum the PCB-contaminated material, failure to clean and chip out areas of the concrete floor stained by spillage of contaminated oil and, lastly, failure to prevent entry to the areas where the transformers were located. No charge was laid for the failure to rinse the transformers, as the Ministry of the Environment now considered this procedure inadequate.

II. Judgments

1. *Ontario Court (Provincial Division)* (1992), 73 C.C.C. (3d) 268 and 76 C.C.C. (3d) 94

At trial, the appellants submitted by way of defence that the order of June 2, 1987 was invalid. In support of their position, they argued that there were no reasonable and probable grounds, as required by s. 17(2) of the *Environmental Protection Act*, to believe that the situation constituted an environmental risk. On this point, the trial judge was of the opinion that the validity of the order could be challenged, but only for lack of jurisdiction. Since the appellants had elected not to appeal the order to the Board, he could not rule on the merits of the order.

Nonetheless, the trial judge admitted extensive scientific evidence on the environmental risk presented by PCBs and the appropriate means for preventing those risks. He concluded that the order to construct a storage area could be justified only in light of the triple rinse procedure. However,

n'est déposé à la Commission et aucune tentative n'est faite pour obtenir une révision judiciaire de l'ordonnance.

10 Face à l'inaction des appelants, le ministère fait nettoyer le site et construire un abri pour les transformateurs, le tout au coût de 131 000 $. Le ministère décide également de porter des accusations en vertu du par. 146(1a) de la *Loi sur la protection de l'environnement*, telle que modifiée par L.O. 1986, ch. 68, par. 14(1) (maintenant le par. 186(2)). Ces accusations comportent quatre chefs distincts, soit le défaut de construire un abri pour entreposer les transformateurs, le défaut de mettre dans des barils les matériaux contaminés par les BPC, le défaut de nettoyer et ciseler le solage de béton souillé par des écoulements d'huile contaminée et, enfin, le défaut d'empêcher l'accès aux lieux où se trouvaient les transformateurs. Aucune accusation n'est portée à l'égard du défaut de rincer les transformateurs puisque cette procédure est désormais considérée inadéquate par le ministère de l'Environnement.

II. Les décisions antérieures

1. *La Cour de l'Ontario (Division provinciale)* (1992), 73 C.C.C. (3d) 268 et 76 C.C.C. (3d) 94

11 Au procès, les appelants soulèvent en défense l'invalidité de l'arrêté du 2 juin 1987. Au soutien de leur position, ils avancent qu'il n'existait pas de motifs raisonnables et probables, tel que requis par le par. 17(2) de la *Loi sur la protection de l'environnement*, de croire que la situation présentait un risque pour l'environnement. À cet égard, le juge de première instance est d'avis que la validité de l'arrêté peut être attaquée, mais uniquement pour défaut de juridiction. Étant donné que les appelants ont choisi de ne pas en appeler de l'arrêté devant la Commission, il ne saurait être question pour lui de se prononcer sur le mérite de l'arrêté.

12 Le juge permet néanmoins une preuve scientifique étendue relative aux dangers que présentent les BPC pour l'environnement et à la façon de prévenir adéquatement les risques associés aux BPC. Il conclut que l'ordre de construire un abri ne pouvait se justifier qu'à la lumière de la procédure de

since the Ministry now considered that procedure inadequate and had abandoned it, the judge concluded that there could be no reasonable and probable grounds to justify construction of the storage area. As for the order to clean and chip out the concrete surfaces, he also concluded that the scientific evidence did not support the order and that the order was neither necessary nor even desirable. Regarding the order to secure the site within seven days, he found it unreasonable in that it did not take the nature of the risk and the characteristics of the site into account.

13 The only order the trial judge considered valid and a possible ground for convicting the appellants was the order to drum and store the contaminated material. However, he felt that it was open to the appellants to raise a defence of due diligence in respect of this order by showing that compliance with it would entail a greater environmental risk than non-compliance. Since they had failed to show this, the appellants were convicted on this count alone. Consolidated Maybrun and Mr. Sheridan were accordingly ordered to pay fines of $5,000 and $500, respectively.

2. *Ontario Court (General Division)* (1993), 86 C.C.C. (3d) 317

14 Kurisko J. allowed the respondent's appeal with respect to the orders to construct a storage area and clean the concrete surfaces, and dismissed the appellants' cross-appeal. In his view, the trial judge had exceeded his jurisdiction under the *Environmental Protection Act* by reviewing the validity of the order on which the charges were based. Kurisko J.'s decision was based on his understanding of the legislature's intention in enacting the *Environmental Protection Act* in the context of a modern industrial society concerned with protecting the environment. In his view, the entire procedural scheme set up by the Act shows that the legislature did not intend to allow an accused to circumvent the Act's appeal mechanisms and ignore an order with impunity. These appeal mechanisms would be unnecessary if a person charged

triple-rinçage. Or, cette procédure étant désormais reconnue comme inadéquate et abandonnée par le ministère, le juge conclut qu'il ne pouvait exister de motifs raisonnables et probables permettant de justifier la construction de l'abri. Quant à l'ordre de nettoyer et de ciseler les surfaces de béton, il conclut également que la preuve scientifique n'appuyait pas l'ordonnance et que celle-ci n'était ni nécessaire ni même souhaitable. En ce qui a trait à l'ordre de verrouiller les lieux dans les sept jours, il est d'avis que cet ordre était déraisonnable car il ne tenait pas compte de la nature du risque et des caractéristiques des lieux.

La seule ordonnance que le juge du procès accepte comme valide et susceptible d'entraîner la condamnation des appelants est celle relative à la mise en barils et au remisage des matériaux contaminés. À cet égard, cependant, il est d'avis que les appelants peuvent faire valoir une défense de diligence raisonnable en démontrant que le respect de l'ordonnance présentait un plus grand risque pour l'environnement que son non-respect. N'ayant pas réussi dans cette démonstration, les appelants sont condamnés sur ce seul chef. En conséquence, Consolidated Maybrun et M. Sheridan se voient imposer une amende de 5 000 $ et de 500 $ respectivement.

2. *La Cour de l'Ontario (Division générale)* (1993), 86 C.C.C. (3d) 317

Le juge Kurisko accueille l'appel de l'intimée concernant l'ordre de construire un abri ainsi que l'ordre de nettoyer les surfaces de béton et rejette l'appel incident des appelants. À son avis, le juge de première instance a excédé la juridiction que lui confère la *Loi sur la protection de l'environnement* en examinant la validité de l'arrêté sur lequel se fondent les accusations. Sa décision repose sur ce qu'il conçoit être l'intention de la législature en édictant la *Loi sur la protection de l'environnement* dans le contexte d'une société industrielle moderne soucieuse de la protection de l'environnement. Selon lui, la structure procédurale complète édictée par la Loi démontre que la législature n'a pas voulu qu'un accusé puisse court-circuiter les mécanismes d'appel mis en place et ignorer impunément un arrêté. Ces mécanismes d'appel seraient

with failing to comply with an order could collaterally attack its validity in a penal court without appealing it in accordance with the prescribed procedure. Kurisko J. concluded that in ruling on the validity of the order, the trial judge had encroached on the Environmental Appeal Board's functions.

rendus inutiles si une personne accusée de n'avoir pas respecté un arrêté pouvait en attaquer la validité de façon incidente devant un tribunal pénal sans avoir formé un appel suivant la procédure prescrite. Le juge Kurisko conclut qu'en statuant sur la validité de l'arrêté, le juge du procès a usurpé les fonctions confiées à la Commission d'appel de l'environnement.

3. *Court of Appeal* (1996), 105 C.C.C. (3d) 388

Laskin J.A., writing for the Court of Appeal, dismissed the appeal. In his view, the rule laid down in *Litchfield*, *supra*, must apply, with certain restrictions, to an administrative order. He held that the following five factors should be considered in determining whether a collateral attack is permissible: (1) the wording of the statute; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the kind of collateral attack; and (5) the penalty on a conviction for failing to comply with the order.

In the case at bar, the wording of the Act neither permits nor forbids a collateral attack on the validity of the order. An attempt must, therefore, be made to ascertain the legislature's intention in this respect. In his view, the objective of environmental protection would be undermined if a court were permitted, in a trial on a charge of non-compliance with an order issued by the Director, to rule on the existence of reasonable and probable grounds for making the order. The purpose of the Act is to protect public and societal interests by creating regulatory, rather than criminal, offences. These provisions are intended to encourage compliance with orders for the general welfare of society. Furthermore, the Act balances these interests with the interests of those to whom an order is directed by providing for the possibility of an appeal within 15 days entailing a *de novo* hearing by the Board.

As to the nature of the collateral attack, Laskin J.A. distinguished between lack of jurisdiction *ab initio*, which can result in a collateral attack on an order, and an error, even if unreasonable, committed by a director in exercising his or her jurisdiction, which is not open to such an attack. He con-

3. *La Cour d'appel* (1996), 105 C.C.C. (3d) 388

15 Au nom de la Cour d'appel, le juge Laskin rejette le pourvoi. À son avis, la règle énoncée dans l'arrêt *Litchfield*, précité, doit, avec certains assouplissements, trouver application dans le contexte d'une ordonnance administrative. À cet égard il conclut que les cinq facteurs suivants doivent être considérés pour déterminer si une attaque incidente peut être autorisée: (1) les termes de la loi; (2) l'objectif de la loi; (3) l'existence d'un droit d'appel; (4) la nature de la contestation; et (5) la sanction imposable pour défaut d'avoir respecté l'ordonnance.

16 En l'occurrence, les termes de la Loi n'autorisent ni n'interdisent d'attaquer de façon incidente la validité de l'arrêté. Il faut donc chercher à déterminer l'intention de la législature à cet égard. Selon lui, l'objectif de protection de l'environnement serait miné si l'on devait autoriser une cour, dans le cadre d'un procès sur une accusation pour non respect d'un arrêté rendu par le directeur, à se prononcer sur l'existence de motifs raisonnables et probables à l'appui de l'arrêté. La Loi cherche à protéger les intérêts de la société et du public en créant des infractions réglementaires plutôt que criminelles. Ces dispositions visent à encourager le respect des arrêtés pour le bénéfice général de la société. Par ailleurs, la Loi concilie ces intérêts avec ceux de personnes visées par un arrêté en prévoyant la possibilité d'un appel par voie de procès *de novo* devant la Commission dans les 15 jours.

