McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Gordon M. Nettleton
Partner, National Energy Regulatory Practice
Email: gnettleton@mccarthy.ca

Assistant: Feser, Monique
Direct Line: (406-260-3607)
Email: mfeser@mccarthy.ca

March 8, 2021

VIA RESS, EMAIL AND COURIER

Ms. Christine E. Long, Registrar
Ontario Energy Board
Suite 2700, 2300 Yonge Street
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Long:

RE: EB-2020-0194 – Hydro One's Reply Submissions

In accordance with the Ontario Energy Board ("**OEB**") Decision on Motion and Procedural Order No. 3 dated February 8, 2021, please find enclosed the reply submissions and book of authorities of Hydro One Networks Inc. ("**Hydro One**") in connection with the above-noted matter.

Please contact the undersigned if you have any questions in regards to the foregoing.

Yours truly,

McCarthy Tétrault LLP

Gordon M. Nettleton
GMN

cc: Intervenors in EB-2020-0194

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a proceeding on the Board's own motion to implement the decision of the Divisional Court dated July 16, 2020 in its File #200/19, and for an Order or Orders approving or fixing just and reasonable rates for Hydro One Networks Inc. for the transmission and distribution of electricity as of January 1, 2021.

HYDRO ONE NETWORKS INC. REPLY SUBMISSIONS

March 8, 2021

PART I. OVERVIEW

1. In accordance with Ontario Energy Board Decision on Motion and Procedural Order No. 3 dated February 8, 2021 ("**PO#3**"), Hydro One Networks Inc. ("**Hydro One**") is pleased to provide reply submissions regarding the recovery of disputed tax savings amounts that have been the subject matter of appeals before the Ontario Energy Board ("**Board**") and the Ontario Divisional Court ("**Court**") since the issuance of Board Decision EB-2016-0160 ("**Original Decision**").

2. These reply submissions are provided in response to:

- Submissions of the Board Staff dated February 22, 2021;
- Submissions of the Power Workers' Union ("**PWU**") dated February 25, 2021;
- Submissions of the London Property Management Association ("**LPMA**") dated February 26, 2021;
- Final argument of the School Energy Coalition ("**SEC**") dated February 26, 2021;
- Submissions of the Society of United Professionals ("**SUP**") dated February 26, 2021;
- Argument Submission of Energy Probe Research Foundation ("**Energy Probe**") dated February 26, 2021;
- Submissions of Canadian Manufacturers & Exporters ("**CME**") dated February 26, 2021;
- Submission of the Vulnerable Energy Consumers Coalition ("**VECC**") dated February 26, 2021;
- Submissions of the Association of Major Power Consumers in Ontario ("**AMPCO**") dated February 26, 2021; and
- Final submissions of the Consumers Council of Canada ("**CCC**") dated March 1, 2021.

3. This submission is organized as follows:

I. Overview
II. Background and Preliminary Comments
III. Reply to the Main Issues to be Determined in this Proceeding
    a. Recovery Amount
    b. Recovery Period Options
    c. Recovery of Lost Time Value on Recovery Amounts
IV. Other Reply Submissions
V. Conclusion

PART II. BACKGROUND AND PRELIMINARY COMMENTS

(a) The Board Must Balance the Interests of Ratepayers and Shareholders

4. This matter has a lengthy history. The decision of the Ontario Divisional Court issued on July 16, 2020 ("**Court Decision**")[1] provides an accurate summary, as does the more detailed chronology set out in Hydro One's application and evidence filed on October 28, 2020 ("**HONI DTB Evidence**").[2] The Court determined that the Future Tax Savings is, effectively, a recovery over time of the PILS Departure Tax that was entirely paid by Hydro One and funded by its shareholders.[3] Given this, no part of the benefit of the Future Tax Savings is allocable to ratepayers and must instead be paid entirely to Hydro One's shareholders.[4] That result is not the subject of debate or challenge in this proceeding.

5. The sole purpose of this proceeding is to implement the Court Decision by developing a methodology to return to Hydro One and its shareholders erroneously allocated deferred tax savings ("**Misallocated Tax Savings**") embedded in 2017-2022 approved rates for transmission and 2018-2022 for distribution regulated services. This proceeding is <u>not</u> about: (a) how Hydro One's original shareholder decided to finance the cost of the change in tax regimes through the public issuance of share capital; (b) "re-deciding" the merits of the Original Decision or the proper allocation of deferred tax savings; or (c) "refunding" the full value of the Deferred Tax Asset ("**DTA**") of $3.532 billion. Instead, it is about returning the amounts wrongfully directed to ratepayers over the period between January 1, 2017 and the end of 2021 and altering the methodology used to calculate regulatory income taxes in 2022. The term **"Appeal Period"** will be used to describe the time when misallocations first commenced until the end of 2022.

6. The issues in this proceeding are straightforward: (1) what is the calculation of the overall amount that must be returned; (2) what period of time should be applied to the recovery of the Misallocated Tax Savings ("**Recovery Period**"); and (3) what method should be applied to recover the lost time value of the Misallocated Tax Savings during both the Appeal Period and the Recovery Period? Importantly, it is the combined period – beginning in 2017 when misallocations were first made and extending until full recovery is completed – that is relevant to this exercise as

---

1 *Hydro One Networks Inc. v Ontario Energy Board,* 2020 ONSC 4331 at paras 3, 12-17 ["**Court Decision**"] [attached to Hydro One's response to Energy Probe Interrogatory #1].

2 HONI DTB Evidence at 2.0 (pp. 2-5).

3 Court Decision at para 19.

4 Court Decision at para 60.

that is the period over which the amounts were paid out and the time taken to have them ultimately returned in full to Hydro One and its shareholders.

7. There are two overarching principles relevant to resolving these issues. The first concerns the "keep whole" principle. Principles of justness and fairness dictate that those who have suffered a wrongful taking should be, to the extent possible, placed in the same position as they would have otherwise been.[5] The second concerns finding an appropriate balance in the overall recovery methodology that addresses both the interests of ratepayers and Hydro One and its shareholders. Importantly, the issues of quantum, Recovery Period and carrying costs are all interrelated. To find an appropriate overall balance, the Board must consider these issues together, and not on a mutually exclusive basis.

8. There is no question that these circumstances are unique. The circumstances are distinguishable from facts involving refunds of amounts for the provision of rate-regulated service. The latter can involve circumstances such as the Alberta scenario where refunds occurred regarding re-allocations of transmission losses to historical ratepayers. Nor is this case similar to the more common situation where regulatory service involves the use of deferral or variance accounts, or amounts for the construction of assets that are works in progress. Here, the amounts at issue concern a misallocation of non-regulated company value judicially determined as falling outside of the regulated rate-setting paradigm.

9. Placing these background facts into their proper context is essential. Suggestions that the current circumstances are akin to Hydro One's shareholders providing a loan to ratepayers are imperfect and fictitious. Loans occur between consenting commercial parties. Loan arrangements require upfront agreement between parties to fundamental terms such as principal, interest rate, and amortization periods.[6] Ask whether and why a reasonable shareholder would agree to "loan"

---

5 See e.g. *Reeves v Arsenault*, 1998 CarswellPEI 97 at paras 14-18, 168 Nfld & PEIR 251 (PEICA), leave to appeal to SCC refused (April 20, 2000) [***Reeves***] [**TAB 1**]; SM Waddams, *The Law of Damages* (looseleaf ed) (Toronto: Thomson Reuters Canada Ltd, 2019) at para 7.400 [**Waddams**] [**TAB 2**]; see also *Cobb v Long Estate*, 2017 ONCA 717 at para 86 [***Cobb***] [**TAB 3**].

6 John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc., 2020) at 97 ("In order for an agreement to be enforceable, the parties must have reached agreement on all the essential terms of their agreement") [**TAB 4**]; *Black v The Queen*, 2019 TCC 135 at para 124 ("An enforceable contract requires that the essential terms be clear or reasonably ascertainable. The essential terms of the loan between Black and Inc. can be determined with a reasonable degree of certainty. The amount is known, $15.3 million; the interest rate is known, the same interest rate that Black was to pay on the Quest loan; the date on which the monies were advanced, and therefore when interest would begin to accrue, is known") [**TAB 5**].

approximately $257 million[7] without such agreement, without any prospect of receiving any interest on that amount – let alone compound interest – and without return of those funds for 11 years? Ask how would prudent investors regard future investment decisions in Ontario if that was the outcome? Using loan analogies without taking into account the realities of these circumstances conveniently ignores the fact that Hydro One and its shareholders never agreed – let alone sought approval – to "give" loans or allocate tax savings for the calculation of rates.

10. The extreme positions taken by some parties in this proceeding, particularly SEC, seek to ignore facts and law. Hydro One urges the Board to consider these positions in their proper context. SEC is effectively suggesting that the Board interpret the Court Decision in a way that permits the Board to continue the misallocations going forward and indeed provide the full value of the DTA – not only the Misallocated Tax Savings determined in the Original Decision – to ratepayers, and then to return it decades later. Two wrongs do not make a right. Adopting SEC's approach would result in errors of law and manifestly nullify the effect of the Court Decision by imposing significant incremental costs through postponement and delay. If the recovery methodology is to be properly balanced, the interests of both sides – shareholders and ratepayers – must be considered.

11. Hydro One is mindful that other unique and unprecedented circumstances must also be taken into account in finding an appropriate balanced solution. Hydro One's approach makes important concessions benefiting customers while also considering the interests of its shareholders. Hydro One has intentionally not sought compounded interest, but rather, has proposed a simple interest calculation. The impact of this concession has far greater significance when longer Recovery Periods are proposed.[8] Hydro One has also deliberately not included the full effects of its approved revenue cap index ("**RCI**") to calculate the recovery amount.[9]

---

7 HONI DTB Evidence at 3.1, Table 1 (p. 7).

8 For a two-year Recovery Period ending in 2023, using compound rather than simple interest would result in increased carrying costs of approximately $0.2M based on the Board-prescribed rate, $4.1M based on WACD, and $6.4M based on WACC. For a longer Recovery Period ending in 2027, the disparity between simple and compound interest is approximately $0.3M based on the Board-prescribed rate, $9.1M based on WACD, and $14.4M based on WACC. The effects would be even greater using the Board's approved ROE.

9 HONI DTA Remittance IRRs (Response to Board Staff Interrogatory #1) at p. 2 (escalating the 2018 distribution amount by the approved RCI components to derive the 2019-2021 distribution amount, and escalating the 2020 transmission amount by the approved RCI to derive the 2021 transmission amount, results in higher Misallocated Tax Savings ($18.7M for Dx and $3.8M for Tx), in addition to higher interest).

12. Hydro One has also attempted to find middle ground in selecting an appropriate interest rate to calculate carrying costs. In particular, Hydro One has not sought to use the Board-approved rate of equity ("**ROE**"), even though this is the undisputed metric which the Board uses to assess prudent equity investor expectations in Ontario rate-regulated companies. Moreover, Hydro One has not suggested use of its weighted average cost of capital ("**WACC**"), even though this is the calculation on which overall fair return on and of Hydro One's regulated capital is determined.

13. Instead, a middle ground has been proposed: (1) use of Hydro One's lower costing source of approved financing, its weighted average cost of debt ("**WACD**"); (2) lessening ratepayer impacts by allowing full recovery of Misallocated Tax Savings to occur over the next six-and-a-half-year period[10] and thus a combined period of 11 years (from 2017 when misallocations were first made until full recovery is completed); (3) applying simple interest; and (4) excluding the full impact of the RCI calculations.

14. The Board must consider <u>all</u> components of the recovery methodology together in assessing whether the overall approach is reasonable and fair to ratepayers and shareholders alike.

(b) The Board's Task is to Unwind the Misallocation in the Appeal Period

15. Regarding implementation of the recovery, Hydro One has proposed two steps: (1) altering the methodology used to calculate regulatory income taxes in 2022; and (2) implementing temporary rate adjustments commencing in 2021 that are designed to recover the Misallocated Tax Savings amounts allocated to ratepayers during the Appeal Period.

16. Hydro One understands that this Panel has declined to fix the method of calculating regulatory income taxes in future (i.e. unapproved) rate periods and that this matter may be considered by Commissioners that decide such future rate applications.[11] What is fully within this Panel's jurisdiction and mandate is to ensure that the calculation of regulatory tax for the current rate-making period is based on well-established rate-making guiding principles[12] and to "unwind"

---

[10] See HONI DTB Evidence at 3.1.3 (Option 3 from 2021-2027 was based on recovery beginning January 1, 2021, but that period will now be cut short by approximately six months).

[11] PO#3 at pp. 7-8.

[12] Including but not limited to the stand-alone utility principle, which distinguishes the utility from its shareholders and limits its business activities and recoverable costs to the provision of regulated services: see Court Decision at para 6.

the errors so that regulatory income tax amount originally requested in the EB-2016-0160 proceeding is reinstated and applied throughout the Appeal Period. The only difference between the originally applied-for regulatory income tax amounts and those actually adopted is the deduction for the Misallocated Tax Savings, along with the calculation of a carrying cost.

17. Hydro One understands that changes in circumstances and new facts regarding the method of calculating regulatory income taxes are considerations that can be tested in future rate cases. However, it is important for this Panel to acknowledge and demonstrate that, as the matter of regulatory income tax calculations apply to the Appeal Period, these amounts cannot include any Misallocated Tax Savings, consistent with the Court Decision.

PART III. REPLY TO THE MAIN ISSUES TO BE DETERMINED IN THIS PROCEEDING

(c) Recovery Amount

18. The quantum of recovery is detailed in Hydro One's evidence.[13] These calculations are based on information that has been fully disclosed to and ultimately used by the Board during the Appeal Period for both transmission and distribution.[14]

19. Most parties in this proceeding support the Table 1 values as being correct.[15] For example, CCC states that the amounts proposed by Hydro One represent the actual amounts approved by the Board in the relevant Rate Orders related to the Misallocated Tax Savings.[16] The Board's Staff submits Hydro One has provided the information the Board required in PO#1 relating to quantum, as outlined in sections 3.1 and 3.2 of Hydro One's evidence.[17]

20. Only SEC takes issue with these calculations. It does so by asserting that the Board must "re-decide" the Original Decision in order to make the calculations. SEC conveniently attempts to do indirectly what it has not and cannot do directly: ignore the clear directions from this Panel in PO#1 and PO#3 and appeal the Original Decision and the Court Decision, on some unknown or

---

13 HONI DTB Evidence at 3.1.

14 HONI DTB Evidence at 3.1 & Table 1. The amounts shown in Table 1 were reported and included in the annual regulatory income tax calculations in each of the relevant rate orders for: the 2017-2018 Transmission Revenue Requirement (EB-2016-0160); the 2019 Transmission Revenue Requirement (EB-2018-0130); the 2018-2022 Distribution Revenue Requirement (EB-2017-0049); and the 2020-2022 Transmission Revenue Requirement (EB-2019-0082).

15 See e.g. Submissions of SUP, VECC, Energy Probe, AMPCO, and CCC.

16 CCC Submissions at p. 3.

17 Board Staff Submissions at p. 4.

indeterminable basis, to achieve the results-based outcome it seeks, which is to push recovery as far as possible into the future at no cost to ratepayers and full cost to shareholders.

21. The Board Staff's submissions note that Hydro One's calculation of Misallocated Tax Savings, as represented in Table 1, inconsistently applied the RCI.[18] Hydro One's calculation of Misallocated Tax Savings amounts for 2019 for transmission took into account the RCI, but the RCI was not used to derive either the 2021 transmission recovery amount, nor the distribution recovery amount for the period 2019-2021. The tables included in Hydro One's response to Board Staff Interrogatory #1 summarize the approved and proposed RCI for each respective year.[19]

22. The Board's Staff agree with Hydro One's proposed approach to determining the Future Tax Savings, without escalating these amounts that were applied to the 2021 transmission amounts or 2020-2021 distribution amounts, noting the proposed approach would benefit ratepayers. However, the Board's Staff calculate the Future Tax Savings using the escalation approach to be $269.1M, rather than $279.9M.[20]

23. In response, Hydro One submits that an RCI for 2019 distribution should be used to calculate the Misallocated Tax Savings for 2019 under the escalation approach. Despite the fact that Hydro One does not propose to recover the higher amounts as calculated by the annually approved RCIs, Hydro One notes that as part of the 2018-2022 Distribution Application, the Board approved the 2018 revenue requirement and the RCI for 2019-2022.

24. Regarding the Board Staff's suggestion that use of the RCI for 2019 is inappropriate given that the revenue requirement was approved by component, consideration should be given to the manner in which the annual RCI is calculated. An annual RCI is calculated by taking into account the approved revenue requirement by component. Regardless of the fact that both the 2018 and 2019 revenue requirement was approved in 2019, the 2019 revenue requirement was still approved based on a 2019 approved RCI and a calculation relative to the 2018 revenue requirement as 2018 was the rebasing year. As such, Hydro One submits that the calculation as presented in Hydro One's response to Board Staff Interrogatory #1 is appropriate and the actual amount is $279.9M, in addition to the higher interest costs if Hydro One was to propose a recovery based on approved annual RCI values.

---

18 Board Staff Submissions at p. 5.

19 HONI DTA Remittance IRRs at pp. 3-4.

20 Board Staff Submissions at p. 6.

(d) Recovery Period Options

(i) The recovery period and carrying cost must be considered together

25. The various Recovery Periods and corresponding impacts on ratepayers are outlined in Hydro One's evidence.[21] As discussed in Hydro One's responses to Board Staff Interrogatory #1 (particularly part (a)) and SEC Interrogatory #2,[22] Hydro One calculated the amounts to minimize impacts on ratepayers. Hydro One submits the Board must consider carrying costs by taking into account the combined Appeal Period and Recovery Period together. A longer Recovery Period will necessarily involve higher carrying costs in accordance with the 'keep whole' principle.