17 Quant à la nature de la contestation, le juge Laskin fait une distinction entre l'absence de juridiction *ab initio*, qui peut être invoquée de façon incidente à l'encontre d'un arrêté, et l'erreur, même déraisonnable, commise par un directeur dans l'exercice de sa juridiction et qui est à l'abri

cluded that in the case at bar the Director did have jurisdiction to make the order. On the final factor, Laskin J.A. noted that the penalty is a fine rather than imprisonment.

18 Concerning the due diligence defence raised by the appellants, Laskin J.A. concluded that accused persons cannot argue that an order was unreasonable or unfounded so as to avoid performing the obligations imposed on them by the order. That would amount to authorizing a disguised collateral attack.

III. Issues

19 The main issue concerns the appropriate forum for determining the validity of an administrative order. More specifically, the appeal raises two questions:

1. May persons charged with failing to comply with an order issued under the *Environmental Protection Act* collaterally attack the validity of the order by way of defence after failing to avail themselves of the appeal mechanisms provided by the Act?

2. If so, was the order issued against the appellants invalid in whole or in part?

IV. Relevant Statutory Provisions

20 *Environmental Protection Act*, R.S.O. 1980, c. 141

1. — (1) In this Act,

. . .

(c) "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,

(i) impair the quality of the natural environment for any use that can be made of it,

(ii) cause injury or damage to property or to plant or animal life,

d'une semblable attaque. En l'espèce, il conclut que le directeur avait juridiction pour rendre l'arrêté. Considérant le dernier facteur, le juge Laskin note que la sanction est une amende plutôt que l'emprisonnement.

En ce qui a trait à la défense de diligence raisonnable invoquée par les appelants, le juge Laskin conclut qu'elle ne saurait permettre à un accusé de plaider que l'arrêté était déraisonnable ou mal fondé afin de se soustraire aux obligations qui lui sont imposées par l'arrêté. Cela équivaudrait, en effet, à autoriser une attaque incidente de façon déguisée.

III. Les questions en litige

Il s'agit, essentiellement, de déterminer quel est le forum approprié pour décider de la validité d'une ordonnance administrative. Plus spécifiquement, le pourvoi soulève les deux questions suivantes:

1. Une personne accusée d'avoir fait défaut de se conformer à un arrêté rendu en vertu de la *Loi sur la protection de l'environnement* peut-elle, en défense, chercher à attaquer de façon incidente la validité de l'ordonnance alors qu'elle ne s'est pas prévalue des mécanismes d'appel prévus par la Loi?

2. Dans l'affirmative, l'arrêté rendu contre les appelants était-il en totalité ou en partie invalide?

IV. Les dispositions législatives pertinentes

Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141

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

. . .

«contaminant» Solide, liquide, gaz, son, odeur, chaleur, vibration, radiation ou une combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui peuvent, selon le cas :

(i) dégrader la qualité de l'environnement naturel relativement à tout usage que l'on peut en faire,

(ii) causer du tort ou des dommages à des biens, des végétaux ou des animaux,

(iii) cause harm or material discomfort to any person,

(iv) adversely affect the health or impair the safety of any person,

(v) render any property or plant or animal life unfit for use by man,

(vi) cause loss of enjoyment of normal use of property, or

(vii) interfere with the normal conduct of business.

16. Where any person causes or permits the deposit, addition, emission or discharge into the natural environment of a contaminant that injures or damages land, water, property or plant life, the Minister, where he is of the opinion that it is in the public interest so to do, may order such person to do all things and take all steps necessary to repair the injury or damage.

17. — (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or who has management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary in order that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.

(2) The Director may make an order under this section where the Director is of the opinion, upon reasonable and probable grounds,

(a) that the nature of the undertaking or of anything on or in the property is such that if a contaminant is discharged into the natural environment from the undertaking or from or on the property, the contaminant will result or is likely to result in an effect mentioned in clause 1 (1) (c); and

(iii) nuire ou causer des malaises sensibles à quiconque,

(iv) altérer la santé de quiconque ou porter atteinte à sa sécurité,

(v) rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains,

(vi) causer la perte de jouissance de l'usage normal d'un bien,

(vii) entraver la marche normale des affaires.

16 Si une personne cause ou autorise le dépôt, l'émission ou le rejet d'un contaminant dans l'environnement naturel ou son addition à l'environnement, et que ce contaminant cause du tort ou des dommages à un terrain, à l'eau, à des biens ou des végétaux, le ministre, s'il est d'avis qu'il est dans l'intérêt public d'agir ainsi, peut ordonner à cette personne de prendre toutes les mesures nécessaires et de faire tout ce qui s'impose afin de réparer le tort ou les dommages causés.

17 (1) Dans les circonstances prévues au paragraphe (2), le directeur peut, par arrêté écrit, exiger d'une personne qui est propriétaire d'une entreprise ou d'une propriété, qui en assure la gestion ou en a le contrôle, de procéder à l'une ou plus des mesures suivantes :

1. Avoir à portée de la main, en permanence ou pendant les périodes que précise l'arrêté, l'équipement, le matériel et le personnel prévus dans l'arrêté et aux emplacements qui y sont mentionnés.
2. Acquérir, construire, installer ou modifier les appareils, l'équipement et les installations prévus dans l'arrêté aux emplacements et de la façon visée dans l'arrêté.
3. Mettre en œuvre les procédures précisées dans l'arrêté.
4. Prendre les mesures nécessaires de façon à appliquer les procédures précisées dans l'arrêté dans le cas où un contaminant serait rejeté dans l'environnement naturel à partir de l'entreprise ou de la propriété ou sur cette dernière.

(2) Le directeur peut prendre l'arrêté visé au présent article s'il est d'avis, en se fondant sur des motifs raisonnables et probables :

a) que l'entreprise, la propriété ou l'un quelconque de ses éléments sont d'une nature telle que si un contaminant est rejeté dans l'environnement naturel à partir de l'entreprise ou de la propriété ou sur cette dernière, il en résultera ou en résultera vraisemblablement une conséquence visée à la définition du terme «contaminant» au paragraphe 1 (1);

(b) that the requirements specified in the order are necessary or advisable in order,

(i) to prevent or reduce the risk of the discharge of the contaminant into the natural environment from the undertaking or from or on the property, or

(ii) to prevent, decrease or eliminate an effect mentioned in clause 1 (1) (c) that will result or that is likely to result from the discharge of the contaminant into the natural environment from the undertaking or from or on the property.

122. — (1) A person to whom an order of the Director is directed may, by written notice served upon the Director and the Board within fifteen days after service upon him of a copy of the order, require a hearing by the Board.

123. — (1) A hearing by the Board shall be a new hearing and the Board may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Board considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Board may substitute its opinion for that of the Director.

(2) Any party to a hearing before the Board under this section may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court.

(3) A party to a hearing before the Board may, within thirty days after receipt of the decision of the Board or within thirty days after final disposition of an appeal, if any, under subsection (2), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Board as to the matter in appeal as he considers in the public interest.

146. . . .

(1a) Every person who fails to comply with an order under this Act is guilty of an offence.

. . .

(3) Every person who is guilty of an offence under subsection (1), (1a) or (1b) or section 147a is liable on conviction for each day or part of a day on which the offence occurs or continues to a fine of not more than

b) que les exigences précisées dans l'arrêté sont nécessaires ou souhaitables de façon à :

(i) empêcher ou diminuer le risque de rejet du contaminant dans l'environnement naturel à partir de l'entreprise ou de la propriété ou sur cette dernière,

(ii) empêcher, diminuer ou éliminer une conséquence visée à la définition du terme «contaminant» au paragraphe 1 (1) qui résultera ou résultera vraisemblablement du rejet du contaminant dans l'environnement naturel à partir de l'entreprise ou de la propriété ou sur cette dernière.

122 (1) Une personne à qui s'adresse un arrêté du directeur peut, au moyen d'un avis écrit signifié au directeur et à la Commission dans les quinze jours qui suivent la date où lui est signifiée une copie de l'arrêté, exiger d'être entendue par la Commission.

123 (1) L'audience tenue par la Commission est une nouvelle audience et la Commission peut confirmer, modifier ou révoquer l'action du directeur qui constitue l'objet de l'audience. Elle peut, par ordonnance, enjoindre au directeur de prendre les mesures qu'elle estime qu'il doit prendre conformément à la présente loi et les règlements et, à ces fins, la Commission peut substituer son opinion à celle du directeur.

(2) Une partie à une audience tenue devant la Commission en vertu du présent article peut faire appel de sa décision ou de l'ordonnance qu'elle rend sur une question de droit devant la Cour divisionnaire, conformément aux règles de pratique.

(3) Une partie à une audience tenue devant la Commission peut, dans les trente jours qui suivent la réception de la décision de la Commission ou la conclusion définitive de l'appel porté, le cas échéant, en vertu du paragraphe (2), interjeter appel par écrit devant le ministre de toute question autre qu'une question de droit. Le ministre confirme, modifie ou révoque la décision de la Commission en ce qui concerne la question en appel, selon ce qu'il estime dans l'intérêt public.

146 . . .

(1a) Quiconque ne se conforme pas à un arrêté pris en vertu de la présente loi est coupable d'une infraction.

. . .

(3) Quiconque commet une infraction prévue aux paragraphes (1), (1a) ou (1b) ou à l'article 147a est passible, sur déclaration de culpabilité, pour chaque journée ou partie de journée au cours de laquelle l'infraction est

$5,000 on a first conviction and not more than $10,000 on each subsequent conviction.

(4) Where a corporation is convicted of an offence under subsection (1), (1a) or (1b), the maximum fine that may be imposed for each day or part of a day on which the offence occurs or continues is $25,000 on a first conviction and $50,000 on each subsequent conviction and not as provided in subsection (3).

commise ou se poursuit, d'une amende d'au plus 5 000 $ à l'égard d'une première déclaration de culpabilité et d'une amende d'au plus 10 000 $ à l'égard de chaque déclaration de culpabilité subséquente.