26. The positions of the intervenors on Recovery Periods range widely, from one year at the lowest extreme (VECC) to 31 years for transmission at the highest extreme (Energy Probe). These disparities, again, reinforce the need for a balanced middle ground. Hydro One's proposal is exactly that.

27. Hydro One reiterates its preference for Option 3 (recovery from 2021-2027) as the best option for mitigating rate impacts on customers, provided the WACD is applied as requested. The Board Staff, PWU, SUP, and AMPCO support the use of Option 3. CCC also supports recovery of the distribution amounts over a seven-year period.[23]

28. CME and VECC support a shorter Recovery Period, recognizing that a longer period increases the costs to customers (if a carrying cost is approved) and contributes to intergenerational inequities. CME submits that Option 2 "reflects the appropriate balance of recovery equity and rate impacts, given the fragile state of many businesses and households in Ontario today."[24] VECC argues that a period as short as one year is warranted.[25] CCC submits the recovery of the transmission amounts should be over a two-year period.[26]

29. While CME and others prefer a Recovery Period over "two years", the reality now is that the earliest recovery could begin is mid-year 2021. Indeed, the Board Staff[27] and AMPCO[28] note

---

21 HONI DTB Evidence at 3.1.3 (pp. 12-15).

22 HONI DTA Remittance IRRs at pp. 3-6, 53-59.

23 CCC Submissions at pp. 4-5.

24 CME Submissions at p. 3.

25 VECC Submissions at pp. 5-6.

26 CCC Submissions at pp. 4-5.

27 Board Staff Submissions at p. 14.

28 AMPCO Submissions at p. 3.

that recovery will likely not be implemented earlier than July 1, 2021 for transmission and June 1, 2021 for distribution. This effectively means there would only be about one-and-a-half years over which to recover the Misallocated Tax Savings amounts, which will result in larger customer impacts than currently shown under Option 2 (which assumes recovery over a full two years). Similarly, VECC's proposal of a one-year Recovery Period is actually only half a year, resulting in significant customer impacts.

30. LPMA submits the Board should consider different Recovery Periods for each of the transmission and distribution portions,[29] and potentially different Recovery Periods for different distribution rate classes.[30] LPMA supports the recovery of the transmission amounts effective July 1, 2021, with 25% recovered in 2021, 50% in 2022 and 25% in 2023.[31]

31. Hydro One does not foresee any implementation concerns with using a different Recovery Period for transmission and distribution. However, a different Recovery Period for different distribution classes would introduce significant implementation and administrative complexity. This complexity is unwarranted given that recovery over the same period is not expected to result in significantly different bill impacts across rate classes. In all cases, customer impacts will be well below the 10% total bill impacts referenced in the Board's filing requirements, and it is only when bill impacts are in excess of 10% that class-specific mitigation is typically considered. Additionally, Hydro One does not understand the basis for the transmission recovery amounts proposed by LPMA. The proposed split does not align with any of the Recovery Periods proposed by Hydro One, and would not result in optimal rate smoothing. Hydro One proposes that customer bill impacts be smoothed by evenly recovering the Misallocated Tax Savings amounts over the Recovery Period approved by the Board.

32. SEC and Energy Probe support a much longer Recovery Period equivalent to a theoretical remaining life of regulated capital assets. SEC's ratemaking proposal is based on recovering the full DTA amount over 30 years for transmission and 23 years for distribution.[32] Energy Probe submits that the transmission Misallocated Tax Savings amounts should be collected through a

[29] LPMA Submissions at p. 6.

[30] LPMA Submissions at p. 8.

[31] LPMA Submissions at p. 7.

[32] SEC Submissions at pp. 26-27.

rate rider over a 31-year period, while the distribution Misallocated Tax Savings amounts should be collected over a 24-year period.[33]

33. In reply, Hydro One views the Recovery Periods proposed by SEC and Energy Probe as extreme. Imposing a 20-plus year Recovery Period to the proposed carrying cost calculation is unbalanced and gives no regard to the 'keep whole' principle. No consideration has been given to the intergenerational inequities that would be created by using this approach. These positions ignore the fact that Hydro One's shareholders have been wrongfully deprived of funds they would have been entitled to and invested for the past four years and counting.

(ii) Recovery should commence as soon as reasonably possible

34. The Board's Staff submit that there may be some administrative convenience if the recovery begins on January 1, 2022 when Hydro One's rates would otherwise be adjusted.[34] In reply, Hydro One submits recovery must begin as soon as possible in order to reduce costs for customers. There is no additional complication to starting recovery of the distribution amounts in 2021 with a rate rider, and the Board has previously approved the resetting of transmission rates mid-year.[35]

35. Addressing the Board Staff's caveats at the top of page 18,[36] Hydro One's proposal to alter the methodology used to calculate regulatory income taxes included in the 2022 revenue requirement as part of the transmission and distribution 2022 annual rate applications will not complicate or delay the processing and approval of the annual applications, provided that the Board approves the 2022 regulatory income tax adjustment amounts to be recovered in 2022 (i.e. $28.4 for transmission and $21.0 for distribution). Hydro One does not intend to introduce any additional complications associated with adjusting the 2022 revenue requirement calculation to account for IRM adjustments to regulatory income tax adjustment amounts up to 2022, as proposed by the Board Staff.

36. SUP agrees that the Recovery Period should begin as soon as reasonably and administratively possible,[37] and remarks that all parties should support recovery beginning sooner

---

33 Energy Probe Submissions at pp. 5-6.

34 Board Staff Submissions at p. 13.

35 See Decision and Rate Order EB-2019-0164 (2019 Uniform Transmission Rates) dated July 25, 2019 [**TAB 6**].

36 Board Staff Submissions at p. 18.

37 SUP Submissions at p. 3.

to limit total carrying costs and to avoid intergenerational inequities.[38] LPMA also recognizes that, if the Board approves a carrying cost, recovery of the Misallocated Tax Savings should not wait until January 1, 2022.[39]

37. The Board's Staff recommend that recovery of the transmission Misallocated Tax Savings amount begin as part of a change to Uniform Transmission Rates ("**UTRs**") on July 1, 2021. Hydro One supports this approach. However, the Board should consider the impact of 2021 being only a partial 'stub year' for recovering the Misallocated Tax Savings amount. As indicated in Hydro One's evidence,[40] Option 3 was intended to begin on January 1, 2021 and end December 31, 2027 (a seven-year Recovery Period). As such, resetting UTRs on July 1, 2021 would mean that recovery of the Misallocated Tax Savings amount would occur over the remaining half year in 2021 and the subsequent six years (i.e. a six-and-a-half-year period). Including one-seventh of the $183.3M transmission Misallocated Tax Savings amounts (i.e. $26.2M) in the resetting of UTRs on July 1, 2021 will recover only half of the annual amount, or $13.1M, in 2021. The remaining Misallocated Tax Savings amount of $170.2M would then be evenly collected over the remaining six years as part of resetting the UTRs effective January 1 in each subsequent year.

38. Starting the recovery of the distribution Misallocated Tax Savings amount on June 1, 2021, the earliest possible implementation date as proposed by the Board Staff,[41] would mean that recovery would be evenly spread over the remaining seven months in 2021 and then over the subsequent six years, for a total Recovery Period of 79 months. This would mean that the 2021 rider would be set to collect 7/79, or $8.9M, of the total $100.2M, and 12/79, or $15.2M, would be collected via riders in each of the subsequent years. Of course, it would be possible to implement recovery of the distribution Misallocated Tax Savings amount at any time in 2021, subject to the timing of the Board's decision, with the total distribution Misallocated Tax Savings amount recovered evenly over the balance of 2021 and the 2022 to 2027 period.[42]

---

38 SUP Submissions at p. 3.

39 LPMA Submissions at pp. 8-9.

40 HONI DTB Evidence at 3.1.3.

41 Board Staff Submissions at p. 19.

42 All amounts indicated above are subject to interest improvement.

(e) Recovery of Lost Time Value on Recovery Amounts

(iii) Interest is necessary to compensate for the lost time value of money

39. More than four years will have lapsed between the effective date of the Original Decision and conclusion of this proceeding. Throughout this period, Hydro One's shareholders have been wrongfully deprived of the value of the Misallocated Tax Savings and a carrying cost. In order to rectify that error and give effect to the Court Decision, Hydro One proposes that a reasonable carrying cost, commensurate with the time over which the recovery occurs, is included in the Misallocated Tax Savings amounts. Tables 2 and 3 of Hydro One's evidence outline carrying cost rates and total carrying costs considered for this purpose, respectively.[43]

40. Just compensation requires that, so far as possible by means of a monetary award, a party should be put in the position it would have been in had it not suffered the wrong complained of.[44] Further, it is well-accepted that awarding interest is the fairest and most effective way of compensating for the lost time value of money.[45] The provisions of the *Courts of Justice Act* concerning prejudgment interest do this by preserving the court's discretion not to apply the default rate. Hydro One's shareholders were deprived of funds they would otherwise have invested, and therefore can only be 'made whole' by awarding an interest rate commensurate with that lost opportunity.[46]

41. The principle of just compensation does not appear to be contested (other than by SEC and its supporters), but many of the parties nonetheless propose recovery options that would clearly not make Hydro One's shareholders 'whole'. For instance, the Board's Staff explicitly accept the proposition that carrying costs are appropriate, yet argue for a lower interest rate and longer Recovery Period,[47] seemingly relying on carrying costs and Recovery Period being

---

43 HONI DTB Evidence at 3.1 & Tables 2 & 3 (p. 9).

44 See e.g. *Reeves* [**TAB 1**].

45 Waddams at para 7.400 [**TAB 2**]; see also *Cobb* at para 86 ("Interest is meant to compensate for the loss of use of money's worth from the date when the injury is sustained to the time of judgment. The goal is to fairly compensate an injured party and to restore to him or her, so far as money is able to do, all that he or she has lost as result of the injury") [**TAB 3**]; Alberta Utilities Commission Decision 790-D-04-2016 dated September 28, 2016 at paras 78-82 [**TAB 7**], leave to appeal refused, 2019 ABCA 222 [**TAB 8**].

46 Waddams at para 1.20 (compensation contains two elements: "a substitute for loss of the value of the property and a substitute for the loss of the opportunity to use it") [**TAB 2**].

47 Board Staff Submissions at pp. 8-9.

independent considerations. Hydro One's responses to the various submissions on the appropriate carrying cost are discussed below.

(iv) Hydro One's WACD is a Balanced Middle Ground

42. As noted above, Hydro One's proposal reflects a measured approach to the recovery of the Misallocated Tax Savings. Hydro One's proposal to use (a) approved cost of debt values in calculating carrying costs (as opposed to a higher rate based on the Board-approved ROE or Hydro One's WACC[48]); (b) simple, not compounded, interest; and (c) an extended seven-year Recovery Period over which (a) and (b) would be applied are concessions intended to reduce rate impacts on Hydro One's customers.

43. In response to the Board Staff's confusion as to which interest rate Hydro One is proposing during the Recovery Period,[49] Hydro One is proposing to use the same carrying cost rate (Hydro One's approved WACD) throughout the entire Recovery Period as well as the Appeal Period.

44. In the present circumstances, Hydro One's weighted average cost of debt ("**WACD**") is an appropriate rate to calculate all carrying costs and the bill impacts included in its evidence reflects that rate.[50] As a result of the Original Decision, Hydro One incurred a higher level of debt than it otherwise would have. The Misallocated Tax Savings Amounts were funds expected to be received by Hydro One in its normal operations. WACD is the rate used when approving an interest rate that applies to the entire debt portfolio of the company. The cost to finance this shortfall would reasonably attract Hydro One's WACD given that the combined period of the Appeal Period and Hydro One's proposed Recovery Period is 11 years.[51] That period of time does not square with any notion that debt used to finance a liability over this duration is short-term in nature. The weighted average term to maturity of Hydro One Inc.'s long-term debt, as reported in its publicly available MD&A, is 14.8 years.[52] The duration of the combined period is similar to Hydro One's actual weighted average outstanding debt duration.

---

48 The AUC has approved such a method in other contexts: Alberta Utilities Commission Decision 24805-D01-2020 dated July 6, 2020 at paras 89-94, adopting Decision 2278-D01-2016 [**TAB 9**].

49 Board Staff Submissions at p. 11.

50 HONI DTB Evidence at 3.1.1 (p. 10).

51 HONI DTB Evidence at 3.1.1 (p. 11).

52 Hydro One Inc. Management's Discussion and Analysis for the Years Ended December 31, 2020 and 2019 at p. 11: https://www.hydroone.com/investorrelations/Reports/2020%20YE%20HOI%20MDA.pdf

45. PWU agrees that only the ROE would truly make shareholders 'whole', but that Hydro One's proposed use of WACD is fair and balanced.[53] Additionally, SUP submits that WACD is a reasonable option based on the premise that, had the Misallocated Tax Savings been available to Hydro One, long-term debt could theoretically have been retired and interest costs could have been avoided.[54]

46. As described further in Hydro One's response to Board Staff Interrogatory #2,[55] the Original Decision ordered the unlawful allocation of tax savings. The Divisional Court effectively determined that this part of the Original Decision is a nullity. The Board must now exercise its discretion to fairly place parties in the position that they would have been, but for the error committed in the first instance. The injured parties are Hydro One's shareholders – parties who are not directly involved in the rate-setting process. During the Recovery Period, Hydro One's shareholders will continue to suffer the loss of the time value of money in the same manner they sustained when the misallocations occurred. The longer the Recovery Period, the greater the potential exists for Hydro One and its shareholders to receive less than they would have received had the Original Decision correctly determined the matter.

47. Hydro One's approach is consistent with the principles applied in awards of pre-judgment and post-judgment interest in accordance with sections 128-130 of the *Courts of Justice Act*.[56] The Board can exercise its discretion by approving a carrying cost charge based on Hydro One's approved WACD in the same way that courts have awarded simple interest at higher rates or for longer periods than statutorily described, if it considers it just to do so under s. 130(1). Section 130(2) prescribes seven factors courts should take into account:

a. changes in market interest rates;

b. the circumstances of the case;

c. the fact that an advance payment was made;

d. the circumstances of medical disclosure by the plaintiff;

---

53 Power Workers' Union Submissions at p. 6.

54 SUP Submissions at p. 2.

55 HONI DTA Remittance IRRs at p. 10.

56 RSO 1990, c C-43 ("***CJA***") [**TAB 10**]. See also *Hislop v Canada (Attorney General)*, 2004 CanLII 43774 at para 145, 73 OR (3d) 641 (ONCA) [**TAB 11**], aff'd 2007 SCC 10; *Pilon v Janveaux*, 2006 CanLII 6190 at para 27, [2006] OJ No 887 (ONCA) [**TAB 12**]; *Cobb* at para 86 [**TAB 3**].

e. the amount claimed and the amount recovered in the proceeding;

f. the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

g. any other relevant consideration.

48. In this context, it is reasonable for the Board to take the following factors into consideration when exercising its discretion in a manner analogous to the approach Ontario courts would apply under the *CJA*:

- the lengthy Appeal Period combined with the length of the proposed Recovery Period;
- an "advance" was effectively made by Hydro One and its shareholders throughout the Appeal Period;
- the negative effects on Hydro One and its shareholders taking into account their reasonable investor expectations in these circumstances;
- the fact that the shareholders reasonably anticipated all of the impugned tax savings would form part of Hydro One's valuation and offset the real and upfront cost of the Departure Tax;[57] and
- the notional carrying costs that Hydro One has incurred over the lengthy Appeal Period in addition to the Recovery Period durations.

49. As discussed in its response to AMPCO Interrogatory #1 and BOMA Interrogatory #1,[58] Hydro One views the present circumstance as analogous to commercial disputes that result in judicial pronouncements and determinations. While these types of circumstances are a normal part of the court's operations, a court would resolve such disputes by applying pre- and post-judgement interest as outlined in the *CJA*.

50. By allowing courts discretion to depart from a default rate, s. 130 ensures courts can provide fair compensation to a plaintiff for injury (without over-compensation or under-compensation) in light of economic realities.[59] Similar reasoning applies in these unique circumstances. The equitable principles of keeping aggrieved parties whole and the factors

---

57 Court Decision at paras 3-8, 19, 22-23, 36.

58 HONI DTA Remittance IRRs at pp. 18-19, 122-124, 131-133.

59 *Cobb* at paras 86-88 [**TAB 3**].

outlined pursuant to ss. 128 and 129 can assist the Board. Please see AMPCO Interrogatory #1 for a full discussion of the *CJA*.[60]

51. The Board has applied this principle in the past when it was reasonable to do so, and awarded interest at rates higher than the Board-prescribed rate, including in:

- Great Lakes Power Transmission LP - EB-2012-0300: Account 1575 (IFRS-CGAAP Transitional PP&E Amounts) is interest improved using the approved cost of capital rate;
- OEB Accounting Procedures Handbook Guidance - March 2015 Update: Accounts 1575 and 1576 (CGAAP Accounting Changes) reference a "rate of return" component, with no reference to the OEB prescribed interest rates;
- Report of the OEB - Regulatory Treatment of Pension and Other Post-employment Benefits Costs (EB-2015-0040): Several different interest rate options were considered in this consultation ranging from the Board's prescribed rate for deferral and variance accounts to a utility's WACC.

52. Other regulators have also applied this principle. For example, in the context of a prudency determination, the Alberta Utilities Commission exercised discretion and used the weighted average cost of capital of the utility to calculate recovery of carrying costs attributable to imprudently incurred costs.[61] Imprudently incurred costs are, by definition, costs determined to fall outside of the regulated rate-setting paradigm. Similar to the present circumstances, the issue concerned fairness in calculating the refund amount improperly collected through rates.

53. Here, the Divisional Court has clearly determined that the cost category does not pertain to rate setting and that all of the benefit from the misallocation should be provided to shareholders.[62] Applying a rate less than Hydro One's WACD would allow ratepayers to benefit from the misallocation due to the time value of money over the combined period. The total recovery amount by year, taking into consideration both the WACD and the Misallocated Tax Savings Amounts, is outlined in Table 4 of Hydro One's evidence.[63]

---

60 HONI DTA Remittance IRRs at pp. 122-124, 131-133.

61 AUC Decision 24805-D01-2020 [**TAB 9**]; Decision 3378-D010-2016 at I-10-02-01 [attached to VECC-02].

62 Court Decision at para 60.

63 HONI DTB Evidence at Table 4 (p. 10).

(v) The Board's Prescribed Interest Level is Not Appropriate

54. LPMA, AMPCO, and CCC argue that if a carrying cost is to be applied, the Board's prescribed interest rate is appropriate. LPMA submits the Original Decision and Court Decision were not the customer's fault and they should not be penalized. [64] LPMA cites RP-2002-0147/EB-2004-0004, where the Board held that customers should not be burdened by any interest charges on the amounts paid to the utility as the result of its mistake.

55. Respectfully, the error made with these submissions is the implied characterization of the Misallocated Tax Savings as being a proper ratemaking element. RP-2002-0147/EB-2004-0004 involved differences between actual and forecasted costs of natural gas that were included in the provision of rate-regulated service. The LPMA admits the case is not "exactly comparable";[65] Hydro One submits it is not comparable at all. The case has no relevance because this situation involves a cost component that falls outside the rate-making exercise and the misallocation resulted from the Board's error, not Hydro One's. Indeed, LPMA accepts that the costs are "a direct result of a Board error."[66] Hydro One's shareholders suffered the loss of the Misallocated Tax Savings and must be made whole.

56. Using the Board's prescribed interest levels is not appropriate. Hydro One's normal utility operations do not include the recovery of monies paid under errors of law and impacted by lengthy appeal periods. The current circumstances have resulted in a lengthy process where an amount that would have otherwise been payable to shareholders was erroneously determined to be included in the regulatory rate-setting paradigm. See Hydro One's response to Board Staff Interrogatory #3.[67] These facts are not part of Hydro One's normal utility operations.

57. LPMA offers no principled reason why the Board's prescribed interest rate is appropriate, except that it would result in lower costs to customers. But shareholder's interests must also be considered. As noted above, Hydro One has already attempted to minimize rate impacts on

---

64 But in the EB-2016-0160 proceeding, some customer intervener groups did, in fact, support the allocation of tax savings. CME, for example, supported SEC's views on allocating benefits to ratepayers: EB-2016-0160 CME Final Argument Submissions at paras 119-120. VECC stated a preference towards a rate decline by the value of the "tax shield": EB-2016-0160 VECC Final Argument Submissions at page 36. BOMA also supported allocating tax benefits to ratepayers: EB-2016-0160 BOMA Final Argument Submissions at pages 1-6.

65 LPMA Submissions at p. 3.

66 LPMA Submissions at pp. 3, 8.

67 HONI DTA Remittance IRRs at p. 18.

customers by not seeking to use the WACC or ROE for a carrying cost, not seeking compound interest, and proposing a longer Recovery Period.

(vi) Interest at the Rate of BoC + 150 bp is Not Appropriate

58. The Board's Staff agree the effects of the Original Decision cannot be fully reversed without applying a carrying cost, but state that the appropriate carrying charge rate is BoC + 150 bp rather than the approved WACD. Hydro One agrees with the Board's Staff that Hydro One's approved short-term rate is not appropriate because those rates reflect a three-month term.[68] Hydro One notes that BoC + 150 bp is actually lower than the actual short-term rate in 2020, so these two conclusions by the Board's Staff appear inconsistent.[69]

59. According to the Board's Staff, this matter is akin to Hydro One lending funds to ratepayers for a five-year period, from 2017 to 2021. VECC supports this proposal.[70] However, the Board's Staff have not submitted any support to establish that these are reasonable terms of a consensual loan. Simply, no company would fund a long-term debt with simple interest.

60. As discussed above in the preliminary comments, the loan analogy is not appropriate for two main reasons. First, this was a wrongful taking and is not akin to a consensual shareholder loan offered to ratepayers. Second, it was not on terms that Hydro One would have agreed to. Assuming this was a shareholder loan, the parties would have agreed at the outset to key terms such as principal, interest rate, and amortization period. Such a loan would be funded by Hydro One's entire 60% debt and 40% equity capital structure, thus attracting Hydro One's WACC. Hydro One agrees with PWU that such financing could not have been arranged through a five-year loan (let alone the combined 11-year period associated with the Appeal and Recovery Periods) at the CWIP rate.[71]

61. The Board Staff also submit that the majority of Hydro One's long-term debt reflected in its approved long-term debt rate is for a 30-year period, which is substantially longer than the five-year Appeal Period.[72] Hydro One disagrees. As noted above, the weighted average term to

---

68 Board Staff Submissions at p. 10.

69 In 2020, BoC + 150 bp = 2.10% and short-term rate = 2.75%. BoC + 150 bp is consistently lower (up to 0.59% lower as seen in 2017), except in 2019 when it was 0.01% higher than CWIP.

70 VECC Submissions at p. 5.

71 Power Workers' Union Submissions at p. 6.

72 Board Staff Submissions at p. 9.

maturity of Hydro One Inc.'s long-term debt is 14.8 years.[73] Hydro One's WACD is comprised of 93% long term debt and 7% short term debt; the 7% short term debt component lowers the average term of the debt. Further, Hydro One echoes PWU's remarks that the appropriate period is not five years, but the entire period beginning in 2017 when the wrongful taking occurred until 2027 when recovery is completed.[74] Hence, the average term of WACD is reasonably close to the combined period of 11 years.

62. The full name of the BoC rate being referenced herein is the Bank of Canada target for the overnight rate. An overnight rate is not appropriate for a period of 11 years. The 11-year combined period is also longer than the seven-year effective term of the FTSE Mid Term Corporate bond index which the prescribed CWIP rate is based on.[75]

63. Given the certainty of recovery resulting from the Court decision, the Board Staff say the Future Tax Savings are akin to a regulatory asset. They say the AUC's precedent for using BoC + 150 bp should apply here, as an alternative to the prescribed CWIP rate.

64. Hydro One disagrees. As noted above, the circumstances in this case do not involve any regulatory asset. Line losses were a proper element of the cost of rate-regulated service in Alberta.

(vii) Charging Zero Interest is Clearly Inappropriate

65. SEC, LPMA, CME, Energy Probe, AMPCO and CCC submit there should be no carrying cost applied to the Misallocated Tax Savings because: (a) Hydro One has not provided sufficient evidence that it incurred a higher level of debt; and (b) the Departure Tax including the DTA were financed by the issuance of common shares at zero cost.

66. SEC argues that neither the payment of the Departure Tax, nor the investment by the province in new equity, changed the deemed equity or the allowed ROE on that deemed equity. Hydro One's cost of capital, debt and equity, was identical immediately before and after the

---

73 Hydro One Inc. Management's Discussion and Analysis for the Years Ended December 31, 2020 and 2019 at p. 11: https://www.hydroone.com/investorrelations/Reports/2020%20YE%20HOI%20MDA.pdf

74 Power Workers' Union Submissions at p. 5.

75 https://research.ftserussell.com/products/FTSETMX/Home/Indices (Select Mid Term bond on page, then relevant figures are shown in the Corporate Bond row).

payment of the Departure Tax, and before and after the equity infusion. Since the cost of financing was zero, they say the appropriate carrying cost should also be zero.[76]

67. With respect, the submission that there was no 'cost' to Hydro One because the DTA was financed by the issuance of common shares is an unhelpful distraction. This argument has been rejected in the review and variance proceeding and the Court Decision.[77] How Hydro One's original shareholder financed the original liability has no bearing on the question of carrying costs. They are separate and distinct events. The fact is: (1) funds were taken from Hydro One and its shareholders and provided to ratepayers (the Misallocated Tax Savings); and (2) this occurred after incurrence of the PILS Departure Tax and Hydro One's initial public offering.

68. The arguments of SEC and its supporters are based on, at best, a fundamental misunderstanding of the Court Decision, and at worst, an attempt to re-litigate it. Notably, one of the errors made in the Original Decision was the finding that the transaction came at no real cost to Hydro One. A real cost was incurred, and the Misallocated Tax Savings represent a further real cost to Hydro One and its shareholders. It is the loss of that value which otherwise would have accrued to shareholders that the Board is concerned with in this proceeding, not the reconsideration of the Departure Tax and its financing.

69. LPMA submits the Divisional Court did not make any determination on compensation to HONI related to carrying costs. They say only matters concerning the implementation of its decision, including the calculations and method of recovering of the Misallocated Tax Savings, were remitted to the Board.[78] Hydro One disagrees. Carrying costs are a necessary part of determining the "method of recovering the Misallocated Tax Savings," because of the 'keep whole' principle. The issue of just compensation and interest is clearly within the Board's jurisdiction. Nowhere in the Court Decision is there any suggestion that the Board should, in its deliberations, preclude consideration of these real costs.

70. LPMA also argues that Hydro One did not have a deferral or variance account associated with the Misallocated Tax Savings. If such an account had been in place, they say interest at the prescribed interest rate, or some other Board-approved rate, could have been included as part of

---

76 SEC Submissions at 3.3.

77 Court Decision at paras. 3-8, 19, 22-23, 36, 60.

78 LPMA Submissions at p. 4.

the accounting order.[79] Hydro One submits no weight should be placed on the suggestion that a lower (or no) carrying cost should result from Hydro One not setting up a deferral account. It is unclear what this would have accomplished. Use of a deferral account is appropriate where the item is a cost of rate-regulated service and is characterized by forecast risk. The Divisional Court confirmed the Misallocated Tax Savings were not part of the rate-setting process. The Misallocated Tax Savings were not a variable amount and there was no forecast risk. The only uncertainty was that the item in question was the subject matter of an appeal, which is an exception to the principle against retroactive ratemaking and thus not requiring deferral account treatment in order to allow recovery.[80]

71. Additionally, LPMA says if the Misallocated Tax Savings cannot be characterized as a "regulatory" asset subject to deferral and variance account treatment, the Board is under no obligation to approve any carrying costs because it is outside the calculation of rates. In response, Hydro One submits the fact that the Misallocated Tax Savings fall outside the rate-setting exercise is exactly why a higher carrying cost is appropriate. Shareholders would theoretically expect recovery of an ROE; use of the approved WACD is a compromise.

PART IV. OTHER REPLY SUBMISSIONS

(f) Responses to SEC's Criticisms of Hydro One's Proposal

72. SEC argues that Hydro One's proposed methodology has many problems, including:

- **Front end load problem:** SEC says its table at p. 12 demonstrates that, under the Hydro One Proposal, Hydro One recovers more of the $3.532 billion from customers in the earlier years, and a declining amount in later years, contrary to good ratemaking practices and principles. Rather, Hydro One should recover an increasing amount each year, so any net annual impact on ratepayers is removed, and the front end load is also eliminated.[81]

- **Two sets of books problem:** SEC submits the Hydro One proposal will require Hydro One to keep two sets of books for decades. They say Hydro One has not made a proposal as to: (a) how it will track the drawdown of the amount owing by ratepayers, year by year; (b) how it will reflect recapture of depreciation, when it occurs; or (c) the treatment of gains

[79] LPMA Submissions at p. 4.

[80] *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437 [**TAB 13**].

[81] SEC Submissions at pp. 12-13.

on the sale of land, for which there was a capital gain of $1.026 billion that was included in the Departure Tax, but does not produce any CCA tax shelter.[82]

- **OEB oversight problem:** SEC argues the Board will face challenges in its decades of overseeing collection of the DTA, including: (a) annual savings (the calculation of the drawdown of the DTA each year for transmission and distribution); (b) access to information relating to Hydro One's tax planning and calculations which Hydro One has not disclosed; (c) dispositions (recapture of extra CCA, capital gains or reduced capital gains, retirements, terminal losses, and many other tax implications; (d) implications of changes in tax rates, tax rules, or the calculations applicable to the FMV Bump; and (e) IRM (in years in which Hydro One's rates are set on a formula basis, how will the DTA drawdown be calculated?).[83]

- **Finality problem:** SEC submits it is in the best interests of both Hydro One and customers to implement a recovery solution that is finite and known. Under the Hydro One proposal, there will be a difference between actual and deemed taxes as long as Hydro One continues to own even one of the assets that had a FMV Bump, i.e. likely 50-70 years.[84]

- **Rate impacts problem:** Finally, SEC submits the Hydro One proposal builds in a rate reduction over time, year after year for decades. SEC says this ignores two realities of ratemaking: (1) formulae (the industry average data used to establish Hydro One's formula rates will not actually reflect just and reasonable rates, because costs will be overstated by the formula); and (2) expectations (it is not wise to build into a utility's cost structure – different from all of its peers – a material annual decline in extra, notional costs that the Board needs to take into account for many years).[85]

73. Broadly, Hydro One submits that SEC is attempting to needlessly overcomplicate the recovery methodology. Hydro One responds to each concern as follows:

- **Front end load problem:** It is incorrect to say Hydro One is recovering more of the Deferred Tax Asset of $3.532 billion in the earlier years. Hydro One is not recovering the DTA from ratepayers, but rather, excluding it from the calculation of regulated income

82 SEC Submissions at p. 13.
83 SEC Submissions at pp. 13-16.
84 SEC Submissions at p. 17.
85 SEC Submissions at pp. 17-18.

taxes because it was determined by the Court to be entirely a shareholder benefit following the real cost paid by shareholders, namely the PILS Departure Tax. If there is any front end load problem, it is the fact that the PILS Departure Tax was paid up front, and shareholders recover this liability over time through use of higher annual capital cost allowance, which is essentially what comprises the DTA.

- **Two sets of books problem:** Regulated and unregulated aspects of a company do not constitute "problems". The stand-alone utility principle governs these circumstances. The fact that the DTA is excluded from Hydro One's regulated business and rates charged to customers will be accounted for in the normal course, as is the case with most sophisticated regulated entities that carry out businesses that are both regulated and non-regulated.

- **OEB oversight problem:** SEC incorrectly asserts that the Board should oversee the DTA. This view is inconsistent with the Court Decision. Why would the Board oversee a matter that falls outside the costs required to provide rate-regulated service?

- **Finality problem:** SEC either ignores or mischaracterizes the circumstances. The issue at hand is the recovery of past and present Misallocated Tax Savings. Hydro One is not seeking to recover the full amount of the DTA from ratepayers. Rather, it is trying to correct that very error and prevent it from being repeated going forward. Finality is achieved by the Board establishing a recovery methodology that is certain, transparent, and objective.

- **Rate impacts problem:** Hydro One does not understand SEC's allegations. Rate impacts associated with Hydro One's proposal have been thoroughly canvassed in this proceeding. The impacts are not indeterminate, but certain, transparent, and objective.

(g) Responses to SEC's Alternative Proposal

74. Hydro One recognizes that SEC has suggested an alternate method of recovery. SEC proposes that the Board use "traditional methods" of allowing the utility to recover a known amount from ratepayers over time, including: (1) a deferral account treating the grossed-up Future Tax Savings as a regulatory asset; and (2) a rate rider, calculated as if it started in 2016, to collect both the transmission and distribution Future Tax Savings from customers (subject to a true up for the period to the end of 2022 during which rates have already been established). The rate riders should increase at the same rate as the overall rates for the utility so they have no impact

on customer rates. SEC proposes recovering the full DTA amount – not only the Misallocated Tax Savings – over a 30-year period for transmission and 24-year period for distribution.[86]

75. SEC says its approach is more straightforward, achieves the same long term goal, and should be implemented by the Board. According to SEC, the advantages include: (1) a smoothed recovery pattern (no rate impact in the future); (2) simplified accounting; (3) simplified regulatory oversight; (4) a finite collection period; and (5) transparency due to no hidden rate impacts.[87]

76. In reply, Hydro One submits that SEC's proposal is inconsistent with the purpose and intent of this proceeding. It is based on factors and information that have been ruled to be out of scope, and attempts to go beyond the issues in this proceeding by developing a methodology that affects ratemaking methodologies well beyond the prescribed period.

77. Hydro One has considered whether it would assist the Board to provide a reply to each portion of SEC's submission. Frankly, Hydro One doubts that approach would add any value since SEC's proposal is based on a fundamentally flawed premise: that the role of this panel is to "re-engage the issues of the deferred taxes, and exercise its statutory jurisdiction to re-decide the issue within the strictures directed by the Court."[88]

78. Shockingly, SEC asserts that such a view is likely not in dispute and that PO#3 did not intend to preclude such reconsideration of the Original Decision. It is impossible to see how SEC could reasonably reach this conclusion given the Board's determinations in this proceeding and the Court Decision. The bulk of SEC's submission is effectively a re-litigation of how the DTA can be calculated and shared with ratepayers going forward, which is clearly outside the scope of this proceeding and impossible to reconcile with the Court's clear direction. SEC suggests that it has accurately "paraphras[ed] the words of the Court", but does so by attributing to the Court a quoted statement not found anywhere in the Court Decision.[89] These fictions are unhelpful.

79. The Court never suggested the Board should reopen the DTA hearing to reconsider the allocation factor. Rather, the Court determined that none of the deferred tax savings are for the

86 SEC Submissions at pp. 25-26.

87 SEC Submissions at pp. 28-29.

88 SEC Submissions at 1.2.5 (pp. 5-6) [underlining added].

89 SEC Submissions at 1.2.6 (p. 6).

benefit of ratepayers.[90] There are two implications from this determination: (1) no further amounts can be allocated in rates; and (2) amounts already provided to ratepayers must be returned.