(4) Lorsqu'une personne morale est déclarée coupable d'une infraction prévue aux paragraphes (1), (1a) ou (1b), l'amende maximale qui peut être imposée pour chaque journée ou partie de journée au cours de laquelle l'infraction est commise ou se poursuit est de 25 000 $ à l'égard d'une première déclaration de culpabilité et de 50 000 $ à l'égard de chaque déclaration de culpabilité subséquente, contrairement à ce que prévoit le paragraphe (3).

V. Analysis

1. *General Comments*

Before trying to answer the question raised by this appeal, it may be helpful to define its parameters somewhat and review the context in which this question arises.

It must be mentioned at the outset that the issues involved in the question of "collateral attacks" on administrative orders are different from those traditionally encountered in the judicial review context. Cases involving the superintending and reforming power of the superior courts are generally concerned with determining whether courts must show deference in reviewing a decision by an administrative tribunal. Although administrative orders like the one in the case at bar can be subject to judicial review by the superior courts, the problem before us presupposes, *inter alia*, that the affected party did not apply for review. Thus, the question that arises is, instead, whether a penal court, which is not necessarily a superior court, can determine the validity of an administrative order when the case before it concerns primarily a charge of a penal nature.

Admittedly, the issue before this Court involves considerations that are not entirely foreign to those which inform the superintending and reforming

V. Analyse

1. *Remarques générales*

Avant de chercher à répondre à la question soulevée par le présent pourvoi, il peut être utile d'en préciser quelque peu les paramètres et d'examiner le contexte duquel cette question émerge. 21

Il importe au départ de préciser que la question des «attaques incidentes» à l'encontre d'ordonnances administratives met en cause des considérations distinctes de celles rencontrées traditionnellement en matière de contrôle judiciaire. En effet, dans les affaires impliquant le pouvoir de contrôle des cours supérieures, il s'agit généralement de déterminer si la cour doit faire preuve de retenue judiciaire à l'égard d'une décision émanant d'une instance administrative. Bien que les ordonnances administratives du type de celle qui nous préoccupe ici puissent faire l'objet d'un contrôle judiciaire par les cours supérieures, le problème auquel nous sommes confrontés suppose, notamment, qu'aucune demande de révision n'ait été formulée par la partie touchée. Ainsi, la question qui se pose est plutôt celle de savoir si un tribunal pénal, qui n'est pas nécessairement une cour supérieure, peut se prononcer sur la validité d'une ordonnance administrative alors que l'objet premier du litige dont il est saisi est une accusation de nature pénale. 22

Le problème dont nous sommes saisis fait appel, il est vrai, à des considérations qui ne sont pas entièrement étrangères à celles qui sous-tendent le 23

power of the superior courts. In both cases, the lawfulness of government actions is at issue. In the United States, the question of collateral attacks in penal proceedings has been resolved by means of the "exhaustion doctrine", which is intended primarily to protect the integrity of administrative mechanisms set up by law. See, in particular, *McGee v. United States*, 402 U.S. 479 (1971). Our own administrative law recognizes a similar doctrine relating to the discretion enjoyed by the superior courts in exercising their superintending and reforming power. See: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Commission des accidents du travail du Québec v. Valade*, [1982] 1 S.C.R. 1103; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. Although I will be discussing the American case law on collateral attacks below, I simply point out here that it would be wrong to think that the considerations underlying the exhaustion doctrine in the judicial review context are irrelevant to the issue before this Court. However, this is insufficient to deprive the problem submitted to the Court of its inherent originality and permit it to be resolved by directly transposing principles developed in another context, i.e. the superintending and reviewing power of superior courts.

pouvoir de contrôle et de surveillance des cours supérieures. Dans les deux cas, c'est la légalité des actes de l'Administration qui est soulevée. Aux États-Unis, la question des attaques incidentes dans le cadre de procédures pénales a été résolue par le moyen de la doctrine dite de l'épuisement des recours (*exhaustion doctrine*) qui vise principalement à protéger l'intégrité des mécanismes administratifs mis en place par la loi. Voir en particulier l'arrêt *McGee c. United States*, 402 U.S. 479 (1971). Notre propre droit administratif connaît une doctrine similaire relativement à la discrétion dont jouissent les cours supérieures dans l'exercice de leur pouvoir de surveillance et de contrôle. Voir: *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Commission des accidents du travail du Québec c. Valade*, [1982] 1 R.C.S. 1103; *Abel Skiver Farm Corp. c. Ville de Sainte-Foy*, [1983] 1 R.C.S. 403; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3. Bien que j'examine plus loin la jurisprudence américaine sur la question des attaques incidentes, je me permets simplement de souligner à ce stade qu'il serait faux de penser que les considérations qui sous-tendent la doctrine de l'épuisement des recours dans le contexte du contrôle judiciaire n'ont aucune pertinence pour la question dont nous sommes saisis. Cela n'est cependant pas suffisant pour priver le problème qui nous est soumis de son originalité propre et pour permettre de le résoudre en y transposant directement des principes développés dans un autre contexte, soit le pouvoir de contrôle et de surveillance des cours supérieures.

24 On the other hand, while it is true that the instant case does not arise in a judicial review context, it does not involve a court sitting on appeal from an administrative decision either. Indeed, the question of collateral attacks clearly arises precisely when the relevant statute provides for no right of appeal to the court responsible for trying the charge. As will be seen below, this does not necessarily mean that no appeal otherwise lies to another forum or that the existence of such a right of appeal is not a relevant factor. However, the problem raised by collateral attacks requires us, at the outset, to take into account the legislature's decision not to confer the power to hear an appeal

Par ailleurs, s'il est vrai que nous ne sommes pas dans un contexte de contrôle judiciaire, nous ne sommes pas non plus confrontés à la situation d'un tribunal siégeant en appel d'une décision administrative. En fait, à l'évidence, la question des attaques incidentes se pose précisément lorsqu'aucun droit d'appel devant le tribunal chargé d'entendre l'accusation n'est prévu par la loi en question. Cela ne signifie pas nécessairement, comme on le verra par la suite, qu'aucun droit d'appel n'existe par ailleurs devant une autre instance et que l'existence d'un droit d'appel ou son absence n'est pas un facteur à prendre en considération. Mais le problème soulevé par les attaques

from the administrative order on the court responsible for hearing the charge. From this perspective, the question is, accordingly, the extent to which, where no right of appeal confers express jurisdiction on the trial judge, the rule of law enables a penal court, here a provincial court, to consider the validity of an administrative order where a person is charged with failing to comply with such order.

incidentes exige au départ de tenir compte du fait que le législateur a choisi de ne pas conférer au tribunal chargé d'entendre l'accusation le pouvoir d'entendre un appel à l'encontre de l'ordonnance administrative. Sous cet angle, la question est donc de savoir dans quelle mesure, en l'absence d'un droit d'appel qui donnerait expressément juridiction au juge du procès, le principe de légalité permet à un tribunal pénal, ici une cour provinciale, de considérer la validité de l'ordonnance administrative à laquelle une personne est accusée de ne pas s'être conformée.

The rule of law viewed, in particular, as the submission of the executive branch to the authority of the law, is clearly an essential component of our constitutional structure. This principle requires that it be open to concerned citizens to bring the excesses of government to the attention of the courts, especially where penal sanctions are involved. It explains *inter alia* why a party against whom a regulatory provision is raised may collaterally attack the validity of the provision, as is generally the case, for example, with municipal by-laws — see *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna v. Procureur général du Québec* (1984), 10 Admin. L.R. 210 (Que. C.A.); as well as *R. v. Rice*, [1980] C.A. 310, concerning a regulation enacted by a band council. However, the rule of law does not imply that the procedures for achieving it can be disregarded, nor does it necessarily empower an individual to apply to whatever forum he or she wishes in order to enforce compliance with it.

25 Il ne fait aucun doute que le principe de légalité entendu, en particulier, comme la soumission de l'Exécutif à l'autorité de la loi, représente une composante essentielle de notre structure constitutionnelle. Ce principe exige que les citoyens concernés aient la possibilité de porter à l'attention des tribunaux les excès de l'Administration, en particulier lorsque des sanctions pénales sont en jeu. Il explique, notamment, le fait qu'une partie qui se voit opposer un texte réglementaire puisse attaquer de façon incidente la validité de ce texte comme c'est communément le cas, par exemple, en matière de réglementation municipale — voir *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Khanna c. Procureur général du Québec* (1984), 10 Admin. L.R. 210 (C.A. Qué.); de même que *R. c. Rice*, [1980] C.A. 310, relativement, cette fois, à un règlement adopté par un conseil de bande. Le principe de légalité n'implique toutefois pas que l'on puisse ignorer les procédures par lesquelles il est réalisé, ni ne confère nécessairement à un individu la faculté de s'adresser à n'importe quelle instance pour en assurer le respect.

Finally, in resolving the problem of collateral attacks on administrative orders, it is necessary to bear in mind the role and importance of administrative structures in the organization of the various sectors of activity characteristic of contemporary society. The growing number of regulatory mechanisms and the corresponding administrative structures are a reflection of the state's will to intervene in spheres of activity, such as economics, communications media, health technology or the environ-

26 Finalement, en cherchant réponse au problème des attaques incidentes à l'encontre d'ordonnances administratives, il faut tenir compte du rôle et de l'importance des structures administratives dans l'ordonnancement des divers secteurs d'activités qui caractérisent la société contemporaine. La multiplication des mécanismes réglementaires et des structures administratives correspondantes reflète la volonté de l'État d'intervenir dans des sphères d'activités dont la complexité croissante, que ce

ment, whose growing complexity requires constantly evolving expertise and normative instruments permitting a pointed and rapid intervention consistent with the specific circumstances of the situation. The effectiveness of these instruments depends to a large extent on the penal sanctions that ensure their authority. As Cory J. wrote in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 233:

> The realities and complexities of a modern industrial society coupled with the very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation.

27 In order to ensure the integrity of these administrative structures, while at the same time seeking to protect the rights of individuals affected by government actions, the legislature is free to set up internal mechanisms and establish appropriate forums to enable such individuals to assert their rights. In considering the requirements resulting from the rule of law and the rights of a person accused of non-compliance with an administrative order, it is important not to isolate the penal proceedings from the whole of the process established by the legislature.

2. *Applicable Principles*

(a) The Case Law

28 As Laskin J.A. pointed out, the Canadian case law relating to collateral attacks on administrative orders is surprisingly sparse. It does, however, contain some principles for determining the appropriate response to the problem at issue here.

29 In *R. v. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25 (Ont. Prov. Ct.), Geiger Prov. Ct. J. held that a person charged with failing to comply

soit dans des domaines comme l'économie, les moyens de communication, la technologie de la santé ou l'environnement, fait appel à une expertise en constante évolution et requiert des instruments normatifs qui permettent une intervention ponctuelle, rapide et répondant aux circonstances particulières de la situation. L'efficacité de ces instruments dépend dans une bonne mesure des sanctions pénales qui assurent leur autorité. Comme l'écrivait le juge Cory dans l'affaire *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, à la p. 233:

> Les réalités et les complexités d'une société industrielle moderne associées au besoin réel de protéger tous les membres de la société et, en particulier, ceux qui sont vulnérables font ressortir l'importance cruciale des infractions réglementaires au Canada aujourd'hui. Notre pays ne pourrait tout simplement pas fonctionner sans réglementation très étendue.

Afin d'assurer l'intégrité de ces structures administratives tout en cherchant à protéger les droits des personnes affectées par les actes de l'Administration, il est loisible au législateur de mettre en place des mécanismes internes et de prévoir des forums appropriés pour permettre à ces personnes de faire valoir leurs droits. En considérant les exigences qui découlent du principe de légalité et les droits d'une personne accusée de ne pas s'être conformée à une ordonnance administrative, il importe de ne pas isoler l'instance pénale de l'ensemble du processus mis en place par le législateur.

2. *Les principes applicables*

a) La jurisprudence

Comme l'a souligné le juge Laskin de la Cour d'appel, la jurisprudence canadienne sur la question des attaques incidentes à l'encontre d'ordonnances administratives est étonnamment mince. Elle fournit néanmoins certains guides pour cerner la façon appropriée de répondre au problème sous étude.

Dans l'affaire *R. c. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25 (C. prov. Ont.), le juge Geiger a statué qu'une personne accusée de ne pas

with an order issued under s. 6 of the *Environmental Protection Act* cannot raise the validity of the order by way of defence. In his view, persons to whom such an order is directed should instead avail themselves of their right under the Act to appeal to the Board, and then to the Divisional Court.

The decision in *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.), also appears to be unfavourable to collateral attacks in penal proceedings for failing to comply with an administrative order. Although the decision is not explicit on this point, it should be noted that the *Environmental Protection Act*, S.N.S. 1973, c. 6, which was at issue in that case, provided, in s. 53, for a right to appeal the administrative order. According to the section in question, a judge sitting on appeal and whose decision was final, could rule on any question of law or fact, including whether or not the order was necessary to protect the environment.

The appellants refer to the comments of Saunders J. in *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9 (Div. Ct.). Saunders J. wrote the following about the power under s. 16 of the *Environmental Protection Act* to order the clean-up of contaminated soil, at p. 13:

> If the Minister has the work done, he may only recover his costs in a court of competent jurisdiction if he has made a s. 143 order. In this case, the power to make a s. 143 order is based on the Minister having "authority" to make the s. 16 order. In an action by the Minister to recover his costs, it would be open to the applicants to assert that they had not caused or permitted the emission and that the s. 16 order was therefore made without authority. Similarly, it would be my opinion, having regard to the subject matter and the pattern of the legislation, that a person prosecuted for failure to comply with the s. 16 order could defend on the ground that the pollution was not caused or permitted by him. [Emphasis added.]

s'être conformée à un arrêté rendu en vertu de l'art. 6 de la *Loi sur la protection de l'environnement* ne pouvait soulever en défense la validité de l'arrêté. À son avis, une personne faisant l'objet d'un tel arrêté devait plutôt se prévaloir du droit d'appel devant la Commission que lui confère la Loi et, par la suite, du droit d'appel à la Cour divisionnaire.

30 La décision dans l'affaire *R. c. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (C. prov. N.-É.), semble également défavorable aux attaques incidentes dans le cadre de poursuites pénales pour défaut de s'être conformé à une ordonnance administrative. Bien que la décision ne soit pas explicite à cet égard, je note cependant que l'*Environmental Protection Act*, S.N.S. 1973, ch. 6, qui était en cause dans cette affaire, prévoyait à son art. 53 un droit d'appel de l'ordonnance administrative. Suivant les termes de cet article, le juge siégeant en appel, et dont la décision était finale, pouvait se prononcer sur toute question de droit ou de fait, notamment sur la question de la nécessité de l'ordonnance pour la protection de l'environnement.

31 Les appelants, de leur côté, invoquent les propos du juge Saunders dans l'affaire *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9 (C. div.). S'exprimant au sujet du pouvoir prévu à l'art. 16 de la *Loi sur la protection de l'environnement* d'ordonner le nettoyage de sols contaminés, le juge Saunders écrivait, à la p. 13:

> [TRADUCTION] Si le ministre fait faire les travaux, il ne pourra recouvrer ses frais en s'adressant au tribunal compétent que s'il en a ordonné l'exécution en conformité avec l'art. 143. En l'espèce, le pouvoir d'ordonner l'exécution des travaux, prévu à l'art. 143, se fonde sur la compétence du ministre de prendre l'arrêté visé à l'art. 16. Dans le cadre d'une action intentée par le ministre pour recouvrer ses frais, les requérants pourraient faire valoir qu'ils n'ont ni causé ni autorisé l'émission et que celui-ci n'avait donc pas compétence pour prendre l'arrêté visé à l'art. 16. De la même façon, je serais d'avis, compte tenu du sujet et de l'économie de la loi, que la personne poursuivie pour avoir omis de se conformer à l'arrêté pris en vertu de l'art. 16 pourrait se défendre en soutenant qu'elle n'a ni causé ni autorisé la pollution en cause. [Je souligne.]

32 In the instant case, Laskin J.A. dismissed this passage as mere *obiter*. He also distinguished the case at bar on the basis that, at the time the decision in *Re Mac's Convenience Stores* was rendered, there was no right to appeal an order issued under s. 16, which is not the case here. This is, indeed, a significant difference.

Dans le présent litige, le juge Laskin a écarté ce passage comme un simple *obiter*. Il l'a également distingué du cas sous étude en affirmant qu'à l'époque où l'affaire *Re Mac's Convenience Stores* avait été décidée, il n'existait aucun droit d'appel d'une ordonnance rendue en vertu de l'art. 16, ce qui n'est pas le cas ici. Il s'agit, en effet, d'une différence significative.

33 Finally, there is the decision of the Alberta Court of Appeal in *R. v. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225, rendered shortly after the Ontario Court of Appeal's decision in the case at bar. Given that the case in question has also been appealed to this Court, I will, of course, limit my comments on the decision, in which Conrad J.A., speaking for the majority, authorized a collateral attack on an order issued pursuant to the Alberta *Planning Act*. Although she did not dismiss Laskin J.A.'s analysis in the instant case, Conrad J.A. concluded that the *Planning Act* should not be interpreted as conferring any immunity whatsoever from a development officer's order. She relied, in particular, on the fact that the Act did not declare such an order to be final and that, in her view, a judge responsible for trying a charge of non-compliance is, at any rate, called upon to rule on issues relating to land-use planning at the sentencing stage.

Je mentionne, en dernier lieu, la décision de la Cour d'appel de l'Alberta dans *R. c. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225, rendue peu après la décision de la Cour d'appel de l'Ontario dans la présente affaire. Étant donné que nous sommes également saisis d'un appel dans ce dossier, je limiterai naturellement mes commentaires relativement à cette décision dans laquelle Madame le juge Conrad, au nom de la majorité, a autorisé une attaque incidente à l'encontre d'une ordonnance rendue sous l'autorité de la *Planning Act* de l'Alberta. Sans rejeter l'analyse du juge Laskin dans la présente affaire, le juge Conrad conclut que la *Planning Act* ne devait pas être lue comme conférant une quelconque immunité à l'encontre de l'ordonnance d'un agent de développement. Elle s'appuie en particulier sur le fait que la *Planning Act* ne déclarait pas finale une telle ordonnance, et sur le fait que, selon elle, le juge chargé d'entendre une accusation pour défaut de s'y être conformé était, de toute façon, appelé à se prononcer, au stade de la sentence, sur des questions de planification foncière.

34 It can be seen from this survey of the Canadian case law that, in most of the cases, the existence of a right to appeal the order on which the penal charges were based appears to have been an important, if not decisive, factor. As will be seen below, while this factor cannot be decisive in itself, it is nonetheless a key element of the analysis. This factor is also central to the American case law, which, as already mentioned, is based on the exhaustion doctrine. It is, therefore, appropriate to take a brief look at it.

Ce survol de la jurisprudence canadienne permet de constater que l'existence d'un droit d'appel de l'ordonnance à l'origine des accusations pénales semble être un facteur important sinon déterminant dans la majorité des affaires. Nous verrons par la suite que si ce facteur ne saurait en lui-même être décisif, il constitue, néanmoins, un élément clé de l'analyse. Ce facteur est également au cœur de la jurisprudence américaine qui, comme je l'ai mentionné précédemment, s'appuie sur la doctrine de l'épuisement des recours. Il convient alors d'y jeter un bref coup d'œil.