80. In PO#1, the Board stated: "the current proceeding [is] to implement the clear direction of the Court that all of the future tax savings should be allocated to Hydro One's shareholders."[91] In PO#3, the Board reiterated: "the scope of this proceeding is to reallocate to Hydro One's shareholders any deferred tax savings allocated to ratepayers only for the 2017 to 2022 period."[92] SEC's submissions largely disregard those directions. They do so by making arguments disguised as alternative solutions but which are instead clear attempts to: (1) re-litigate the propriety of the allocation concept arising in the Original Decision; and (2) challenge the view that all Future Tax Savings must be returned to Hydro One's shareholders.

81. The errors of SEC's proposal begin with a mischaracterization of the relief which Hydro One sought in the Original Decision. SEC alleges that Hydro One "sought to recover all of the Deferred Tax Asset from customers in rates, resulting in proposed additions to rates for transmission and distribution over time (over and above actual taxes payable by the Applicant) that would be equal to the grossed-up amount of the Deferred Tax Asset, i.e. $3.532 billion."[93]

82. SEC's assertion is false. At no time did Hydro One seek to recover all of the DTA from customers in rates. SEC bases its assertion on the response Hydro One provided to the Board in the Original Decision proceeding at Undertaking J11.20. Yet, SEC conveniently ignores the premise underlying that undertaking: the Board asked Hydro One to <u>assume the deferred tax benefit is a regulated asset</u> for rate-making purposes.[94] Hydro One's response to the hypothetical assumption in Undertaking J11.20 reads:

> <u>If the deferred tax benefit in respect of the capital cost allowance ("CCA") benefit from the FMV Bump was treated as a regulated asset</u>, the deferred tax asset would be grossed up and there would be an offsetting regulated deferred tax liability for the same amount. The total grossed-up deferred tax asset on the FMV Bump would be estimated to be $3.53 billion ($2.595 billion / (1-.265)).[95]

---

90 Court Decision at para 60.

91 PO#1 at p. 2.

92 PO#3 at p. 7.

93 SEC Submissions at 1.1.1(e) (p. 3), citing EB-2016-0160, Undertaking J11.20.

94 The first sentence of EB-2016-0160, Undertaking J11.20 states: "On the assumption that this deferred tax benefit is a regulated asset."

95 EB-2016-0160, Undertaking J11.20 [underlining added].

83. There can be no confusion regarding Hydro One's position in this undertaking. It is misleading for SEC to suggest that Hydro One ever sought to treat the DTA in the Original Decision as being an amount included in its ratemaking methodology and recovered from ratepayers. Hydro One did not seek ratepayer recovery of the costs resulting from the change in tax regimes (i.e. the Departure Tax). In turn, it did not seek to pass on any of the benefits associated with the change in tax schemes, namely the DTA. Those are the fundamental and underlying facts which gave rise to the Court Decision.[96] Rather, Hydro One paid the Departure Tax, the DTA benefits accruing from that cost were wrongfully allocated to the ratepayers, and Hydro One now proposes to remove the DTA benefits from the calculation of regulatory taxes in accordance with the Court Decision. After removing the DTA benefits, the taxes to be recovered from ratepayers would relate solely to rate-making activities.

84. SEC's fundamental flaw becomes clear when SEC asserts its support for the Original Decision, falsely claiming that it "did not simply make a random 38% allocation, and leave everything else to the future. The Board made a decision of principle that the Future Tax Savings should be shared in a certain way, and that rates should be established to implement that sharing. This was, after all, an exercise of the Board's ratemaking jurisdiction."[97]

85. SEC's views are irrelevant because they do not take into account that the Original Decision was overturned by the Divisional Court. Regardless of SEC's interest in restoring the Original Decision, the Court's determination cannot be disturbed or ignored in this proceeding. The very essence of the Court Decision was the finding that the Future Tax Savings arising from the PILs Departure Tax should never be a part of the regulatory tax calculation nor included in the ratemaking process,[98] based on the long-established ratemaking principle of benefits follow cost and the stand-alone utility principle.

86. Building on this mischaracterization, SEC proposes an altogether new ratemaking framework for recovering $3.532 billion from customers over time and suggests this is an accurate portrayal of what the Court ordered. SEC's proposal assumes DTA amounts will continue to be allocated to ratepayers, and then refunded over the course of several decades. SEC's position clearly contradicts the Court's conclusion that no part of the benefit of the Future Tax Savings is

96 See e.g. Court Decision at para 4.

97 SEC Submissions at 1.2.8 (p. 6).

98 Notwithstanding the recovery of previously misallocated amounts.

allocable to ratepayers.[99] The only amounts which have been shared with ratepayers to date are those shown in Table 1, and it is these amounts that must be returned to shareholders.

87. SEC effectively seeks to dissuade the Board from following its own interpretation of the Court Decision, which should not be considered as a matter of argument in this proceeding. If SEC believes the Board was incorrect in establishing the issues and interpreting the Court Decision, it should have appealed the Court Decision (SEC was granted intervener status in the Divisional Court proceeding) and sought to review and vary PO#1 and PO#3. It chose not to pursue any of these avenues. This proceeding should not suddenly be converted into a 'back-door' exercise that attempts to do indirectly what SEC did not do directly.

88. It should not be lost on the Board that SEC's Motion,[100] which gave rise to the Board's determination in PO#3, sought information regarding drawdown amounts of the DTA resulting from the FMV Bump. SEC sought information regarding total tax savings amounts available in each year, allocations made as between shareholders and ratepayers, and information regarding continuity schedules in CCA for all depreciable assets subject to the FMV Bump. SEC justified its request for all this information so that it could prepare alternative methodologies for recovery.[101]

89. SEC's request was denied. In PO#3, the Board expressly noted that SEC's interrogatories SEC-2 through 6 were intended "to get on the record the full calculation of the Future Tax Savings in order to examine ways that the amount owing from ratepayers to shareholders can be repaid." The Board rejected that justification.

90. Despite the Board's direction, which could not have been clearer, SEC has nonetheless provided such an alternative approach, and continues to maintain that the Board should revisit ways for erroneous allocations to ratepayers to prevail – both in the short and long term. All of the information and calculations regarding the DTA and FMV Bump were determined to be out of scope in this proceeding. How then can SEC's newly framed "alternative solution" possibly fall within the ambit of the issues in this proceeding?

91. SEC's suggestion that the Future Tax Savings should be placed in a deferral account and treated as a regulatory asset is a complete rewrite of the process for calculating quantum. There is simply no support for SEC's suggestion. Future Tax Savings are not regulatory assets. Even

99 Court Decision at para 60.

100 SEC Notice of Motion dated December 10, 2020.

101 SEC Notice of Motion dated December 10, 2020 at para 24, footnote 12.

the Original Decision did not reach this conclusion. The Board should recall that SEC, in the Original Decision proceeding, requested a deferral or tracking account (presumably associated with regulatory asset treatment) which the Board expressly denied.[102] Even if those findings had been made, which they were not, the Original Decision was overturned by the Court. If the Board were to act on SEC's suggestion, it would ignore the Court's clear findings that Future Tax Savings are not part of the ratemaking process and are for the benefit of shareholders.

92. SEC ignores the stand-alone utility principle by trying to fuse regulated and non-regulated activities. The rate-setting process for regulated transmission and distribution activities must remain separate and distinct from shareholder activities that gave rise to deferred tax savings. That is the fundamental *ratio* of the Court Decision. The Court's application of the stand-alone utility principle must be respected in this proceeding.

93. These criticisms apply equally to SEC's proposal to use a rate rider and true-up. All these arguments are flawed because they are founded on a different exercise than the one at hand, namely the recovery of the Misallocated Tax Savings amounts over the Appeal Period.

94. Even assuming SEC's premises are not fundamentally flawed, Hydro One has three additional concerns with SEC's proposal. First, the proposal ignores the 'keep whole' principle and the lost time value of money. A 30-year amortization period with no carrying charge would erode all real economic value that is supposed to be returned to shareholders. Second, the notion of rate neutrality is a fiction. The reality is that ratepayers received the benefit over a four-year period and there is no reason why it should remain outstanding for three decades. Third, it does not address the intergenerational inequities that would arise with such a long Recovery Period. Hydro One would expect SEC to cite precedent to support such an extreme position, but they have provided none.

PART V. CONCLUSION

95. Hydro One has carefully considered the various positions put forth by the Board Staff and intervenors, but ultimately sees no reason to adjust its initial proposal. Only Hydro One's proposed carrying cost and Recovery Period balances the interests of shareholders and ratepayers in a fair, principled manner.

[102] Decision and Order EB-2016-0160 at p. 17.

96. Given the foregoing, Hydro One urges the Board to approve its application and the relief requested therein,[103] namely:

1) Declaration that the recovery of Misallocated Tax Savings Amounts is to be treated as an adjustment to base distribution rates;

2) Amendments to rate orders for the 2017-2018 Transmission Revenue Requirement (EB-2016-0160), the 2019 Transmission Revenue Requirement (EB-2018-0130), the 2018-2022 Distribution Revenue Requirement (EB-2017-0049) and the 2020-2022 Transmission Revenue Requirement (EB-2019-0082) to give effect to the following:

    a) Recovery of Misallocated Tax Savings Amounts commencing in 2021 or as determined by this Board and over a recovery period determined by the Board;

    b) Revisions to the method of calculating regulatory income taxes beginning in 2022 to remove the allocation of tax savings from future regulatory income tax;

3) Direction to Hydro One to reflect such revisions in its 2022 annual update filings for distribution and transmission;

4) Approval of a recovery period for the Misallocated Tax Savings Amount, and the applicable carrying charge, from 2021 to 2027 or over such other period as the Board may determine;

5) Approval of the WACD as the appropriate carrying charge, or such other carrying charge to be determined by the Board, to be applied to the annual portions of the Misallocated Tax Savings commencing from January 1, 2017 and continuing for the duration of the recovery period determined by the Board;

6) Approval of Transmission Misallocated Tax Savings Amounts to be included in Hydro One's rates revenue requirement to be included in the setting of 2021 through 2027 UTRs or over such other period as the Board may determine;

7) Approval of a Distribution base rate adjustment rate rider that will:

[103] HONI DTB Evidence at 4.0 (pp. 17-18).

a) Take effect within 30 days of receiving a decision in this matter, or such other date as the Board deems appropriate;

b) Be applied to Hydro One's distribution rate classes using the same cost allocator as was used to allocate the cost of taxes in the cost allocation model filed as part of Hydro One's last distribution application (EB-2017-0049);

c) Provide for the full recovery of the Distribution Misallocated Tax Savings Amount over a duration to be determined by the Board; and

d) Provide for the recovery of the carrying charge as determined by the Board and described herein;

8) Such other relief as Hydro One requests or the Board deems necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2021

Gordon Nettleton
McCarthy Tétrault LLP
Counsel for Hydro One Networks Inc.

FILE NO.: EB-2020-0194

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a proceeding on the Board's own motion to implement the decision of the Divisional Court dated July 16, 2020 in its File #200/19, and for an Order or Orders approving or fixing just and reasonable rates for Hydro One Networks Inc. for the transmission and distribution of electricity as of January 1, 2021;

BOOK OF AUTHORITIES OF HYDRO ONE NETWORKS INC.

Date: March 8, 2021

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6
Fax: 416-868-0673
Gordon M. Nettleton
gnettleton@mccarthy.ca
Tel: 403-260-3622
Counsel for Hydro One Networks Inc.

Hydro One Networks Inc.
483 Bay Street, South Tower, 8th Floor
Toronto ON M5G 2P5
Michael Engelberg
mengelberg@Hydroone.com
Tel: 416-645-6318

TO: Ontario Energy Board
P.O. Box 2319
26th. Floor
2300 Yonge Street
Toronto ON M4P 1E4

Tel: (416) 481-1967
Fax: (416) 440-7656

AND TO: Intervenors of Record

INDEX

Tab	Authority
1	*Reeves v Arsenault*, 1998 CarswellPEI 97, 168 Nfld & PEIR 251 (PEICA), leave to appeal to SCC refused (April 20, 2000).
2	SM Waddams, *The Law of Damages* (looseleaf ed) (Toronto: Thomson Reuters Canada Ltd, 2019).
3	*Cobb v Long Estate*, 2017 ONCA 717.
4	John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc., 2020).
5	*Black v The Queen*, 2019 TCC 135.
6	Decision and Rate Order EB-2019-0164 (2019 Uniform Transmission Rates) dated July 25, 2019.
7	Alberta Utilities Commission Decision 790-D-04-2016 dated September 28, 2016.
8	*ENMAX Energy Corporation v Alberta Utilities Commission*, 2019 ABCA 222.
9	Alberta Utilities Commission Decision 24805-D01-2020 dated July 6, 2020.
10	*Courts of Justice Act*, RSO 1990, c C-43.
11	*Hislop v Canada (Attorney General)*, 2004 CanLII 43774, 73 OR (3d) 641 (ONCA), aff'd 2007 SCC 10.
12	*Pilon v Janveaux*, 2006 CanLII 6190, [2006] OJ No 887 (ONCA).
13	*Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437.

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dyck v. Wilkinson | 2004 ABQB 731, 2004 CarswellAlta 1338, [2004] A.J. No. 1155, [2004] A.W.L.D. 618, 134 A.C.W.S. (3d) 620 | (Alta. Q.B., Oct 8, 2004)

1998 CarswellPEI 97
Prince Edward Island Supreme Court (Appeal Division)

Reeves v. Arsenault

1998 CarswellPEI 97, [1998] P.E.I.J. No. 95, 168 Nfld. & P.E.I.R. 251, 517 A.P.R. 251, 84 A.C.W.S. (3d) 500

Eustace Reeves, Appellant and Reginald Arsenault, Mary Kyra Lynn Gauthier and Herbert Gauthier and Home Insurance Company, Respondents

Carruthers C.J.P.E.I., Mitchell, McQuaid JJ.A.

Judgment: November 19, 1998
Heard: June 9, 1998
Heard: June 10, 1998
Heard: June 11, 1998
Heard: June 12, 1998
Heard: June 15, 1998
Docket: AD-0709

Proceedings: varying (1996), 145 Nfld. & P.E.I.R. 205 (P.E.I. T.D.); additional reasons at (1997), 44 C.C.L.I. (2d) 256 (P.E.I. T.D.); further additional reasons at (1997), 155 Nfld. & P.E.I.R. 328 (P.E.I. T.D.); and affirming (1997), 44 C.C.L.I. (2d) 256 (P.E.I. T.D.)

Counsel: *Patrick L. Aylward*, for the Appellant.
Eugene P. Rossiter, Q.C., for the Respondent, Arsenault.
Benjamin B. Taylor, Q.C., for the Respondent, Gauthier.
M. Lynn Murray, for the Respondent, Home Insurance.

Subject: Civil Practice and Procedure; Torts
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.i Entitlement to
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.ii Rate of
Remedies
I Damages
I.1 Causation
I.1.c Pre-existing conditions
I.1.c.ii Physical susceptibility

I.1.c.ii.B Aggravation of pre-existing condition
Remedies
I Damages
I.1 Causation
I.1.c Pre-existing conditions
I.1.c.ii Physical susceptibility
I.1.c.ii.C Miscellaneous
Remedies
I Damages
I.2 Special damages [pre-trial pecuniary loss]
I.2.a Expenditures
I.2.a.vii Miscellaneous
Remedies
I Damages
I.2 Special damages [pre-trial pecuniary loss]
I.2.b Past loss of income
I.2.b.v Loss of business profits
Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.B Future loss of earning capacity
Remedies
I Damages
I.3 General damages
I.3.b Non-pecuniary loss
I.3.b.ii Pain and suffering
I.3.b.ii.E Miscellaneous
Remedies
I Damages
I.14 Valuation of damages
I.14.b Mitigation
I.14.b.iii Appropriate medical treatment
Remedies
I Damages
I.15 Practice and procedure
I.15.e Evidence
I.15.e.iv Miscellaneous

Headnote

Damages --- Damages in tort — Personal injury — Pre-existing conditions — Physical susceptibility — General

Plaintiff brought action for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Defendants admitted liability and trial judge assessed damages at $247,848 having taken into account plaintiff's pre-existing medical condition — Medical problems suffered by plaintiff prior to first accident reduced defendant's liability 25 percent — Plaintiff appealed — Trial judge's apportionment between tortious and non-tortious causes of injury was not contrary to first principles of tort law outlined in Supreme Court of Canada decision of similar case released soon after trial — Supreme Court decision did not change law in any respect — Defendant still obligated to restore plaintiff to pre-accident position — Appropriate to consider pre-existing condition in assessing damages as injuries suffered in accidents aggravated plaintiff's suffering or hastened onset of symptoms — Trial judge did not err in taking evidence of pre-existing condition into account

when assessing responsibility of defendants for plaintiff's existing condition — Appeal dismissed — Cross-appeal for larger apportionment of responsibility to pre-existing condition was also dismissed.

Damages --- Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Expenditures — General

Plaintiff brought action for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Defendants admitted liability — Trial judge assessed damages for past and future losses due to wage expenses and vehicle expenses — Family members hired to help with physical component of business included two sons and cousin — Plaintiff appealed on ground that judge erred in calculating amount on basis of evidence of expert witness and not on basis of wages paid — Appeal was dismissed as trial judge did not err in law in reaching conclusion after assessing all relevant evidence — Defendants cross-appealed — Trial judge did not ignore or misunderstand evidence regarding cousin's wages or assess excessive damage awards for past and future vehicle expenses — Trial judge relied upon report prepared by expert witness which determined that loss due to additional wages and vehicle expenses had occurred although there was no loss of revenues — Loss due to additional wages and vehicle expenses decreased plaintiff's net return from business — No error was made by trial judge in determining on evidence that plaintiff required new truck in 1987 — Trial judge did not err in calculating additional capital costs of acquiring new vehicle or operating costs of second vehicle — Conclusion reached by trial judge regarding reason for hiring of cousin was not unreasonable given evidence — Cross-appeal was dismissed.