35 In *Yakus v. United States*, 321 U.S. 414 (1944), the appellant was charged with violating an order fixing wartime meat prices and sought to challenge

Dans l'affaire *Yakus c. United States*, 321 U.S. 414 (1944), l'appelant était accusé d'avoir violé une ordonnance fixant le prix de la viande en

the validity of the order by way of defence. Since the statute expressly established an appeal mechanism for challenging the order, the Supreme Court held that a person could not disregard this procedure and elect instead to attack the order in a trial for non-compliance. It wrote in this respect that a prohibition on attacking the order "is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity" (p. 446).

temps de guerre et, en défense, cherchait à contester la validité de l'ordonnance. Comme la loi prévoyait expressément un mécanisme d'appel permettant de contester l'ordonnance, la Cour suprême statua qu'une personne ne pouvait ignorer cette procédure et choisir plutôt d'attaquer l'ordonnance dans le cadre d'un procès pour défaut de s'y être conformé. Elle écrivait à cet égard que l'interdiction d'attaquer l'ordonnance [TRADUCTION] «sera inacceptable seulement si, en vertu de la loi ou dans les faits, elle prive ceux qui sont accusés de violations, d'une possibilité suffisante d'être entendus sur la question de la validité» (p. 446).

The rule against collateral attacks was tempered somewhat in *McKart v. United States*, 395 U.S. 185 (1969), which concerned a charge of failing to report for military service. The appellant wished to benefit from an exemption then conferred on a family's sole surviving son and challenged the validity of the military order on this basis. In light, in particular, of the fact that the appellant was liable to imprisonment, the court authorized the collateral attack on the basis that it would not jeopardize the integrity of the administrative process. However, it was careful to reiterate the general rule against such attacks on the basis of the exhaustion doctrine, as follows, at p. 195:

36 Un certain tempérament fut apporté à la règle interdisant les attaques incidentes dans l'arrêt *McKart c. United States*, 395 U.S. 185 (1969). Il s'agissait, en l'occurrence, d'une accusation pour défaut de s'être rapporté au service militaire. L'appelant souhaitait invoquer le bénéfice d'une exemption alors accordée au dernier fils survivant d'une famille et, sur cette base, contestait la validité de l'ordonnance militaire. Considérant, en particulier, le fait que l'appelant était passible d'emprisonnement et estimant que l'intégrité du processus administratif ne s'en trouverait pas menacée, la cour autorisa l'attaque incidente. Elle prit soin, toutefois, de réitérer la règle générale à l'encontre de telles attaques en la fondant sur la doctrine de l'épuisement des recours, en ces termes, à la p. 195:

A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

[TRADUCTION] La partie plaignante peut réussir à faire valoir ses droits dans le cadre du processus administratif. Si elle est tenue d'exercer ses recours administratifs, il se peut que les tribunaux n'aient jamais à intervenir. En outre, l'autonomie administrative veut que l'on donne à l'organisme la possibilité de déceler et de rectifier ses propres erreurs. Enfin, il se peut qu'à force de délibérément passer outre aux processus administratifs, l'on mine l'efficacité de l'organisme en incitant les gens à ne pas tenir compte de ses procédures.

The later cases confirmed the great reluctance of the United States Supreme Court to permit the invalidity of an administrative order to be raised by way of defence to a charge of violating the order. See, in particular, *McGee v. United States*,

37 La jurisprudence subséquente a confirmé l'extrême réticence de la Cour suprême des États-Unis à permettre que soit invoquée l'invalidité d'une ordonnance administrative en défense à une accusation d'avoir contrevenu à l'ordonnance. Voir en

supra, and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

38 As can be seen from the above passage, the exhaustion doctrine is based on a set of considerations, including the efficient use of judicial resources and preservation of the integrity of the administrative process. On the latter factor, it is impossible to fully dissociate the exhaustion doctrine from the concern to respect the legislature's intention in the establishing of the administrative structure and the appeal mechanisms it comprises. Although it is inappropriate, for the reasons set out above (para. 23), to apply the exhaustion doctrine to settle the collateral attack issue in Canada, it is, on the other hand, entirely appropriate to inquire into the legislature's intention for the purpose of determining the appropriate forum to decide whether an administrative order is valid.

39 Furthermore, this is the approach that was adopted quite recently in the United Kingdom by the House of Lords in *R. v. Wicks*, [1997] 2 W.L.R. 876. The respondent was charged with failing to comply with a demolition order issued under the *Town and Country Planning Act 1990* and later upheld on appeal by the Secretary of State. In a penal court, he argued by way of defence that the order was invalid. The House of Lords held that, in light of the full appeal mechanism provided for in the *Town and Country Planning Act 1990*, Parliament's intention was to bar courts hearing penal matters from reviewing the validity of the order. Lord Hoffmann wrote the following on this subject: "The question must depend entirely upon the construction of the statute under which the prosecution is brought" (p. 891). I am proposing a similar approach.

40 It should also be noted that, in concurring reasons, Lord Nicholls of Birkenhead expressed doubt, at p. 884, as to the wisdom of distinguishing "patent" invalidity from "latent" invalidity. In so doing, he seems to have implicitly rejected the reasoning previously adopted by the House of Lords in *Director of Public Prosecutions v. Head*, [1959]

particulier les arrêts *McGee c. United States*, précité, et *United States c. Mendoza-Lopez*, 481 U.S. 828 (1987).

Comme l'illustre le passage reproduit ci-dessus, la doctrine de l'épuisement des recours repose sur un ensemble de considérations, dont l'utilisation efficace des ressources judiciaires et la préservation de l'intégrité du processus administratif. Quant à ce dernier élément, il est impossible de dissocier entièrement la doctrine de l'épuisement des recours du souci de respecter l'intention législative quant à la mise en place de la structure administrative et des mécanismes d'appel qu'elle comporte. S'il n'est pas opportun, pour les raisons mentionnées précédemment (par. 23), de recourir à la doctrine de l'épuisement des recours pour trancher chez nous le problème des attaques incidentes, il est, en revanche, tout à fait approprié de s'enquérir de l'intention du législateur afin de déterminer le forum approprié pour décider de la validité d'une ordonnance administrative.

Cette approche est d'ailleurs celle retenue tout récemment au Royaume-Uni par la Chambre des lords dans l'affaire *R. c. Wicks*, [1997] 2 W.L.R. 876. L'intimé était accusé de n'avoir pas respecté un ordre de démolition qui avait été rendu en vertu de la *Town and Country Planning Act 1990* puis confirmé en appel par le secrétaire d'État. Devant le tribunal pénal, il invoquait en défense l'invalidité de l'ordonnance. La Chambre des lords a jugé que, vu le mécanisme d'appel complet prévu à la *Town and Country Planning Act 1990*, l'intention du Parlement était de ne pas autoriser les tribunaux siégeant en matière pénale à examiner la validité de l'ordonnance. Lord Hoffmann écrivait à cet égard: [TRADUCTION] «La question doit reposer entièrement sur l'interprétation de la loi sur laquelle est fondée la poursuite» (p. 891). C'est une approche similaire que je propose.

Je note, par ailleurs, que Lord Nicholls of Birkenhead, dans des motifs concordants, exprime à la p. 884 un doute quant à la sagesse de distinguer entre l'invalidité qui serait [TRADUCTION] «patente» de celle qui serait [TRADUCTION] «latente». Ce faisant, il semble rejeter implicitement le raisonnement retenu plus tôt par la

A.C. 83, which the appellants relied on in this Court.

(b) Determining the Legislature's Intention as to the Appropriate Forum

In his treatise on administrative law (*Administrative Law* (3rd ed. 1996)), Professor David Mullan suggests that the validity of government acts can just as well be raised directly as collaterally. He wrote the following, *inter alia*, at p. 490:

The essence of collateral attack is invalidity or an absence of jurisdiction. Decisions or orders made or actions taken without jurisdiction or in excess of jurisdiction are nullities which cannot be relied upon as a justification; they have no legally recognized existence.

Although this proposition is sound, as is usually the case in regulatory matters, it is far too general in scope to be applied in all circumstances. Taken literally, it would imply that a person to whom an order is directed is entirely free, rather than having recourse to the established procedures for challenging the order, to wait for penal charges to be laid before challenging its validity. Such a solution would obviously have serious ramifications for both the government and society in general. Aside from the danger that administrative tribunals would be discredited, increasing recourse to penal sanctions would result. Rather than promoting cooperation and conciliation, which are among the basic objectives of such administrative mechanisms, this would result in a hardening of relations between governments and citizens. In many cases, this would seriously undermine the effectiveness of administrative schemes designed to respond to situations requiring immediate remedial action, as is often the case, for example, in environmental matters.

Nor should it be forgotten that the goal of many such administrative structures is to draw on expert knowledge by creating specialized tribunals. Per-

Chambre des lords dans l'affaire *Director of Public Prosecutions c. Head*, [1959] A.C. 83, sur laquelle les appelants se sont appuyés devant nous.

b) La recherche de l'intention législative quant au forum approprié

Dans son traité de droit administratif (*Administrative Law* (3e éd. 1996)), le professeur David Mullan suggère que la validité des actes de l'Administration peut être soulevée aussi bien directement que de façon incidente. Il écrit, notamment, à la p. 490: 41

[TRADUCTION] L'attaque incidente concerne essentiellement l'invalidité ou l'absence de compétence. Les décisions, ordonnances ou mesures prises sans compétence ou débordant le cadre des attributions conférées à leur auteur sont entachées de nullité et ne peuvent servir de justification; légalement, elles n'existent pas.

Bien que cette proposition soit juste, comme c'est généralement le cas en matière réglementaire, elle est d'une portée beaucoup trop générale pour être appliquée en toutes circonstances. Prise à la lettre, elle impliquerait qu'une personne à l'égard de qui une ordonnance est rendue serait entièrement libre, plutôt que de recourir aux procédures mises en place pour contester l'ordonnance, d'attendre que des accusations pénales soient déposées pour en soulever la validité. Il va sans dire qu'une telle solution aurait des conséquences sérieuses pour l'Administration comme pour la société en général. Outre le risque de discrédit des instances administratives, il en résulterait un recours croissant à des sanctions pénales. Plutôt que de favoriser la collaboration et la conciliation, qui sont parmi les objectifs essentiels de tels mécanismes administratifs, cela mènerait à un durcissement des rapports entre l'Administration et les citoyens. Dans bien des cas, cela aurait pour effet de miner sérieusement l'efficacité de régimes administratifs conçus pour répondre à des situations exigeant des remèdes immédiats, comme c'est souvent le cas, par exemple, en matière d'environnement. 42

Il ne faut pas non plus négliger le fait que nombre de ces structures administratives visent à faire appel à un savoir d'expert par la création d'ins- 43

mitting citizens to circumvent these tribunals and transfer the debate to the judicial arena could lead the courts to rule on matters that they are not best suited to decide. Due to the importance of administrative structures for the organization of the activities of a society such as ours, the scope of Professor Mullan's statement must, therefore, be tempered considerably, especially where a structure with a full appeal mechanism is involved.

tances spécialisées. En permettant au citoyen de court-circuiter ces instances et de transposer le débat dans l'arène judiciaire, on risquerait d'amener les tribunaux à se prononcer sur des questions à l'égard desquelles ils ne sont pas les mieux placés. L'importance des structures administratives pour l'ordonnancement des activités d'une société comme la nôtre exige donc de tempérer significativement la portée des propos du professeur Mullan, en particulier lorsque l'on est en présence de structures dotées d'un mécanisme d'appel complet.