Practice --- Judgments and orders — Interest on judgments — Prejudgment interest — Rate of

Plaintiff commenced actions in 1988 and 1991 for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Defendants admitted liability and trial judge assessed damages at $247,848 having taken into account plaintiff's pre-existing medical condition and failure to mitigate — Trial judge awarded $73,388 interest based on rate of 2.5 percent — Interest awarded based on s. 50 of Supreme Court Act rather than s. 33 of Judicature Act due to date action commenced — Plaintiff appealed — Supreme Court Act was amended in 1995 by s. 12(f) of Provincial Affairs and Attorney General (Miscellaneous Amendments) Act — Amendment provided rate of interest and set date of claim entitlement to date cause of action arose — Amendment was not given retroactive or retrospective effect because plaintiff did not have vested right to prejudgment interest until order making defendants liable for payment was received — Order was not received and entitlement not gained until after amendment was in full force and effect — Appeal dismissed — Supreme Court Act, R.S.P.E.I. 1988, c. S-10. s.50 — Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 33 — Provincial Affairs and Attorney General (Miscellaneous Amendments) Act, S.P.E.I. 1995, c. 35, s. 12(f).

Damages --- Damages in tort — Personal injury — Prospective pecuniary loss — Diminution of earning capacity

Plaintiff commenced actions in 1988 and 1991 for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Defendants admitted liability — Plaintiff had suffered loss of earning capacity as ability to prospect for new customers by attendance at hockey games and horse racing was severely curtailed — Economic value of loss of earning capacity assessed at $50,000 by trial judge due to inability to precisely calculate losses — Assessment was reduced to $32,500 to account for pre-existing condition and failure to mitigate — Plaintiff appealed — Non-reliance by trial judge on plaintiff's lease portfolio to support loss of future earnings was not error as plaintiff had not made serious effort to establish lease portfolio — Damages for loss of future earning capacity compensated diminution of capacity to earn income not loss of assessable earnings so could not be precisely calculated — Plaintiff's appeal was dismissed.

Damages --- Valuation of damages — Duty to mitigate — Types of mitigation — Appropriate medical treatment

Plaintiff brought action for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Defendants admitted liability and trial judge assessed damages at $247,848 having taken into account plaintiff's pre-existing medical condition and failure to mitigate — Trial judge found that plaintiff had breached duty to mitigate and reduced damages 10 percent — Defendants cross-appealed on grounds that trial judge failed to give sufficient weight to evidence regarding plaintiff's failure to mitigate — Plaintiff had not been unreasonable in foregoing certain medical treatment — Plaintiff had not been fully informed of treatment and extent to which treatment would have assisted condition and minimized losses — Trial judge's conclusion was appropriate given evidence — No conclusive evidence was overlooked or misapprehended which would have established that trial judge erred in reaching conclusion — Cross-appeal was dismissed.

Damages --- Damages in tort — Personal injury — Principles relating to non-pecuniary loss — Pain and suffering

Plaintiff brought action for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Plaintiff diagnosed with myofascial pain syndrome — Plaintiff had worked extensive hours, had active family and social life and was avid sportsman prior to accident — Plaintiff could no longer sleep properly and had no energy — Defendants admitted

liability and damages for non-pecuniary losses were assessed at $75,000 — Non-pecuniary damages were reduced to $48,750 due to pre-existing condition and failure to mitigate — Defendants cross-appealed assessment — Consideration of some factors under two different heads of damages had resulted in partial double recovery — Trial judge erred in application of functional approach by not making comparison with appropriate cases within jurisdiction — Circumstances regarding loss of amenities of life not supported by evidence were considered by trial judge — Assessment of $75,000 as non-pecuniary damages for pain and suffering was set aside in favour of assessment of $45,000.

Damages --- Practice — Evidence — General

Plaintiff brought action for damages for personal and business losses due to injuries sustained in two motor vehicle accidents — Plaintiff diagnosed with myofascial pain syndrome — Defendants admitted liability and trial judge assessed damages at $247,848 having taken into account plaintiff's pre-existing medical condition and failure to mitigate — Defendants cross-appealed on grounds that trial judge erred in law in finding plaintiff credible and awarded excessive damages based on that finding — Cross-appeal on judge's finding of credibility was dismissed — Trial judge's finding on credibility one of fact and not interfered with on appeal unless manifest or palpable error was made by judge — Evidence presented by plaintiff found credible but unreliable and rejected by trial judge on several issues — Trial judge's assessment of plaintiff's credibility was made against backdrop of all evidence — No palpable or manifest error was made by judge in assessment of plaintiff's credibility.

Table of Authorities

Cases considered by *McQuaid J.A.*:

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182 (S.C.C.) — considered

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458 (S.C.C.) — applied

Beaton v. Prince Edward Island Bag Co. (July 14, 1998), Doc. GSS-3137 (P.E.I. T.D.) — referred to

Betts v. Reilly (January 7, 1997), Doc. F/C/407/95 (N.B. Q.B.) — considered

Betts v. Reilly (1997), 194 N.B.R. (2d) 226, 496 A.P.R. 226 (N.B. C.A.) — considered

Cairns v. Harris, 117 Nfld. & P.E.I.R. 216, 365 A.P.R. 216, [1994] 1 P.E.I.R. 53 (P.E.I. C.A.) — considered

Christensen v. Rivard (September 11, 1998), Doc. E-C-75-95 (N.B. Q.B.) — referred to

Corkum v. Sawatsky (1993), 118 N.S.R. (2d) 137, 327 A.P.R. 137 (N.S. T.D.) — considered

Deyoung v. Beaulieu (July 17, 1996), Doc. M/C/968/94 (N.B. Q.B.) — considered

Dillon v. Kelly (1996), 19 C.C.E.L. (2d) 177, 150 N.S.R. (2d) 102, 436 A.P.R. 102 (N.S. C.A.) — referred to

Dowe-Weadick v. Bolivar (1996), 180 N.B.R. (2d) 366, 458 A.P.R. 366 (N.B. Q.B.) — considered

Engel v. Kam-Ppelle Holdings Ltd., [1993] 2 W.W.R. 373, (sub nom. *Engel v. Salyn)* 147 N.R. 321, (sub nom. *Engel v. Salyn)* 105 Sask. R. 81, (sub nom. *Engel v. Salyn)* 32 W.A.C. 81, (sub nom. *Engel v. Salyn)* 99 D.L.R. (4th) 401, (sub nom. *Engel v. Salyn)* [1993] 1 S.C.R. 306, 15 C.C.L.T. (2d) 245 (S.C.C.) — referred to

Fletcher v. Manitoba Public Insurance Corp., 5 C.C.L.T. (2d) 1, (sub nom. *Fletcher v. Manitoba Public Insurance Co.)* 74 D.L.R. (4th) 636, [1990] 3 S.C.R. 191, (sub nom. *Fletcher v. Manitoba Public Insurance Co.)* 116 N.R. 1, (sub nom. *Fletcher v. Manitoba Public Insurance Co.)* 44 O.A.C. 81, (sub nom. *Fletcher v. Manitoba Public Insurance Co.)* [1990] I.L.R. 1-2672, 1 C.C.L.I. (2d) 1, 71 Man. R. (2d) 81, 30 M.V.R. (2d) 260, (sub nom. *Fletcher v. Manitoba Public Insurance Co.)* 75 O.R. (2d) 373 (note), (sub nom. *Fletcher c. Manitoba Public Insurance Co.)* [1990] R.R.A. 1053 (headnote only) (S.C.C.) — referred to

Gallant v. Dennis, (sub nom. *Dennis v. Gallant)* 88 Nfld. & P.E.I.R. 344, (sub nom. *Dennis v. Gallant)* 274 A.P.R. 344, [1991] 1 P.E.I.R. B-4 (P.E.I. C.A.) — referred to

Gunne v. Larter, 103 Nfld. & P.E.I.R. 323, 326 A.P.R. 323, [1992] 2 P.E.I.R. D-50 (P.E.I. T.D.) — referred to

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — considered

Janiak v. Ippolito, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1, 57 N.R. 241, 9 O.A.C. 1, 31 C.C.L.T. 113 (S.C.C.) — referred to

Johnston v. Murchison (1993), 112 Nfld. & P.E.I.R. 181, 350 A.P.R. 181 (P.E.I. T.D.) — distinguished

Johnston v. Murchison, 127 Nfld. & P.E.I.R. 1, 396 A.P.R. 1, [1995] 1 P.E.I.R. 51 (P.E.I. C.A.) — referred to

King v. Buckley (1997), 195 N.B.R. (2d) 1, 499 A.P.R. 1 (N.B. Q.B.) — referred to

Newman (Guardian ad litem of) v. LaMarche (1994), (sub nom. *Newman v. LaMarche)* 134 N.S.R. (2d) 127, (sub nom. *Newman v. LaMarche)* 383 A.P.R. 127 (N.S. C.A.) — considered
Paine v. Donovan (1994), 118 Nfld. & P.E.I.R. 91, 369 A.P.R. 91 (P.E.I. T.D.) — distinguished
Smith v. Stubbert (1992), 117 N.S.R. (2d) 118, 324 A.P.R. 118 (N.S. C.A.) — considered
Teno v. Arnold, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 19 N.R. 1, 83 D.L.R. (3d) 609 (S.C.C.) — referred to
Terris v. Crossman, 129 Nfld. & P.E.I.R. 181, 402 A.P.R. 181, [1995] 1 P.E.I.R. 362 (P.E.I. T.D.) — referred to
Terris v. Crossman, 139 Nfld. & P.E.I.R. 87, 433 A.P.R. 87, [1996] 1 P.E.I.R. 362 (P.E.I. C.A.) — referred to
Thornton v. Prince George Board of Education, [1978] 2 S.C.R. 267, 3 C.C.L.T. 257, [1978] 1 W.W.R. 607, 19 N.R. 552, 83 D.L.R. (3d) 480 (S.C.C.) — referred to

Statutes considered:

Judicature Act, R.S.P.E.I. 1974, c. J-3
Generally — referred to
Supreme Court Act, S.P.E.I. 1987, c. 66
Generally — referred to

s. 50(1) [rep. & sub. 1995, c. 35, s. 12(f)] — considered

s. 50(2) [rep. & sub. 1995, c. 35, s. 12(f)] — referred to

s. 52 — referred to
Supreme Court Act, R.S.P.E.I. 1988, c. S-10
Generally — considered

Rules considered:

Rules of Civil Procedure, OIC EC 492/90
Generally — referred to

APPEAL by plaintiff from decisions reported at (1996), 145 Nfld. & P.E.I.R. 205, (P.E.I. T.D.) and (1997), 44 C.C.L.I. (2d) 256, (P.E.I. T.D.) assessing damages and awarding interest; CROSS-APPEAL by defendants from damage assessment.

***McQuaid J.A.*:**

Facts and Background

1 The appellant, Eustace Reeves, was involved in two motor vehicle accidents. On July 30, 1986, his vehicle collided with a vehicle driven by the respondent, Kyra Gauthier and owned by the respondent, Hebert Gauthier. The appellant suffered injuries to his neck which eventually caused myofascial pain. On April 18, 1990, the appellant's vehicle collided with a vehicle owned and driven by the respondent, Reginald Arsenault. This accident caused aggravation to the injuries suffered in the 1986 accident. The appellant brought an action against the respondents claiming damages for personal losses as well as losses incurred by his business which he operated as a sole proprietorship under the name and style of "Reeves Soft Water." Liability for both accidents was admitted by the respondents and the matter proceeded to the trial judge for an assessment of damages.

2 The trial judge delivered written reasons on October 26, 1996, [See: (1996), 145 Nfld. & P.E.I.R. 205 (P.E.I. T.D.)] awarding the appellant damages in the amount of $247,848.39, after making adjustments for the appellant's pre-existent medical condition and for the failure of the appellant to mitigate his damages. The respondents, Gauthier, were found responsible for 90% of the appellant's losses, while the respondent, Arsenault, was found responsible for the remaining 10%. There has been no appeal or cross-appeal from this apportionment. The particulars of the damages awarded are as follows:

-	General Non-Pecuniary	$48,750.00
-	Cost of Repairs - 1986 Accident	1,117.50
-	Cost of Repairs - 1990 Accident	673.20
-	Past Medical Expenses - See reasons of March 7, 1997	7,975.89
-	Future Medical Expenses	17,313.40
-	Past Vehicle Expenses	33,085.00

-	Future Vehicle Expenses	31,596.95
-	Past Wage Expenses	40,595.75
-	Future Wage Expenses	34,240.70
-	Loss of earning capacity	32,500.00
-	In Decision October 23, 1996, the total amount awarded was $245,713.52 but it was corrected in March 7, 1997, Decision to be:	$247,848.39.

3 On March 7, 1997, the trial judge delivered written reasons [See: (1997), 152 Nfld. & P.E.I.R. 350 (P.E.I. T.D.)] awarding interest with respect to each particular of the damage award. The particulars of the interest awarded is as follows:

-	General Non-Pecuniary	$ 12,027.89
-	Cost of Repairs - 1986 Accident	1,144.44
-	Cost of Repairs - 1990 Accident	395.07
-	Past Medical Expenses	4,470.98
-	Past Vehicle Expenses	17,458.32
-	Past Wage Expenses	4,820.49
-	Loss of Earning Capacity (1986-'90)	12,091.78
-	Loss of Earning Capacity (1990-'96)	20,979.86
-	Total Interest:	$ 73,388.83.

4 On July 10, 1997, the trial judge delivered another set of written reasons [See: (1997), 155 Nfld. & P.E.I.R. 328 (P.E.I. T.D.)] with respect to the matter of costs. The particulars are not relevant as this decision is not under appeal.

5 The appellant subsequently filed an appeal from the trial judge's assessment of damages and the interest awarded. The respondents, including Home Insurance Company, filed a joint cross-appeal from the assessment.

6 The appellant appeals on four grounds. They may be summarized as follows:

> (1) the trial judge erred in making a deduction in the amount of damages to be paid by the respondents on the basis that the appellant had a pre-existing condition;
>
> (2) the trial judge erred in calculating the replacement labour expense on a piece meal basis rather than using actual replacement cost;
>
> (3) the trial judge erred in computing interest on the basis of the ***Supreme Court Act***, R.S.P.E.I. 1988 Cap. S-10 as amended in May 1995;
>
> (4) the trial judge erred in the assessment of the diminishment of income in that he chose a conventional figure instead of computing the diminishment of income from the financial information set forth in the evidence.

7 The respondents base their cross-appeal on seven grounds and they are as follows:

> (1) That the Learned Trial Judge erred in law in finding the Plaintiff credible, and awarded excessive damages based on this finding of credibility, when such finding was contrary to the evidence presented and to the Learned Trial Judge's own findings on other matters;
>
> (2) That the Learned Trial Judge erred in law in awarding damages for lost wages and vehicle expenses when, in awarding same, the Learned Trial Judge was, in fact and in essence, awarding damages for loss of earnings contrary to the Learned Trial Judge's finding that there was no proof of loss of earnings;
>
> (3) That the Learned Trial Judge erred in law in awarding future medical expenses contrary to the evidence presented;

(4) That the Learned Trial Judge erred in law in making damage awards which were excessive and inconsistent with the evidence presented, considering all of the evidence presented at trial;

(5) That the Learned Trial judge erred in law in failing to give sufficient weight to the Plaintiff's pre-existing conditions and other contributing causes without regard to the 1986 and 1990 motor vehicle accidents;

(6) That the Learned Trial judge erred in law in failing to give sufficient weight to evidence in relation to the Plaintiff's failure to mitigate his damages; and

(7) That the Learned Trial Judge erred in making findings of fact not supported by the evidence, which findings affected his assessment of damages.

Disposition

8 I would dismiss the appeal and allow the cross-appeal in part. In disposing of both in this manner, I will first address the grounds of appeal and where any of them relate to a ground of the cross-appeal, I will address it as well. I will then address the remaining grounds of the cross-appeal. Rather than use descriptive phrases like "appellant by cross appeal" or "respondent by cross-appeal," I will restrict my description of the parties to "the appellant" and "the respondents," as it goes without saying (at least not more than once) that the appellant has filed a notice of appeal to which the respondents have responded, and the respondents have filed a cross-appeal to which the appellant has responded.

Grounds of Appeal

The trial judge erred in making a deduction in the amount of damages to be paid by the respondents on the basis that the appellant had a pre-existing condition.

9 The trial judge found the appellant suffered medical problems prior to the 1986 accident and that he was not then in 'good health'. Specifically at para.92 the trial judge stated:

Given the plaintiff's history and the medical evidence presented, I am satisfied on a balance of probabilities that prior to the 1986 motor vehicle accident the plaintiff suffered a pre-existing condition which was the active source of damage. In the circumstances, therefore, apportionment applies.

10 The trial judge went on to find at para.96 that the condition of the appellant prior to the 1986 accident was 25% responsible for his present condition.

11 The appellant asserts that the apportionment made by the trial judge between the tortious and the non tortious causes for his injury were contrary to the principles set forth in the Supreme Court of Canada's decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), delivered after the trial judge's decision. The respondents, in responding to this ground of appeal, assert the trial judge properly applied the law and the principles upon which *Athey* was decided. In their cross-appeal, however, the respondents argue the trial judge should have apportioned a larger percentage to the pre-existing condition or non tortious cause of the appellant's condition.