44 These comments should in no way be interpreted as minimizing the importance of ensuring that the government exercises its powers within the limits prescribed by law or that appropriate remedies are available for citizens to assert their rights. However, they imply that one must show caution and judgment in order to take into account the legislator's intention as to the appropriate forum. In considering the importance of ensuring that the government stays within the limits fixed by law and the need to permit citizens affected by a government action to fully assert their rights, it is important not to isolate the penal process from the overall process established by the legislature. Based on commentators and case law, I am satisfied that the best way to decide the question, taking both the integrity of the administrative process and the interests of litigants into account, is to focus the analysis on the legislature's intention.

Ces remarques ne sauraient toutefois être interprétées comme minimisant l'importance de s'assurer que l'Administration exerce ses pouvoirs dans les limites prescrites par la loi ou encore que les citoyens disposent de recours appropriés leur permettant de faire valoir leurs droits. Elles impliquent, cependant, qu'il faut faire preuve de prudence et de discernement afin de tenir compte de l'intention du législateur quant au forum approprié. En considérant l'importance d'assurer que l'Administration demeure dans les limites fixées par la loi de même que la nécessité de permettre à un citoyen visé par un acte de l'Administration de faire pleinement valoir ses droits, il importe de ne pas isoler l'instance pénale de l'ensemble du processus mis en place par le législateur. L'examen de la doctrine et de la jurisprudence me convainc que la façon appropriée de trancher la question, en tenant compte à la fois de l'intégrité du processus administratif et des intérêts des justiciables, est de placer au centre de l'analyse la recherche de l'intention législative.

45 Laskin J.A., writing for the Court of Appeal, proposed five factors to be considered in determining whether a court can rule on the validity of an administrative order collaterally attacked in penal proceedings: (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of collateral attack; and (5) the penalty on a conviction for failing to comply with the order.

La Cour d'appel, sous la plume du juge Laskin, propose cinq facteurs à considérer afin de déterminer si un tribunal peut se prononcer sur la validité d'une ordonnance administrative attaquée de façon incidente dans le cadre de procédures pénales. Ces facteurs sont: (1) les termes de la loi dont découle le pouvoir de rendre l'ordonnance; (2) l'objectif de la loi; (3) l'existence d'un droit d'appel; (4) la nature de la contestation; et (5) la sanction imposable pour défaut d'avoir respecté l'ordonnance.

46 Subject to the comments below on the fourth factor, this approach seems to me to be satisfac-

Sous réserve des remarques qui suivent quant au quatrième facteur, cette approche m'apparaît satis-

tory, provided, however, that it reflects a general approach aimed at determining the legislature's intention as to the appropriate forum. From this perspective, the factors set out above are not independent and absolute criteria, but important clues, among others, for determining the legislature's intention. In doing this, it must, *inter alia*, be presumed that the legislature did not intend to deprive citizens affected by government actions of an adequate opportunity to raise the validity of the order. The interpretation process must, therefore, determine not whether a person can challenge the validity of an order that affects his or her rights, but whether the law prescribes a specific forum for doing so.

faisante en autant, cependant, qu'elle reflète une démarche générale centrée sur la recherche de l'intention législative quant au forum approprié. Dans cette optique, les facteurs énoncés ci-dessus ne représentent pas des critères autonomes et absolus, mais plutôt des indices importants, parmi d'autres, permettant de cerner l'intention législative. Ce faisant, on doit, notamment, présumer que le législateur n'a pas eu pour intention de priver les citoyens affectés par les actes de l'Administration d'une possibilité adéquate de faire valoir l'invalidité d'une ordonnance. La démarche interprétative doit donc viser à déterminer non pas si une personne peut ou non soulever la validité d'une ordonnance qui affecte ses droits, mais plutôt si la loi prescrit un forum particulier à cette fin.

The basis for my reservation concerning the fourth factor is that the Court of Appeal, in answering the question as to the nature of the collateral attack, suggests that a distinction be drawn between invalidity for lack of jurisdiction *ab initio* and invalidity resulting from loss of jurisdiction, which is not open to a collateral attack. However, it is not clear that this distinction can always be drawn in practice, nor is it clear how it really makes it possible to determine the legislature's intention as to the appropriate forum.

47 Ma réserve à l'égard du quatrième facteur tient à ce que la Cour d'appel, en se penchant sur la question de la nature de la contestation, suggère de faire une distinction entre l'invalidité pour absence de juridiction *ab initio* et l'invalidité qui découle de la perte de juridiction et pour laquelle une attaque incidente ne serait pas autorisée. Il n'est pas clair, cependant, que cette distinction soit toujours possible en pratique, ni comment cette distinction permet véritablement de nous informer sur l'intention législative quant au forum approprié.

As regards the problems raised by the dichotomy between lack of jurisdiction and loss of jurisdiction, it must be recognized that the distinction between an order in respect of which an agent of the state lacks jurisdiction from the outset and an order that is so unreasonable as to result in a loss of jurisdiction, is not the easiest one to draw. Since *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, the judgments of this Court have shown the clearest possible determination to avoid the problems connected with this type of distinction.

48 En ce qui concerne les difficultés soulevées par la dichotomie fondée sur l'absence de juridiction et la perte de juridiction, il faut reconnaître que la distinction entre une ordonnance pour laquelle un agent de l'État n'aurait pas juridiction au départ et une ordonnance à ce point déraisonnable qu'elle entraînerait une perte de juridiction n'est pas des plus aisées. Depuis l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, la jurisprudence de notre Cour démontre une volonté on ne peut plus claire d'échapper aux difficultés liées à ce type de distinction.

However, Laskin J.A.'s approach to the nature of the collateral attack has an even more fundamental flaw. The distinction he proposes implies an approach that focuses exclusively on the jurisdiction of the authority that issued the order and disregards any relationship between the kind of collateral attack and the jurisdiction or *raison*

49 Mais l'approche du juge Laskin relativement à la nature de la contestation souffre d'une faille encore plus fondamentale. La distinction qu'il propose implique, en effet, une démarche centrée exclusivement sur la juridiction de l'autorité qui a rendu l'ordonnance, sans égard aux rapports qui peuvent exister entre la nature de la contestation et

d'être of the appeal tribunal. The jurisdiction of the authority that issued the order is, of course, relevant to the case, since it is the subject of the attack. However, what this Court must do is determine the forum in which the attack should be made, assuming for discussion purposes that the order does in fact contain a jurisdictional defect. Where the legislature has established an administrative appeal tribunal, it must be asked whether it intended that tribunal to have jurisdiction, to the exclusion of a penal court, to determine the validity of the impugned order. For this purpose, the nature of the collateral attack is, of course, relevant to determine not whether it raises an excess or lack of jurisdiction on the part of the agent or official who issued the administrative order, but rather to determine whether the attack involves considerations that fall within the jurisdiction conferred by statute on the appeal tribunal. Where the appropriate forum must be determined, it is, indeed, the jurisdiction of the appeal tribunal that is at issue rather than that of the Director, even though it is the Director's jurisdiction that is attacked.

la juridiction de l'instance d'appel ou sa raison d'être. La juridiction de celui qui a rendu l'ordonnance est certainement pertinente au litige puisque c'est elle qui est contestée. Mais la question que nous devons trancher est celle de savoir devant quel forum cette contestation doit avoir lieu en supposant, pour les fins de la discussion, que l'ordonnance souffre effectivement d'un vice juridictionnel. Dans le cas où le législateur a mis en place une instance administrative d'appel, il faut se demander s'il a voulu que cette instance ait juridiction, à l'exclusion du tribunal pénal, pour se prononcer sur la validité de l'ordonnance contestée. À cette fin, l'on s'intéressera naturellement à la nature de la contestation, non pas pour savoir si elle soulève un excès ou une absence de juridiction chez l'agent ou l'officier qui a rendu l'ordonnance administrative, mais plutôt pour savoir si la contestation met en cause des considérations qui relèvent de la juridiction conférée par la loi à l'instance d'appel. S'agissant de déterminer le forum approprié, c'est, en effet, la juridiction de l'instance d'appel qui nous préoccupe, et non celle du directeur, bien que ce soit cette dernière qui soit contestée.

50 Thus, where an attack on an order requires the consideration of factors that fall within the specific expertise of an administrative appeal tribunal, this is a strong indication that the legislature wanted that tribunal to decide the question rather than a court of penal jurisdiction. Conversely, where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal. This analysis must be conducted in light of the specific characteristics of each administrative scheme. An approach, such as the one suggested by the Court of Appeal, aimed at establishing a general rule relating to the nature of the attack does not recognize the importance that must be given to the legislature's intention.

Ainsi, lorsque la contestation de l'ordonnance amène à tenir compte d'éléments qui relèvent de l'expertise particulière d'une instance administrative d'appel, on disposera d'un indice solide pour conclure que le législateur souhaitait que la question soit tranchée par cette instance et non par une cour de juridiction pénale. À l'inverse, le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance. Je souligne que cette analyse doit procéder en tenant compte des particularités de chaque régime administratif. Une approche comme celle suggérée par la Cour d'appel et qui tendrait à une règle générale concernant la nature de la contestation n'est pas respectueuse de l'importance qu'il faut accorder à l'intention législative.