12 As the decision in *Athey* followed the trial judge's decision, I will review its impact on the principles with respect to the apportionment of damages between tortious and non tortious causes of a plaintiff's condition. Mr. Athey was a 43-year-old autobody repairman and shop manager with a history of minor back problems. He was injured in two motor vehicle accidents, the first occurred in February 1991 and the second in April of the same year. After the first accident, he began to suffer pain and stiffness in his neck and back. He underwent physiotherapy and chiropractic treatments and was on the way to recovery when the second accident occurred. Although his second accident was much more serious, he was not severely injured. The physiotherapy and the chiropractic treatments continued, and because he showed some improvement and appeared to be on the way to recovery, his doctor suggested he take up his regular exercise routine. While warming up at his local health club, he "popped" his back, and it was discovered he had herniated a disk which was ultimately treated by surgery. He made a good,

but not excellent, recovery and obtained alternative employment with no physical duties and less pay. He brought an action claiming the herniated disk was caused solely by the injuries sustained in the accidents. He was unsuccessful both at trial and on appeal; however, he was successful in the Supreme Court of Canada.

13 The trial judge found that the injuries suffered in the accidents contributed in some minor way to the disc herniation. However, they were a minor contributing factor, and she fixed the "accidents causation factor" at 25%. Before the British Columbia Court of Appeal Mr. Athey's counsel argued that, because the trial judge made a finding the disc herniation was caused, to some extent, by the injuries suffered in the accidents, he was entitled to receive 100% of the damages resulting from the disc herniation. The Court of Appeal was of the view it could not address this argument because it was not put to the trial judge and the Court dismissed the appeal.

14 The Supreme Court of Canada rejected the respondent's argument that where a loss is created by tortious and non tortious causes, it is possible to apportion the loss according to the degree each contributed to the cause of the plaintiff's injury. Major J., writing for the Court, found that if the defendant's negligence has caused or contributed to the injury or condition of which the plaintiff complains and which is the cause of his or her disability, the defendant will be 100% responsible. At para.20 he stated as follows:

> This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

15 The reasoning in *Athey* is founded on the "first principle" of tort law, this being that the plaintiff must be restored to his or her position absent the negligence of the defendant. Nothing more, nothing less. To make this determination, it is necessary to consider the plaintiff's position not only after the accident, but as well before the accident, referred to by Major J. as the plaintiff's "injured position" and the plaintiff's "original position." If the injury or condition complained of by the plaintiff is a product of the negligence of the defendant, it has no connection to the plaintiff's "original position" but is related solely to the plaintiff's "injured condition" and there is no apportionment between tortious causes and non tortious causes for the injury or condition.

16 Major J. discusses the concepts of "thin skull" and "crumbling skull." He states that the former is a situation which makes the negligent defendant liable even if the plaintiff's pre-existing condition made him or her more susceptible to the injury or harm complained of. On the other hand, "crumbling skull" is a rule which recognizes that a pre-existing condition was inherent in the plaintiff's "original position" and the negligent defendant need not put the plaintiff in a better position he or she was in before the accident. Specifically, he stated at para.35:

> ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: ***Graham v. Rourke***, ***supra***; ***Malec v. J.C. Hutton Proprietary Ltd.***, ***supra***; ***Cooper-Stephenson***, ***supra***, at pp.851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

17 When applying *Athey* it is significant to appreciate the trial judge did not make a finding that there was any "measurable risk" the disc herniation suffered by the plaintiff would have occurred absent the actions of the tortfeasor. As Major J. points out at para.33, the disc herniation was the product of the accidents and thus does not affect the assessment of the defendant's original position. Indeed, he says at para.47 that the *Athey* case "... involves a straightforward application of the thin skull rule."

18 *Athey* does not change the law in any respect. The concepts of thin skull and crumbling skull, which are concepts firmly tethered to the basic tenet of tort law which is: a plaintiff is to be restored to the position he or she was in before the actions of

the tortfeasor, remain very much alive. It is not the role of tort law to punish negligent actors nor is it the role of tort law to under compensate plaintiffs because they may be in an especially vulnerable position because of a pre-existing condition. Unless the evidence establishes there is some measurable risk the plaintiff would have the injury or condition complained of, absent the negligence of the defendant, then the injury or condition is completely attributable to the negligence of the defendant and there is to be no apportionment for the non tortious causes of the condition. If, independent of the accident, there is a measurable risk the injury or condition would have resulted, there is to be apportionment between the tortious and non tortious causes.

19 The important point from *Athey* and what is crucial to its application in other cases is that on its facts it is a case where the court was faced with both tortious and non tortious causes for the disc herniation, neither of which independently were capable of producing the injury. Therefore, the ratio of the case is limited to a situation where the court is faced with a situation in which there might be multiple causes for the harm, neither of which independently is sufficient to produce the harm and in such situations, the tortfeasor is not to escape liability simply because one of these causes emanates from the plaintiff. In other words, if the plaintiff did not have a pre-existing condition which by itself was capable of causing the harm complained of by the plaintiff, then the amount of the damages is not to be reduced simply because the plaintiff may have had some condition. On the other hand, if the plaintiff had a pre-existing condition which independently would create some measurable risk the harm might result, absent the negligence, the amount the defendant is to pay because of his negligence may be reduced on the basis of that basic principle that the defendant is only obligated to restore the plaintiff to the position he was in prior to the accident.

20 In the case at Bar the trial judge made a finding that the pre-existing condition of the appellant, independently, was a partial cause of the appellant's present condition, myofascial pain syndrome. Accordingly, he reduced the liability of the respondents by 25%. In effect, the trial judge found that tortious causes contributed 75% toward the appellant's present condition and that non tortious causes contributed 25% toward the condition. The trial judge, in essence, was reducing the responsibility of the respondents for the appellant's present condition because the appellant would have suffered myofascial pain syndrome, absent their negligence. The trial judge found that the injury suffered in the accidents caused by the negligence of the respondents aggravated the suffering of the appellant or hastened the onset of the symptoms, which would have eventually displayed themselves in any event. Accordingly, it was appropriate to consider the pre-existing condition in assessing damages. If, on the other hand, the only effect of the pre-existing injury was to make the myofascial pain syndrome more severe than it really would have been, absent the negligence, then the respondents would have been 100% liable for the resulting damage.

21 There was evidence the trial judge was entitled to accept and which he did accept, that absent the accident and the negligence of the defendants, the appellant, because of his pre-existing condition, may have developed myofascial pain syndrome. This evidence also entitled him to find, as he did, that the injuries suffered by the appellant as the result of the respondents' negligence aggravated the appellant's pre-existent condition and hastened the onset of symptoms which would have presented themselves in any event. Accordingly, the trial judge did not err in taking this fact into account when assessing responsibility of the respondents for the appellant's present condition and thereby reduced the amount the appellant was entitled to by 25%. This ground of appeal fails.

22 In their cross-appeal the respondents argue that, given the overwhelming evidence with respect to the severity of the appellant's pre-existing condition, the trial judge erred in reducing the amount of the defendants' responsibility by only 25%. This ground of the cross-appeal raises a question of fact, and as I am not convinced the trial judge made palpable and overriding errors in his assessment of the evidence in this regard, thereby giving rise to an error of law, this ground of the cross-appeal fails.

The trial judge erred in calculating the replacement labour expense on a piece meal basis rather than using actual replacement cost.

23 The appellant had claimed at trial for past wage expense in the amount of $146,550 and the loss of future wage expense in the amount of $190,167. The basis of this claim was that from the date of the first accident in 1986, he was unable to perform the physical aspects of his business, primarily the lifting and installation of water softeners, and consequently he had to hire additional staff to perform these functions which were an additional cost to the business for which he should be compensated. These additional wages were paid by the appellant to family members, namely, his wife, his two sons and a cousin. The claim

TAB 2

Title Page

CANADA LAW BOOK

THE LAW OF DAMAGES

Looseleaf Edition

S.M. WADDAMS

M.A., LL.B., LL.M., S.J.D.

Of the Ontario Bar
Professor of Law, University of Toronto

THOMSON REUTERS®

Copyright Page

A cataloguing record for this publication is available from Library and Archives Canada

ISBN 0-88804-124-1

Printed in the United States by Thomson Reuters

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, ON
M1T 3V4

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

07 MAR 2021

Law of Damages

I. INTRODUCTION

Many kinds of legal wrongs cause a loss of property to the plaintiff. The commonest cases are negligence, destruction of goods, conversion, non-delivery by a seller, and loss by a carrier or bailee. Classified as legal wrongs, these instances seem to have little in common, crossing the borderlines between contract and tort, negligence and trespass, and sale and service contracts. However, from the point of view of compensation, they all raise a single issue: how to provide in money a substitute for property that the plaintiff does not have, but would have had but for the defendant's wrong. **1.10**

It is common in such cases that the plaintiff complains not only of the loss of property but also of the loss of its use. Had the wrong not been done, the plaintiff would have had, at the time of the complaint, not only capital wealth represented by the property, but an accretion to wealth represented by profitable use of the property. It is often difficult, as the subsequent discussion will show, to draw a clear line between these two claims, for the capital value of property reflects the value of its anticipated use. Thus, if instant reparation could be made for the plaintiff's loss, and a perfect substitute instantly acquired, there would never be a claim for loss of use. But reparation for legal wrongs is never made instantly, and substitutes are rarely perfect. Consequently, compensation may be usefully regarded as containing two elements: a substitute for loss of the value of the property and a substitute for the loss of the opportunity to use it. **1.20**

(3) — Interest at common law

7.390 The leading case on interest as damages is generally taken to be *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co*.[85] The issue arose out of a dispute as to amounts due from one railway to another under a joint operating agreement. The statute then in force in England was *Lord Tenterden's Act* of 1833, which empowered the jury to award interest, in certain circumstances, on "all debts or sums certain, payable . . . by virtue of some written instrument".[86] The House of Lords held that the money due under the operating agreement did not fall within these words, because the amount due depended on the state of accounts between the parties. Further, it was held that no interest was recoverable at common law. Lord Herschell, though considering that justice required the award of interest, held that the question had been settled in *Page v. Newman*,[87] though he expressly said that he was dissatisfied with the reasons given in that case.[88] Of the statute he said: "Speaking for myself, they [the statutory limits] seem to be too narrow for the purposes of justice."[89] Older cases had taken a more generous view but Lord Herschell concluded: "I do not think it would be possible nowadays to reopen the question, even in this House, and to hold that interest under such circumstances could be awarded."[90]

7.400 This deference to settled law was typical of the period. Subsequently a more flexible view has prevailed. In *Trans Trust S.P.R.L. v. Danubian Trading Co*.,[91] where damages were allowed for loss caused by failure to provide a commercial credit, Denning L.J. said:

> It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the introduction of the recent statute: see *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.;* but the ground was that interest was "generally presumed not to be within the contemplation of the parties" . . . That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such a loss may well be recoverable.[92]

Romer L.J. in the same case said:

> I am not, as at present advised, prepared to subscribe to the view that in no case can damages be recovered for non-payment of money; I agree with Denning L.J. that in certain circumstances such damages might well be recoverable provided that the loss occasioned to the plaintiff by the defendant's default was reasonably within the contemplation of the parties when the bargain between them was made.[93]

These dicta were taken up in *Wadsworth v. Lyddall*[94] where, because of the defendant's delay in paying money, the plaintiff was compelled to borrow. It was held that, even though the 1934 statute[95] governing interest did not apply, the plaintiff could recover the interest charges incurred as damages. The *London, Chatham & Dover* case was distinguished as not having been concerned with a claim for special damages. Brightman L.J. said:

> . . . the House of Lords was not concerned with a claim for special damages. The action was an action for an account. The House was concerned only with a claim for interest by way of general damages. If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant's failure to perform his obligation under a contract, and such damages are not too remote on the principle of *Hadley v. Baxendale* (1854), 9 Exch. 341, [156 E.R. 145], I can see no logical reason why such special damages should be unrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation.[96]

7.410 A very similar view has been taken in Nova Scotia where, at the time, a statute based on *Lord Tenterden's Act* was still in force. In *Atlantic Salvage Ltd. v. City of Halifax*,[97] interest was allowed on a claim against a harbour authority for services rendered in cleaning spilt oil. Cooper J.A. considered that the law of Nova Scotia differed from the law of England in 1893, relying on an earlier case where compensation had been awarded for interest charges incurred by the plaintiff, when borrowing money to repair damage for which the defendant was responsible.[98] In the *Atlantic Salvage* case, it was sufficient to found the plaintiff's claim for interest that it had "throughout the relevant period [been] indebted to its bank"[99] in a sum exceeding the amount of the claim. The net effect of these cases appears to be that interest can be allowed at common law if the plaintiff can bring the claim as one of special damages. It will, it seems, be sufficient if the claimant actually incurs interest charges by borrowing money on the defendant's default or if the plaintiff owes money to anyone equal to the amount of the claim and is paying interest on it.[100]

7.420 In Admiralty, as is so often the case on damage questions, the matter was satisfactorily settled at an early date. In *The "Amalia"* Dr. Lushington said:

> Interest is not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money it is a loss in the common sense of the word, but a loss of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision.[101]

In *The "Pacifico" v. Winslow Marine Ry. & Shipbuilding Co*.[102] in a passage later approved by the Supreme Court of Canada,[103] Maclean, J. said:

> The principle adopted by the Admiralty Court in its equitable jurisdiction ... as founded upon the civil law, is that interest was always due to the obligee when payment was delayed by the obligor, and that, whether the obligation arose *ex contractu* or *ex delicto*. It seems that the view adopted by the Admiralty Court has been, that the person liable in debt or damages, having kept the sum which ought to have been paid to the claimant, ought to be held to have received it for the person to which the principle is payable. Damages and interest under the civil law is the loss which a person has sustained, or the gain he has missed.[104]

The Supreme Court of Canada in *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd*.[105] also cited with approval a statement of Lord Esher in *The "Baron Aberdare"*[106] defending the practice of the Admiralty Division as "more just than the common law rule". There would seem to be some encouragement here for the common law to follow the lead of Admiralty.[107]

7.425 In *Hungerford v. Walker*,[107a] the Australian High Court held that compensation for loss of use of money was available at common law and in *Bank of America Canada v. Mutual Trust Co*.[107b] the Supreme Court of Canada, in holding there was power at common law to award compound interest, established by implication that simple interest also would, in an appropriate case, be awarded at common law. The House of Lords came to a similar conclusion in *Sempra Metals Ltd. v. Her Majesty's Commissioners of Inland Revenue*,[107c] but this case has been overruled on this point.[107d]

FOOTNOTES

[85] *Supra*, footnote 78.

[86] *Civil Procedure Act, 1833*, s. 28. See also the comments of Morden J.A. on *Lord Tenterden's Act* in *Lister (Ronald Elwyn) Ltd. v. Dayton Tire Canada Ltd*. (1985), 1985 CarswellOnt 1034, 52 O.R. (2d) 88 (C.A.).

[87] (1829), 9 B. & C. 378, 109 E.R. 140, followed in *Hawker Industries Ltd. v. H.B. Nickerson & Sons Ltd*. (1970), 1970 CarswellNS 139, 16 D.L.R. (3d) 459 (N.S.S.C.). In Newfoundland, where there was no statutory provision, it was held that interest is payable only by agreement: *Pratt Representatives (Nfld.) Ltd. v. Hostess Food Products Ltd*., (1978), 1978 CarswellNfld 61, 18 Nfld. & P.E.I.R. 412 (Nfld. S.C.T.D.).

[88] *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co*., [1893] A.C. 429 (H.L.), at p. 440.

[89] *Supra*, at pp. 440-1.

[90] *Supra*, at p. 441.

[91] [1952] 2 Q.B. 297 (C.A.).

[92] *Supra*, at p. 306. In *Compania Financiera Soleada SA v. Hamoor Tucker Corp. Inc*., [1981] 1 All E.R. 856 (C.A.), extravagant interest charges incurred by the plaintiff were held to be too remote.

[93] *Trans Trust S.P.R.L., supra*, footnote 91, at p. 307.

[94] [1981] 1 W.L.R. 598 (C.A.), approved by the House of Lords in *President of India v. La Pintada Compania Navigacion S.A*., [1985] A.C. 104 (H.L.). See also *President of India v. Lips Maritime Corp*., [1988] A.C. 395 (H.L.); *Armstrong v. Canada (Attorney General)*, 1998 CarswellMan 62, [1998] 6 W.W.R. 537 (Man. C.A.), at p. 543, citing this work.

[95] *Law Reform (Miscellaneous Provisions) Act, 1934*.

[96] *Wadsworth v. Lyddall, supra*, footnote 94, at p. 603.

97 (1978), 1978 CarswellNS 69, 94 D.L.R. (3d) 513 (N.S.S.C. App. Div.).

---

98 *Leslie R. Fairn & Associates v. Colchester Developments Ltd*. (1975), 1975 CarswellNS 58, 60 D.L.R. (3d) 681 (N.S.S.C. App. Div.), followed in *Municipal Spraying & Contracting Ltd. v. J. Harris & Sons Ltd*. (1979), 1979 CarswellNS 130, 35 N.S.R. (2d) 237 (S.C.T.D.), and in *Champion v. Quick-Pik Transfers Ltd*. (1981), 1981 CarswellPEI 45, 121 D.L.R. (3d) 720 (P.E.I.S.C.), where the plaintiff owed interest to contractors who repaired the damage for which the defendant was responsible.

---

99 *Atlantic Salvage Ltd., supra*, footnote 97, at p. 528.

---

100 *Hungerfords v. Walker* (1989), 171 C.L.R. 125 (Australia H.C.), at para. 24, citing this passage from an earlier edition. In the *Municipal Spraying* case, *supra*, footnote 98, at p. 247, the court pointed out that it was anomalous to allow interest only to a plaintiff who had an overdraft.

---

101 *The "Amalia"* (1864), 5 New Rep. 164*n*.

---

102 1924 CarswellNat 48, [1925] Ex. C.R. 32, [1925] 2 D.L.R. 162. See also *Canadian Brine Ltd. v. The "Scott Misener"* [1962] Ex. L.R. 441 at p. 452, *per* Wells D.J.A.

---

103 *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd*., 1971 CarswellNat 387, [1972] S.C.R. 52 at p. 57, 20 D.L.R. (3d) 432 at pp. 435-6.