I would, accordingly reformulate the fourth factor suggested by the Court of Appeal to take into account the nature of the collateral attack in light of the appeal tribunal's expertise and *raison d'être*.

(c) Conclusion

In summary, the question whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made and must be answered in light of the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. For this purpose, the five factors suggested by the Court of Appeal, as reformulated here, constitute important clues for determining the legislature's intention as to the appropriate forum for raising the validity of an administrative order.

3. *Application of the Principles to the Case at Bar*

The purpose of the *Environmental Protection Act* is "to provide for the protection and conservation of the natural environment" (s. 2). It accordingly confers on the directors appointed by the Minister under the Act a certain number of powers of a considerable scope which are essentially preventive in nature. Thus, under s. 7, the Director is authorized to issue a stop order requiring the cessation of any activity resulting in the discharge of contaminants that constitute, or the level of which constitutes, a danger to human life or health. Furthermore, the construction or alteration of any plant, structure or apparatus that may discharge a contaminant into the environment, or any alteration of a process or rate of production entailing the discharge of contaminants into the environment, is subject to prior approval by the Director by means of a certificate (s. 8). Finally, s. 17 authorizes the Director to order the owner of, or person who controls, an undertaking or property to take steps to prevent or reduce the risk of environmental contamination. These are clearly broad powers that are, where ss. 7 and 17 are concerned, subject only to the condition that the Director base such a decision on reasonable and probable grounds that there

Je reformulerais donc le quatrième facteur suggéré par la Cour d'appel pour tenir compte de la nature de la contestation eu égard à l'expertise de l'instance d'appel et de sa raison d'être. 51

c) Conclusion

En somme, la question de savoir si un tribunal pénal peut, de façon incidente, se prononcer sur la validité d'une ordonnance administrative dépend de la loi dont découle l'ordonnance et exige qu'on y réponde en recherchant l'intention législative quant au forum approprié. Ce faisant, on doit présumer que le législateur n'a pas voulu priver une personne visée par une ordonnance de l'opportunité de faire valoir ses droits. À cette fin, les cinq facteurs suggérés par la Cour d'appel constituent, tels que reformulés ici, des indices importants qui permettent de cerner l'intention législative quant au forum approprié pour soulever la validité d'une ordonnance administrative. 52

3. *L'application des principes à la présente affaire*

La *Loi sur la protection de l'environnement* a pour objectif «d'assurer la protection et la conservation de l'environnement naturel» (art. 2). À cette fin, elle confère aux directeurs nommés par le ministre en vertu de la Loi un certain nombre de pouvoirs dont la portée est considérable et qui ont un caractère essentiellement préventif. Ainsi, en vertu de l'art. 7, le directeur est autorisé à rendre un arrêté de suspension par lequel il peut ordonner la cessation de toute activité entraînant le rejet de contaminants qui présentent ou dont l'intensité présente un danger pour la vie ou la santé humaine. D'autre part, toute construction ou modification d'une usine, d'un ouvrage ou d'un appareil susceptible de rejeter un contaminant dans l'environnement, ou toute modification de procédé ou de débit de production entraînant le rejet de contaminants dans l'environnement est assujetti à l'autorisation préalable du directeur au moyen d'un certificat (art. 8). Enfin, l'art. 17 autorise le directeur à rendre un arrêté à l'encontre du propriétaire d'une entreprise ou d'un bien, ou encore de celui qui en a le contrôle, afin d'ordonner que des mesures soient prises pour empêcher ou diminuer le risque de contamination pour l'environnement. Manifestement, 53

is a risk of contamination based on the definition of the word "contaminant" in s. 1 of the Act.

54 The very fact that the Act gives the Director a certain number of powers of a preventive nature, including those set out in s. 17, which are at issue here, is a clear indication that the purpose of the Act is not just to remedy environmental contamination, but also to prevent it. This purpose must, therefore, be borne in mind in interpreting the scheme and procedures established by the Act.

55 It is true that the Act also has a remedial dimension. Thus, it confers on the Minister a power, now exercised by the Director under the present s. 17 (R.S.O. 1990, c. E.19), to order repairs where a contaminant is emitted or discharged into the environment (s. 16). This power to order repairs, like the fact that s. 143 authorizes the government, as it did in the case at bar, to take any necessary action to protect the environment and bring proceedings to recover any amounts disbursed, cannot be read as reducing the importance of the Act's preventive purpose. On the contrary, it is my view that s. 143 shows the concern of the legislature with giving the government the tools needed to guarantee prompt compliance with orders issued under the Act, since a person to whom an order is directed could be required to bear the cost of any steps he or she neglects or refuses to take.

56 However, a person affected by a decision of the Director is not without recourse under the Act. On the contrary, ss. 120 *et seq.* of the Act provide for the creation of an Environmental Appeal Board, whose sole function is to hear appeals from decisions of the Director. In particular, s. 122 authorizes a person to whom an order is directed to appeal to the Board within 15 days after service of the order. Sitting as a panel of three, the Board has full power to review the Director's decision and take any action it deems necessary and may substi-

ce sont là des pouvoirs considérables qui ne sont assujettis, en ce qui concerne les art. 7 et 17, qu'à la condition que le directeur se fonde sur des motifs raisonnables et probables qu'il y a risque de contamination suivant la définition du mot «contaminant» à l'art. 1 de la Loi.

Le fait même que la Loi donne au directeur un certain nombre de pouvoirs à caractère préventif, dont ceux prévus à l'art. 17 et qui sont ici en cause, indique clairement que le but de la Loi n'est pas simplement de remédier à la contamination de l'environnement, mais aussi d'en assurer la prévention. Il est donc essentiel de tenir compte de cet objectif dans la compréhension du régime et des procédures mises en place par la Loi.

Il est vrai que celle-ci a également une dimension curative. Ainsi, la Loi confère au Ministre le pouvoir d'ordonner réparation en cas d'émission ou de rejet d'un contaminant dans l'environnement (art. 16), pouvoir désormais exercé par le directeur en vertu de l'actuel art. 17 (L.R.O. 1990, ch. E.19). Ce pouvoir, comme le fait que l'art. 143 autorise le gouvernement, ainsi que ce fut le cas en l'espèce, à procéder lui-même aux mesures nécessaires pour protéger l'environnement et à intenter des poursuites en recouvrement des sommes déboursées, ne saurait amoindrir l'importance de l'objectif préventif de la Loi. Au contraire, à mon avis, l'art. 143 démontre le souci du législateur de donner à l'Administration les outils nécessaires pour assurer le prompt respect des ordonnances rendues en vertu de la Loi, puisqu'une personne visée par une ordonnance court le risque de devoir assumer les frais des mesures qu'elle aura elle-même négligé ou refusé de prendre.

La Loi ne laisse toutefois pas sans moyens une personne touchée par une décision du directeur. Au contraire, elle prévoit aux art. 120 et suiv. la création d'une Commission d'appel de l'environnement, dont la seule et unique fonction est de siéger en appel des décisions du directeur. En particulier, l'art. 122 permet à une personne visée par un arrêté de s'adresser à la Commission dans les 15 jours de la signification de l'arrêté. Siégeant à trois, la Commission a pleins pouvoirs pour réviser la décision du directeur et prendre les mesures qu'elle

tute its own opinion for that of the Director (s. 123). It is, therefore, a *de novo* process whose purpose is to permit the Director's decision to be reviewed in light of submissions by the affected party. Furthermore, should this party not be satisfied with the outcome, he or she has a right of appeal to the Divisional Court on a question of law, and a right of appeal to the Minister on any other matter.

In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection.

Finally, the Act establishes a penal remedy for failing to comply with an order issued by the Director (s. 146(1a)). The question in the case at bar is whether a person who has not challenged an order through the Board's appeal process may, once charged, raise the validity of the order by way of defence.

Since the legislation does not give an express answer to this question, it is necessary to look for a solution that appears most consistent with the legislature's intention. It is clear from a review of the *Environmental Protection Act* that its purpose is not simply to repair damage to the environment resulting from human activity, even if we assume that repairs will always be possible, but primarily to prevent contamination of the province's environment. Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal pro-

estime nécessaires. Elle peut, à cet égard, substituer son opinion à celle du directeur (art. 123). Il s'agit donc d'un processus *de novo*, visant à permettre la révision de la décision du directeur à la lumière des représentations de la partie touchée. Dans l'éventualité où cette dernière n'obtiendrait pas satisfaction, elle bénéficie, par ailleurs, d'un droit d'appel à la Cour divisionnaire sur une question de droit et d'un droit d'appel au Ministre sur toute autre question.

57 Il est clair que, par ce processus, le législateur a voulu mettre en place une procédure complète, indépendante du droit éventuel de recourir à la révision en cour supérieure, afin d'assurer qu'il existe un moyen rapide et efficace de trancher les différends susceptibles de survenir entre le directeur et les personnes visées par un arrêté. Le choix de créer une instance spécialisée reflète la nature complexe et technique des questions susceptibles d'être soulevées relativement à la nature et l'étendue de la contamination, de même qu'aux mesures appropriées. À cet égard, la Commission joue un rôle essentiel pour l'efficacité du régime tout en assurant un équilibre entre les intérêts conflictuels soulevés par la protection de l'environnement.

58 Enfin, la Loi crée un recours pénal pour défaut de se conformer à un arrêté rendu par le directeur (par. 146(1a)). La question, en l'occurrence, est de savoir si une personne qui n'a pas contesté un arrêté en se prévalant de la procédure d'appel devant la Commission peut, au stade des accusations, soulever en défense la validité de l'arrêté.