---

104 *The "Pacifico," supra*, footnote 102, at pp. 37-8 Ex. C.R., p. 167 D.L.R.

---

105 *Supra*, footnote 103, at p. 60 S.C.R., p. 438 D.L.R. See also *Bell Telephone Co. of Canada — Bell Canada v. The Ship "Mar-Tirenno"* 1974 CarswellNat 27, [1974] 1 F.C. 294, 52 D.L.R. (3d) 702 (T.D.), affd 1976 CarswellNat 6, [1976] 1 F.C. 539, 71 D.L.R. (3d) 608*n* (C.A.); *Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co*., 1993 CarswellBC 139, [1993] 7 W.W.R. 112, 79 B.C.L.R. (2d) 379 (C.A.); *Omega Salmon Group Ltd. v. "Pubnico Gemini" (The)*, 2007 CarswellBC 73, [2007] 6 W.W.R. 428 (B.C.C.A.).

---

106 (1888), 13 P.D. 105 (C.A.).

---

107 As in other areas of the law of damages. See 1.210-1.270, 1.1830-1.2040, *supra*. However, in *Swiss Bank Corp. v. Air Canada*, 1981 CarswellNat 129, [1982] 1 F.C. 756, 129 D.L.R. (3d) 85 (T.D.), affd 1987 CarswellNat 197, [1988] 1 F.C. 71, 44 D.L.R. (4th) 680 (C.A.), the Federal Court held that it had no power to award interest in a non-admiralty case and, in *President of India v. La Pintada Compania Navigacion S.A*., [1985] A.C. 104 (H.L.), the House of Lords refused to establish a general common law right to interest on the ground that the legislature, in giving a power to award interest, had subjected the power to certain restrictions and qualifications. It is submitted, however, that a partial legislative reversal of a common law rule ought not generally to be taken as manifesting an intention to prevent the courts from

completing the reversal. In *Chatham Motors Ltd. v. Fidelity & Casualty Insurance Co. of New York* (1986), 1986 CarswellOnt 3343, 53 O.R. (2d) 581 at pp. 586-87, 7 C.P.C. (2d) 251 (H.C.J.), affd 63 O.R. (2d) 205*n* (C.A.), the Ontario High Court held that prejudgment interest was recoverable, for a period before the current statute came into force, "on equitable principles". See also *Pittman v. Manufacturers Life Insurance Co*. (1990), 1990 CarswellNfld 36, 76 D.L.R. (4th) 320, [1991] I.L.R. 1-2708 (Nfld. C.A.). See *2712270 Manitoba Ltd. v. Grain Insurance and Guarantee Co.*, 2012 CarswellMan 739, [2013] 7 W.W.R. 395 (Man. Q.B.), affd 2013 CarswellMan 255, [2013] 12 W.W.R. 729 (Man. C.A.), refusing to award interest on an arbitrator's award.

107a (1989), 171 C.L.R. 125 (Aust. H.C.); *Simeone v. Pesatura General Contractors Pty. Ltd*. (1993), 60 S.A.S.R. 453 (S.C.).

107b 2002 CarswellOnt 1114, [2002] 2 S.C.R. 601, 211 D.L.R. (4th) 385.

107c [2007] UKHL 34.

107d *Prudential Assurance Co. Ltd. v. Commissioners for HM Revenue and Customs*, [2018] UKSC 39.

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2017 ONCA 717
Ontario Court of Appeal

Cobb v. Long Estate

2017 CarswellOnt 14441, 2017 ONCA 717, [2017] O.J. No. 4830,
283 A.C.W.S. (3d) 402, 416 D.L.R. (4th) 222, 72 C.C.L.I. (5th) 173

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb, a minor by his Litigation Guardian, Erica Mae Cobb (Plaintiffs / Respondents) and The Estate of Martin T. Long (Defendant / Appellant)

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb, a minor by his Litigation Guardian, Erica Mae Cobb (Plaintiffs / Appellants) and The Estate of Martin T. Long (Defendant / Respondent)

Doherty, J. MacFarland, Paul Rouleau JJ.A.

Heard: April 3, 2017
Judgment: September 19, 2017
Docket: CA C61467, C61471, M47419

Proceedings: additional reasons at *Cobb v. Long Estate* (2015), 2015 CarswellOnt 20330, 2015 ONSC 7373, Douglas M. Belch J. (Ont. S.C.J.); reversed in part on other grounds *Cobb v. Long Estate* (2017), 2017 CarswellOnt 14441, 2017 ONCA 717, Doherty J.A., J. MacFarland J.A., Paul Rouleau J.A. (Ont. C.A.)

Counsel: Chris G. Paliare, Tina H. Lie, for The Estate of Martin T. Long
Allan Rouben, Kris Bonn, for Brett Cobb, Erica Mae Cobb and James Wade Cobb, a minor by his Litigation Guardian, Erica Mae Cobb

Subject: Civil Practice and Procedure; Family; Insurance; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.i Miscellaneous
Remedies
I Damages
I.2 Special damages [pre-trial pecuniary loss]
I.2.a Expenditures
I.2.a.iii Housekeeping expenses
Remedies
I Damages
I.14 Valuation of damages
I.14.i Deductions and collateral benefits
I.14.i.iv Insurance
I.14.i.iv.D Miscellaneous
Remedies
I Damages
I.14 Valuation of damages

I.14.i Deductions and collateral benefits
I.14.i.vi Statutory or government benefits
Statutes
III Retroactive and retrospective operation
III.6 Miscellaneous

Headnote

Remedies --- Damages — Valuation of damages — Deductions — Insurance — General principles

Parties sought further adjudication of decision following jury award of $220,000 — Defendant brought motion claiming decision was silent as to reduction required by receipt of housekeeping statutory accident benefits received prior to trial and for disclosure from plaintiff of litigation insurance policy to assist in making informed decision with respect to costs — Trial judge deducted sum of $159,300 that plaintiffs had received before trial in statutory accident benefits for income replacement — Trial judge did not determine whether amendment in s. 258.3(8.1) of Insurance Act, which came into force on January 1 2015, and which reduced default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to bank rate at time proceeding was commenced, applied retrospectively — Trial judge concluded that change to regulation was substantive as opposed to procedural and accordingly, should not be applied retrospectively to action, in which he applied deductible of $30,000, leaving net general damage award of $20,000 — Plaintiffs appealed; defendant's appealed — Plaintiffs' appeal dismissed; defendant's appeal allowed — Trial judge's decision to reduce jury award for past loss income loss and future loss of income to zero was upheld — There were serious reservations as to whether strict matching requirement articulated in Bannon v. McNeel remained good law — There could be little doubt that sum of $159,300 was received by plaintiff before trial for SABs in respect of income loss and that amount should be deducted from totality of award for past and future income loss — Section 267.8(1) of Insurance Act requires deduction of all income replacement SABs, and all payments in settlement of claims for income replacement SABs, that plaintiff received before trial from total of all damages awarded at trial for past and future income loss arising from same incident — Language of legislation did not distinguish between awards for past and future losses.

Remedies --- Damages — Valuation of damages — Deductions — Statutory or government benefits

Parties sought further adjudication of decision following jury award of $220,000 — Defendant brought motion claiming decision was silent as to reduction required by receipt of housekeeping statutory accident benefits received prior to trial and for disclosure from plaintiff of litigation insurance policy to assist in making informed decision with respect to costs — Trial judge deducted sum of $159,300 that plaintiffs had received before trial in statutory accident benefits for income replacement — Trial judge did not determine whether amendment in s. 258.3(8.1) of Insurance Act, which came into force on January 1 2015, and which reduced default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to bank rate at time proceeding was commenced, applied retrospectively — Trial judge concluded that change to regulation was substantive as opposed to procedural and accordingly, should not be applied retrospectively to action, in which he applied deductible of $30,000, leaving net general damage award of $20,000 — Plaintiffs appealed; defendant's appealed — Plaintiffs' appeal dismissed; defendant's appeal allowed — Trial judge erred in applying statutory deductible in force prior to August 1, 2015 ($30,000) rather than statutory deductible in force at time of judgment ($36,540) — Absent persuasive evidence of legislative intention to apply version of regulation in force at specific date, s. 59 of Act ensured application of current version of regulation to which statutory provision referred — Given direction in s. 59, interpretation of regulation at issue must start from premise that regulation that was intended to apply to any given case was regulation that was in force from time to time and not version of regulation that was in force at date of accident.

Statutes --- Retroactive and retrospective operation — Miscellaneous

Parties sought further adjudication of decision following jury award of $220,000 — Defendant brought motion claiming decision was silent as to reduction required by receipt of housekeeping statutory accident benefits received prior to trial and for disclosure from plaintiff of litigation insurance policy to assist in making informed decision with respect to costs — Trial judge deducted sum of $159,300 that plaintiffs had received before trial in statutory accident benefits for income replacement — Trial judge did not determine whether amendment in s. 258.3(8.1) of Insurance Act, which came into force on January 1 2015, and which reduced default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to bank rate at time proceeding was commenced, applied retrospectively — Trial judge concluded that change to regulation was substantive as opposed to procedural and accordingly, should not be applied retrospectively to action, in which he applied deductible of $30,000, leaving net general damage award of $20,000 — Plaintiffs appealed; defendant's appealed — Plaintiffs' appeal

dismissed; defendant's appeal allowed — Amendment in Insurance Act to prejudgment interest rate was intended to have retrospective effect and it applied to all actions that were tried after its commencement — Plaintiff had not demonstrated that he had crystallized or certain right to particular rate of prejudgment interest as interest rates fluctuate over time — It was necessary to consider application of presumptions or to decide whether s. 258.3(8.1) of Insurance Act, which only deals with rate of prejudgment interest and not with entitlement to prejudgment interest, was substantive in nature — Amendment was intended to have retrospective effect after consideration of how such interpretation would have served purposes that legislature must have intended to achieve in bill 15.

Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Expenditures — Housekeeping expenses

Parties sought further adjudication of decision following jury award of $220,000 — Defendant brought motion claiming decision was silent as to reduction required by receipt of housekeeping statutory accident benefits received prior to trial and for disclosure from plaintiff of litigation insurance policy to assist in making informed decision with respect to costs — Trial judge deducted sum of $159,300 that plaintiffs had received before trial in statutory accident benefits for income replacement — Trial judge did not determine whether amendment in s. 258.3(8.1) of Insurance Act, which came into force on January 1 2015, and which reduced default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to bank rate at time proceeding was commenced, applied retrospectively — Trial judge concluded that change to regulation was substantive as opposed to procedural and accordingly, should not be applied retrospectively to action, in which he applied deductible of $30,000, leaving net general damage award of $20,000 — Plaintiffs appealed; defendant's appealed — Plaintiffs' appeal dismissed; defendant's appeal allowed — Plaintiffs' damages award for future housekeeping was reduced by $4,150 — There was no reason to distinguish between past and future awards — Language of legislation required reduction from damages awarded, all payments received before trial for SABs in respect of pecuniary loss.

Civil practice and procedure --- Costs — Scale and quantum of costs — Miscellaneous

Parties sought further adjudication of decision following jury award of $220,000 — Defendant brought motion claiming decision was silent as to reduction required by receipt of housekeeping statutory accident benefits received prior to trial and for disclosure from plaintiff of litigation insurance policy to assist in making informed decision with respect to costs — Trial judge did not determine whether amendment in s. 258.3(8.1) of Insurance Act, which came into force on January 1 2015, and which reduced default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to bank rate at time proceeding was commenced, applied retrospectively — Trial judge concluded that change to regulation was substantive as opposed to procedural and accordingly, should not be applied retrospectively to action, in which he applied deductible of $30,000, leaving net general damage award of $20,000 and awarded costs — Plaintiffs appealed; defendant's appealed — Plaintiffs' appeal dismissed; defendant's appeal allowed — Defendant's offer was valid and was more favourable than judgment that plaintiffs achieved at trial — Amended statutory deductible was effective at time of judgment and ought to have applied, rather than $30,000 number trial judge used — Deduction for SABs in relation to HKHM expenses further reduced judgment amount and number that ought to have been considered as plaintiff's recovery in costs consideration — Amount remaining from jury verdict after all relevant deductions was relevant one for costs assessment because plaintiff's right to tort compensation was to amount net of any collateral benefits and statutory deductions.

Table of Authorities

Cases considered by *J. MacFarland J.A.*:

Angus v. Hart (1988), 9 M.V.R. (2d) 245, *(*sub nom. *Angus v. Sun Alliance Insurance Co.)* [1988] 2 S.C.R. 256, *(*sub nom. *Angus v. Sun Alliance Insurance Co.)* [1988] I.L.R. 1-2370, 52 D.L.R. (4th) 193, 87 N.R. 200, 30 O.A.C. 210, 34 C.C.L.I. 237, 47 C.C.L.T. 39, 65 O.R. (2d) 638n, 1988 CarswellOnt 966, 1988 CarswellOnt 41, 65 O.R. (2d) 638, 65 O.R. (2d) 638 (note) (S.C.C.) — considered

B. (M.) v. 2014052 Ontario Ltd. (2012), 2012 ONCA 135, 2012 CarswellOnt 2557, 109 O.R. (3d) 351, 97 C.C.E.L. (3d) 322, 288 O.A.C. 370 (Ont. C.A.) — referred to

Bannon v. Hagerman Estate (1998), 159 D.L.R. (4th) 223, 1998 CarswellOnt 1755, *(*sub nom. *Bannon v. McNeely)* 38 O.R. (3d) 659, 34 M.V.R. (3d) 189, *(*sub nom. *Bannon v. McNeely)* 109 O.A.C. 339 (Ont. C.A.) — followed

Basandra v. Sforza (2016), 2016 ONCA 251, 2016 CarswellOnt 5140, 130 O.R. (3d) 466, 348 O.A.C. 193, 98 M.V.R. (6th) 1, 400 D.L.R. (4th) 501 (Ont. C.A.) — considered

Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd. (2002), 2002 CarswellOnt 3823, 38 C.B.R. (4th) 13, (sub nom. *MacDonald v. BF Realty Holdings Ltd.)* 166 O.A.C. 226 (Ont. C.A.) — considered
Carleton Condominium Corp. No. 21 v. Minto Construction Ltd. (2002), 2002 CarswellOnt 1515, 21 C.P.C. (5th) 308 (Ont. S.C.J.) — considered
Celanese Canada Inc. v. Canadian National Railway (2005), 2005 CarswellOnt 1124, 196 O.A.C. 60 (Ont. C.A.) — considered
Cobb v. Long Estate (2015), 2015 ONSC 6799, 2015 CarswellOnt 17759 (Ont. S.C.J.) — referred to
Dikranian c. Québec (Procureur général) (2005), 2005 SCC 73, 2005 CarswellQue 10752, 2005 CarswellQue 10753, (sub nom. *Dikranian v. Québec (Procureur Général))* 260 D.L.R. (4th) 17, [2005] 3 S.C.R. 530, (sub nom. *Dikranian v. Quebec (Attorney General))* 342 N.R. 1 (S.C.C.) — considered
El-Khodr v. Lackie (2017), 2017 ONCA 716, 2017 CarswellOnt 14483, 72 C.C.L.I. (5th) 1, 416 D.L.R. (4th) 189, 139 O.R. (3d) 659 (Ont. C.A.) — considered
Gilbert v. South (2015), 2015 ONCA 712, 2015 CarswellOnt 16284, 127 O.R. (3d) 526, [2015] I.L.R. I-5817, 342 O.A.C. 7, 56 C.C.L.I. (5th) 1 (Ont. C.A.) — considered
Gurniak v. Nordquist (2003), 2003 SCC 59, 2003 CarswellBC 2670, 2003 CarswellBC 2671, 19 B.C.L.R. (4th) 1, [2003] 11 W.W.R. 585, 4 C.C.L.I. (4th) 1, 43 M.V.R. (4th) 159, 311 N.R. 61, 232 D.L.R. (4th) 635, 188 B.C.A.C. 161, 308 W.A.C. 161, [2003] R.R.A. 1073, [2003] 2 S.C.R. 652, 2003 CSC 59 (S.C.C.) — considered
Gustavson Drilling (1964) Ltd. v. Minister of National Revenue (1975), [1977] 1 S.C.R. 271, [1976] C.T.C. 1, 75 D.T.C. 5451, 66 D.L.R. (3d) 449, 7 N.R. 401, 1975 CarswellNat 330, 1975 CarswellNat 376 (S.C.C.) — referred to
Kim v. Morier (2014), 2014 BCCA 63, 2014 CarswellBC 388, (sub nom. *Kim v. Mornier)* 351 B.C.A.C. 212, (sub nom. *Kim v. Mornier)* 599 W.A.C. 212, 58 B.C.L.R. (5th) 225 (B.C. C.A.) — referred to
McIntyre v. Grigg (2006), 2006 CarswellOnt 6815, 39 M.V.R. (5th) 39, 43 C.C.L.T. (3d) 209, 217 O.A.C. 217, 274 D.L.R. (4th) 28, 83 O.R. (3d) 161 (Ont. C.A.) — considered
Parklane Private Hospital Ltd. v. Vancouver (City) (1974), [1974] 6 W.W.R. 72, 2 N.R. 305, [1975] 2 S.C.R. 47, 47 D.L.R. (3d) 57, 1974 CarswellBC 350, 1974 CarswellBC 191 (S.C.C.) — referred to
Pilon v. Janveaux (2006), 2006 CarswellOnt 1211, 29 M.V.R. (5th) 172, 211 O.A.C. 19 (Ont. C.A.) — referred to
R. v. Chatwell (1998), 1998 CarswellOnt 2332, 1998 CarswellOnt 2333, (sub nom. *R. v. Puskas)* 125 C.C.C. (3d) 433, (sub nom. *R. v. Puskas)* 227 N.R. 1, (sub nom. *R. v. Puskas)* 161 D.L.R. (4th) 65, 16 C.R. (5th) 324, (sub nom. *R. v. Puskas)* 110 O.A.C. 374, (sub nom. *R. v. Puskas)* [1998] 1 S.C.R. 1207 (S.C.C.) — considered
R. v. Dineley (2012), 2012 SCC 58, 2012 CarswellOnt 13486, 2012 CarswellOnt 13487, 34 M.V.R. (6th) 1, 96 C.R. (6th) 359, 290 C.C.C. (3d) 190, 353 D.L.R. (4th) 236, 436 N.R. 59, 297 O.A.C. 50, [2012] 3 S.C.R. 272, 118 O.R. (3d) 799 (note) (S.C.C.) — considered
Rider v. Dydyk (2007), 2007 ONCA 687, 2007 CarswellOnt 6394, 53 C.C.L.I. (4th) 188, [2007] I.L.R. I-4649, 87 O.R. (3d) 507, 286 D.L.R. (4th) 517, 231 O.A.C. 169, 87 O.R. (3d) 506 (Ont. C.A.) — considered
Rooney (Litigation Guardian of) v. Graham (2001), 2001 CarswellOnt 887, 198 D.L.R. (4th) 1, (sub nom. *Rooney v. Graham)* 144 O.A.C. 240, 53 O.R. (3d) 685, 9 C.P.C. (5th) 50 (Ont. C.A.) — considered
Sales v. Clarke (1998), 1998 CarswellBC 2165, 165 D.L.R. (4th) 241, 113 B.C.A.C. 26, 184 W.A.C. 26, 57 B.C.L.R. (3d) 36 (B.C. C.A.) — referred to
Sidhu v. State Farm Mutual Automobile Insurance Co. (2014), 2014 ONCA 920, 2014 CarswellOnt 18065, 43 C.C.L.I. (5th) 22 (Ont. C.A.) — considered
Somers v. Fournier (2002), 2002 CarswellOnt 2119, 214 D.L.R. (4th) 611, 60 O.R. (3d) 225, 12 C.C.L.T. (3d) 68, 22 C.P.C. (5th) 264, 27 M.V.R. (4th) 165, 162 O.A.C. 1 (Ont. C.A.) — considered
Upper Canada College v. Smith (1920), 61 S.C.R. 413, (sub nom. *Smith v. Upper Canada College)* [1921] 1 W.W.R. 1154, 57 D.L.R. 648, 1920 CarswellOnt 20 (S.C.C.) — considered
Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — followed
Wright v. Hale (1860), 158 E.R. 94, 6 Hurl. & N. 227, 30 L.J. Exch. 40 (Eng. Exch.) — referred to