59 En l'absence de réponse explicite à cette question dans le texte de loi, il faut chercher à déterminer la solution qui paraît la plus compatible avec l'intention législative. De l'examen de la *Loi sur la protection de l'environnement*, il ressort clairement que celle-ci a pour objectif premier de prévenir la contamination de l'environnement dans la province, et non simplement de chercher à réparer les dommages causés à l'environnement par l'activité humaine, même en supposant que la réparation soit toujours possible. Un tel objectif requiert des moyens d'intervention rapides et efficaces de manière à s'assurer que les mesures nécessaires soient prises promptement. Cet objectif se reflète à

cedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible. As Kurisko J. stated in this case (at p. 341):

la fois dans l'étendue des pouvoirs conférés au directeur et dans la création d'une procédure d'appel visant à contrebalancer les pouvoirs considérables conférés au directeur en accordant aux personnes touchées l'occasion de faire connaître leur point de vue et de faire valoir leurs droits dans les délais les plus brefs. Comme l'a exprimé le juge Kurisko dans la présente affaire (à la p. 341):

> It is vital that enforcement of the director's orders under s. 17 be addressed speedily, expertly and effectively while at the same time respecting the private rights and interests of the individuals to whom such orders apply. This has been achieved by the enactment of the three-tier appeal structure set out in s. 123.

> [TRADUCTION] Il est essentiel que le caractère exécutoire des arrêtés pris par le directeur en vertu de l'art. 17 soit déterminé de façon prompte, experte et efficace dans le respect des droits privés des personnes qu'ils visent. L'adoption du processus d'appel en trois étapes, prévu à l'art. 123, permet d'atteindre cet objectif.

60 In the case at bar, the appellants elected to disregard not only the order, but also the appeal mechanism, preferring to wait until charges had been laid before asserting their position. Eleven years later, these proceedings are still in progress, and the appellants are still arguing that the order ought never to have been issued. It seems clear to me that the Board could have dealt with this entire matter more rapidly and more sensibly. The appellants' attitude forced the government to undertake the necessary measures to prevent a PCB spill. While the Act does contemplate such course of action, it cannot be said to encourage it. I agree with Laskin J.A. of the Ontario Court of Appeal that to permit the appellants to collaterally attack the order at the stage of penal proceedings would encourage conduct contrary to the Act's objectives and would tend to undermine its effectiveness.

En l'espèce, les appelants ont choisi d'ignorer non seulement l'arrêté mais aussi le mécanisme d'appel, préférant attendre que des accusations soient portées pour faire connaître leur position. Onze ans après, ces procédures sont encore pendantes et les appelants prétendent toujours que l'arrêté n'aurait jamais dû être rendu. Il m'apparaît évident que toute cette question aurait pu être tranchée plus rapidement et de façon mieux informée par la Commission. L'attitude des appelants a forcé le gouvernement à procéder lui-même aux mesures jugées nécessaires pour prévenir le déversement de BPC. Bien que la Loi envisage une telle possibilité, on ne saurait prétendre qu'il s'agit là d'une démarche que la Loi vise à encourager. Je suis d'accord avec le juge Laskin de la Cour d'appel de l'Ontario pour conclure que le fait d'autoriser les appelants à contester l'ordonnance de façon incidente au stade du processus pénal encouragerait un comportement contraire aux objectifs de la Loi et tendrait à miner son efficacité.

61 Furthermore, in this connection, the appellants cannot raise their right to make full answer and defence without showing that the Act is deficient in this respect or that the government's actions had the effect, in practice, of depriving them of this right. Yet, there is no indication that the Act's appeal process was inadequate or that the Board was powerless to remedy the deficiency that they now raise against the order.

Par ailleurs, les appelants ne peuvent, à cet égard, opposer leur droit de se défendre de façon pleine et entière sans démontrer que la Loi est, de ce point de vue, défaillante ou encore que les agissements de l'Administration ont eu pour effet, dans les faits, de les priver de ce droit. Or, rien n'indique que le processus d'appel établi par la Loi n'était pas adéquat ou que la Commission n'était pas habilitée à remédier au défaut qu'ils invoquent maintenant à l'encontre de l'arrêté.

This leads me to the factor regarding the nature of collateral attack, which I discussed above. At trial, the appellants sought to show that the order was invalid because it could not be based on reasonable and probable grounds to believe, as required by s. 17, that there was a danger of environmental contamination. In accepting this submission, the trial judge reviewed the expert evidence on the dangers of PCBs and on the best way to prevent those dangers. On the basis of this evidence, he found that the order to construct a storage area for the transformers was unfounded, as was the order to clean the concrete surfaces stained with contaminated oil. In his opinion, the cleaning and chipping could cause the release of contaminated particles and would therefore constitute a more serious environmental risk. However, in my view, there is no doubt that this is the very type of question the Board was established to answer. As mentioned above, whether the issue is lack of jurisdiction *ab initio* or loss of jurisdiction is irrelevant. What is important is on whom the legislature intended to confer jurisdiction to hear and determine the question raised. In the case at bar, the answer to this question is not in doubt. The legislature set up a specialized tribunal to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated. I do not see how a penal court could be permitted to answer such questions in lieu of the Environmental Appeal Board, which was established precisely for this purpose, without undermining the scheme set up by the Act.

62 Cela m'amène à traiter du facteur portant sur la nature de la contestation dont j'ai discuté antérieurement. Au procès, les appelants ont cherché à démontrer que l'arrêté était invalide parce qu'il ne pouvait s'appuyer sur des motifs raisonnables et probables de croire, suivant les termes de l'art. 17, qu'il existait un danger de contamination pour l'environnement. Faisant droit à cette prétention, le juge de première instance a examiné la preuve d'expert quant aux dangers que présentent les BPC et quant à la façon la plus appropriée de prévenir ces dangers. Sur la base de cette preuve, il a conclu que l'ordre de construire un abri pour entreposer les transformateurs était mal fondé, tout comme l'était l'ordre de nettoyer les surfaces de béton tachées d'huile contaminée. Selon lui, le nettoyage ordonné comportait le risque que des particules contaminées soient libérées, présentant ainsi un danger accru pour l'environnement. Or, il m'apparaît incontestable que ce sont là précisément le genre de questions pour lesquelles la Commission a été créée. Comme je l'ai indiqué, il importe peu que soit invoquée l'absence de juridiction *ab initio* ou la perte de juridiction. Ce qui importe c'est de savoir à qui le législateur a voulu donner juridiction pour entendre et trancher la question soulevée. En l'espèce, la réponse à cette question ne fait aucun doute. Le législateur a mis sur pied une instance spécialisée pour entendre les questions relatives à l'environnement et adopter les mesures appropriées pour prévenir sa contamination. Je vois mal comment on pourrait permettre que ces questions soient tranchées par un tribunal pénal plutôt que par la Commission d'appel de l'environnement, créée à cette fin, sans porter atteinte au régime mis en place par la Loi.

All that remains to be considered is the final factor suggested by Laskin J.A.: the penal consequences for the accused. Here, the Act provides for a fine of not more than $5,000 for an individual and of not more than $25,000 for a corporation. This maximum amount for a first offence is doubled in the event of a subsequent offence. Although these amounts are not insignificant, no minimum fine is prescribed and imprisonment is not an option, at least as a direct sanction for violating the *Environmental Protection Act*. However

63 Il reste à considérer le dernier facteur suggéré par le juge Laskin, soit les conséquences pénales pour l'accusé. Il s'agit, en l'occurrence, d'une amende d'au plus 5 000 $ pour une personne physique, et d'au plus 25 000 $ pour une personne morale. Ce montant maximal, prévu pour une première infraction, est doublé en cas d'infraction subséquente. Bien que ces sommes ne soient pas négligeables, on remarque qu'aucune amende minimale n'est prescrite et que l'emprisonnement n'est pas envisagé, du moins comme sanction

harsh these measures might be considered to be, they are not sufficient to justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction.

64 In concluding, I cannot refrain from pointing out that the appellants, by systematically refusing to co-operate with the Ministry of the Environment and to participate in any dialogue, have shown an inflexible attitude for which they must now bear the consequences. Such an attitude serves neither the interests of society in environmental protection nor the interests of those who are subject to administrative orders. While penal sanctions will, perhaps, always be a necessary component of any regulatory scheme, they must not become the principal or a customary instrument for relations between the government and its citizens.

VI. Disposition

65 Considering the purpose of the *Environmental Protection Act* and the procedural mechanisms established to guarantee that a person to whom an order is directed can assert his or her rights, I conclude that persons charged with failing to comply with an order issued under the Act cannot attack the validity of the order by way of defence after failing to avail themselves of the appeal mechanisms available under the Act. The trial judge accordingly lacked jurisdiction to rule on the validity of the order.

66 For these reasons, I would uphold the Court of Appeal's decision and dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Greenspan & Associates, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

directe de la violation de la *Loi sur la protection de l'environnement*. Quelle que soit la sévérité que l'on puisse attribuer à de telles mesures, elles ne suffisent pas pour permettre de conclure que l'intention du législateur était d'autoriser des contestations incidentes, au détriment des objectifs poursuivis par la Loi et de la juridiction de la Commission.

En terminant, je ne peux m'empêcher de souligner le fait que les appelants, par leur refus systématique de coopérer avec le ministère de l'Environnement et leur fermeture à tout dialogue ont fait preuve d'une rigidité dont ils doivent maintenant supporter les conséquences. Une telle attitude ne sert ni les intérêts de la société dans la protection de l'environnement, ni les intérêts de ceux qui se trouvent assujettis à des ordonnances administratives. Bien que les sanctions pénales demeureront sans doute toujours une composante nécessaire de tout régime réglementaire, il importe qu'elles ne deviennent pas l'instrument principal ou usuel des rapports entre l'Administration et les citoyens.

VI. Dispositif

Considérant l'objectif de la *Loi sur la protection de l'environnement* et les mécanismes procéduraux mis en place pour assurer à une personne visée par un arrêté la possibilité de faire valoir ses droits, je conclus qu'une personne accusée d'avoir fait défaut de se conformer à un arrêté rendu en vertu de la Loi ne peut, en défense, chercher à attaquer la validité de l'ordonnance alors qu'elle ne s'est pas prévalue des mécanismes d'appel prévus par la Loi. En conséquence, le juge du procès n'avait pas juridiction pour se prononcer sur la validité de l'arrêté.

Pour ces motifs, je confirmerais la décision de la Cour d'appel et je rejetterais le pourvoi.

Pourvoi rejeté.

Procureurs des appelants: Greenspan & Associates, Toronto.

Procureur de l'intimée: Le procureur général de l'Ontario, Toronto.