1392290 Ontario Ltd. v. Ajax (Town) (2010), 2010 ONCA 37, 2010 CarswellOnt 229, 64 M.P.L.R. (4th) 170, 257 O.A.C. 311 (Ont. C.A.) — considered

Statutes considered:

Access to Justice Act, 2006, S.O. 2006, c. 21

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 6(2) — considered

s. 127 — considered

s. 127(1) "prejudgment interest rate" — considered

s. 128 — considered

s. 128(1) — considered

s. 128(2) — considered

s. 130 — considered

s. 130(1)(b) — considered

s. 131(1) — considered

Courts of Justice Act, 1984, S.O. 1984, c. 11

s. 138 [am. 1989, c. 67, s. 6] — referred to

s. 138(1a) [en. 1989, c. 67, s. 6(1)] — considered

s. 138(4) — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 253(1) — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Pt. V — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

Pt. VI — referred to

s. 258.3(8.1) [en. 2014, c. 9, Sched. 3, s. 12] — considered

s. 267.5(7) ¶ 1 [en. 1996, c. 21, s. 29] — considered

s. 267.5(7) ¶ 3 ¶ i [en. 1996, c. 21, s. 29] — considered

s. 267.5(7) ¶ 3 ¶ i ¶ B [en. 1996, c. 21, s. 29] — considered

s. 267.5(8) [en. 1996, c. 21, s. 29] — considered

s. 267.5(8.1.1) [en. 2010, c. 1, Sched. 11, s. 1(3)] — referred to

s. 267.5(8.3) [en. 2015, c. 20, Sched. 17, s. 3(3)] — considered

s. 267.5(9) [en. 1996, c. 21, s. 29] — considered

s. 267.8 [en. 1996, c. 21, s. 29] — considered

s. 267.8(1) [en. 1996, c. 21, s. 29] — considered

s. 267.8(1) ¶ 1 [en. 1996, c. 21, s. 29] — considered

s. 267.8(4) [en. 1996, c. 21, s. 29] — considered

s. 268.1(1) [en. 1993, c. 10, s. 27] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 43(c) — considered

Judicature Act, R.S.O. 1980, c. 223

Generally — referred to

s. 36(7) — considered

Judicature Amendment Act, 1977 (No. 2), S.O. 1977, c. 51

Generally — referred to

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F

s. 52(4) — considered

s. 59 — considered

Victims' Bill of Rights, 1995, S.O. 1995, c. 6

s. 4(4) — considered

s. 4(6) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 49 — referred to

R. 49.10 — considered

R. 49.10(2) — considered

R. 53.10 — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Court Proceedings for Automobile Accidents that occur on or after November 1, 1996, O. Reg. 461/96

Generally — referred to

s. 5.1 [en. O. Reg. 221/15] — considered

s. 5.1(1) [en. O. Reg. 221/15] — considered

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

s. 46(2) — referred to

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg. 34/10

s. 2 — considered

s. 2(2) — considered

s. 51(3) — considered

APPEALS by plaintiffs and defendant from judgment reported at *Cobb v. Long Estate* (2015), 2015 ONSC 7373, 2015 CarswellOnt 20330 (Ont. S.C.J.) and *Cobb v. Long Estate* (2015), 2015 ONSC 7373, 2015 CarswellOnt 19857, [2015] O.J. No. 7033 (Ont. S.C.J.), deducting sum of $159,300 from plaintiffs' jury verdict in statutory accident benefits for income replacement and awarding costs.

***J. MacFarland J.A.*:**

1 These appeals arise from the judgment of Justice Douglas M. Belch of the Superior Court of Justice, dated November 25, 2015, sitting with a jury, and, if leave be granted, from the accompanying costs judgment dated December 23, 2015. They were heard together with the appeal in *El-Khodr v. Lackie*, 2017 ONCA 716 (Ont. C.A.) because these cases raise common issues regarding the regime in Part VI of the *Insurance Act*, R.S.O. 1990, c. I.8 for the treatment of statutory accident benefits ("SABs") in the calculation of damages arising from motor vehicle accidents. They also raise a common issue regarding the applicable rate of prejudgment interest under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The reasons for judgment in this appeal are being released concurrently with the reasons for judgment in *El-Khodr*.

2 In the *Cobb* appeals, because separate appeals were instituted by the parties, I propose to refer to them as "the plaintiffs" and "the defendant" in order to avoid any confusion that might arise from referring to each party according to its role in each appeal. When I refer to "the plaintiff" in the singular, I refer to Wade Cobb, the primary victim of the accident.

3 At the outset of the hearing, the defendant moved to have this court hear its appeal even though it was not within the monetary jurisdiction of this court pursuant to s. 6(2) of the *Courts of Justice Act*. The plaintiffs consented to the motion. The court was satisfied on hearing the submissions of counsel that it has jurisdiction to hear both appeals.

A. BACKGROUND

(1) The Claims of Wade Cobb and His Family against Long's Estate

4 On July 8, 2008, the vehicles driven by Martin T. Long and the plaintiff, Wade Cobb, collided. Long was charged with operating a motor vehicle while impaired or "over 80" (*Criminal Code*, R.S.C., 1985, c. C-46, s. 253(1)), to which charge he pleaded guilty in August 2009. He was sentenced to a fine of $1,300 and a one-year driving prohibition. Mr. Long died before the trial of the civil action, so his estate became the defendant in this litigation.

5 In December 2009, the plaintiffs brought this action in negligence and gross negligence, claiming $2.35 million in compensatory damages and $3 million in punitive damages. The trial took place over the course of 19 days in the fall of 2015. The jury awarded $220,000 in compensatory damages. After deducting amounts pursuant to the *Insurance Act* for collateral benefits that Wade Cobb had received from his insurer and for the statutory deductible for general damages (i.e., damages for "non-pecuniary" losses, such as "pain and suffering" and "loss of amenity"), the trial judge calculated a final judgment amount of $34,000.

6 At trial, liability for the motor vehicle collision was not seriously in contention. However, the defendant refused to admit liability formally because the plaintiffs had refused to limit their monetary claims to the defendant's liability insurance policy limit. Over the course of the 19-day trial, the plaintiffs called 28 witnesses, the defendant two.

7 The real issue dividing the parties was the quantum of damages to which the plaintiff, Wade Cobb, was entitled. The other two plaintiffs had relatively minor claims for compensation pursuant to Part V of the *Family Law Act*, R.S.O. 1990, c. F.3.

8 By the time of trial, Mr. Cobb's injuries would be described as soft tissue in nature, resulting in chronic pain, such that he claimed to be permanently disabled and unable to resume either his pre-accident employment in the contracting field or any other meaningful employment.

(2) The Jury's Verdict

9 Before the jury, the plaintiffs sought damages in the following amounts:

General Damages:	$150,000
Past Lost Income:	$178,136
Future Loss of Income:	$528,000 to $910,000
Past Housekeeping Loss:	$21,000
Future Housekeeping Loss:	$82,280
Family Law Act Damages:	$45,000
	$1,004,416 - $1,386,416

10 The jury awarded:

General Damages:	$50,000
Past Lost Income:	$50,000
Future Loss of Income:	$100,000
Past Housekeeping Loss:	$5,000
Future Housekeeping Loss:	$10,000
Family Law Act Damages:	$5,000
Total:	$220,000

11 The trial judge rejected the plaintiff's request to put the question of punitive damages to the jury. The plaintiff alleged this was a proper case for that question to go to the jury because of Mr. Long's drinking and driving conviction arising from the accident and the fact that Mr. Long had an earlier conviction for a similar offence.

(3) The Trial Judge's Deductions from the Jury's Award

12 Following receipt of the jury's verdict, the defendant brought a motion to settle the judgment. The trial judge's reasons on this motion are reported at 2015 ONSC 6799 (Ont. S.C.J.). Mr. Cobb had received collateral benefits from his SABs insurer in the following amounts:

	Up to June 29, 2010:
$29,300:	income replacement benefits
$9,150:	housekeeping and home maintenance benefits ("HKHM")
On June 29, 2010:	
$152,000:	apportioned as $130,000 in income replacement benefits, $20,000 in medical benefits and $2,000 in costs, as part of a global settlement.

13 From the jury's award for past and future income losses, which totalled $150,000, the trial judge deducted the sum of $159,300 that the plaintiffs had received before trial in SABs for income replacement benefits. This sum was comprised of $29,300 received before the settlement of June 29, 2010 and the $130,000 portion of that settlement apportioned to "all past and future income replacement benefits". This deduction resulted in a net award of zero for the loss of past and future income.

14 The trial judge did not determine whether the amendment in s. 258.3(8.1) of the *Act*, which came into force on January 1, 2015, and which reduced the default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to the bank rate at the time the proceeding was commenced (here, .5 percent), applied retrospectively. Instead, the trial judge exercised his discretion pursuant to s. 130 of the *Courts of Justice Act* and set the prejudgment interest rate at three percent.

15 The plaintiff had received $9,150 in HKHM benefits before trial from his SABs insurer. Accordingly, the trial judge reduced the jury's award of $5,000 for past HKHM expenses to zero. However, the trial judge refused to apply the remaining $4,150 in HKHM benefits that the plaintiff had received before the trial to the amount that the jury had awarded for future housekeeping loss, maintaining that award at $10,000.

16 Effective August 1, 2015, the statutory deductible applicable to an award for non-pecuniary damages increased from $30,000 to $36,540 through an amendment to s. 5.1(1) of the regulation entitled *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg. 461/96.

17 The trial judge concluded that the change to the regulation was "substantive", as opposed to "procedural", and, accordingly, should not be applied retrospectively to this action. He applied a deductible of $30,000, leaving a net general damage award of $20,000.

18 The final judgment of $34,000 was made up as follows:

General Damages:	$20,000
Future Housekeeping Loss:	$10,000
Pre-Judgment Interest (3%):	$4,000
Total:	$34,000

(4) The Trial Judge's Decision on Costs of the Action

19 The final issue the trial judge determined was the costs of the action, where, despite the relatively small recovery, the trial judge awarded the plaintiff costs of the action on a partial indemnity scale in the sum of $409,098.48, allocated as follows:

Legal Fees:	$250,000
HST:	$32,500
Disbursements:	$126,598.48
Total:	$409,098.48

20 In his reasons on costs, the trial judge addressed whether the amendment to s. 267.5(9) of the *Insurance Act* that came into force on August 1, 2015 should apply to this action. Until July 31, 2015, under s. 267.5(9) and this court's decision in *Rider v. Dydyk*, 2007 ONCA 687, 87 O.R. (3d) 507 (Ont. C.A.), the court was not to consider the statutory deductible in determining entitlement to costs. Effective August 1, 2015, however, s. 267.5(9) was amended so that entitlement to costs was to be determined "with regard" to the statutory deductible. The difference here was significant, because of a defence settlement offer made March 13, 2014.

21 In reasons for judgment dated December 23, 2015 and reported at 2015 ONSC 7373 (Ont. S.C.J.), the trial judge determined that he "would not give the *Insurance Act* amendments retroactive application". He added, however, that if he was wrong in that determination, he would exercise his discretion and order that each side bear its own costs.

B. ISSUES ON APPEAL

22 The plaintiffs raise three grounds of appeal:

1. Did the trial judge err by deducting, pursuant to s. 267.8(1) of the *Insurance Act*, the amounts allocated to income replacement benefits in the SABs settlement from the jury awards for past and future income loss?

2. Did the trial judge err in refusing to put the question of punitive damages to the jury?

3. Did the trial judge err in his determination of prejudgment interest?

23 The defendant also raises three grounds of appeal:

1. Did the trial judge err by failing to deduct the full amount of the HKHM benefits received by the plaintiff before the trial from the damages awarded for the housekeeping loss?

2. Did the trial judge err in applying the statutory deductible in force prior to August 1, 2015 ($30,000) rather than the statutory deductible in force at the time of judgment ($36,540)?

3. Did the trial judge err in his assessment of costs?

C. PLAINTIFFS' APPEAL

(1) Issue One: Did the trial judge err by deducting the amounts allocated to income replacement benefits in the SABs settlement from the jury awards for past and future income loss under s. 267.8(1)?

(a) Introduction

24 At trial, the jury awarded to the plaintiff $50,000 in damages for past loss of income and $100,000 in damages for future loss of income. The trial judge determined that the plaintiff had received $159,300 in respect of income replacement SABs before trial, treated the two awards for income loss as one award of $150,000 for the purpose of deducting SABs, and thereby reduced the damages for income loss to nil.

25 There is no dispute about the amounts paid by the plaintiff's SABs insurer to him prior to the trial. Up until June 29, 2010, the plaintiff had received $29,300 in income replacement benefits. On that day, he entered into a final settlement agreement with his SABs insurer whereby he finally settled all his claims for statutory accident benefits. According to the Settlement Disclosure Notice, which document the plaintiff, by his signature, acknowledged having received and read on June 29, 2010, the settlement sum of $152,000 was attributed as follows:

OFFER TO SETTLE INCOME REPLACEMENT BENEFITS

You have been offered $130,000 for all past and future income replacement benefits.

OFFER TO SETTLE MEDICAL BENEFITS

You have been offered $20,000 for all past and future medical benefits.

OFFER TO SETTLE ANY OTHER ITEMS

You have been offered $2,000 for other items.

26 The settlement was finalized on this basis and the amounts reflected in the Settlement Disclosure Notice were paid accordingly. The plaintiff was represented by counsel (not appellate counsel) at the time the settlement was negotiated and that counsel was alive to the deductibility aspects of the settlement.

27 The plaintiff argues that the defendant has the onus of proof — a strict onus — to establish how much of the settlement related to past lost income and how much related to future loss of income and whether any of the settlement monies may have

related to a somewhat vague claim for punitive damages. He contends that this strict onus is not met and no amount of settlement monies recovered by him should be deducted from the jury's award.

28 Of course in this case, there is no issue raised about any future entitlement to SABs. Any such entitlement was finally settled by the June 29, 2010 settlement.

29 The statutory provision that governs this issue is s. 267.8(1) of the *Insurance Act*. The relevant portion of that provision's text is as follows:

> **267.8** (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:
>
> 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.

30 The issue for this court is what amount, if any, of the $130,000 that the SABs insurer paid in settlement of "all past and future income replacement benefits" is deductible from the amounts that the jury awarded for past loss income and for future loss of income.

31 The defendant says that the issue is a question of fact: did the defendant satisfy its onus of establishing that the $130,000 allocated in the settlement to past and future income replacement benefits constituted "statutory accident benefits in respect of the income loss and loss of earning capacity" received by the plaintiff before the trial under s. 267.8(1)?

32 The plaintiffs impugn the trial judge's decision to deduct the full $130,000 from the jury's awards for past and future income loss on two grounds. First, they argue that the $130,000 in the settlement was not deductible from the jury's verdict because the defendant did not satisfy the applicable standard of proof. Second, the plaintiffs interpret this court's decision in *Bannon v. Hagerman Estate* (1998), 38 O.R. (3d) 659 (Ont. C.A.) to require separate treatment of damages and SABs for past income losses and of damages and SABs for future income losses for the purpose of deducting SABs from damages.

(b) The allegation of compensation for "bad faith"

33 The thrust of the plaintiffs' first argument is that the settlement with the SABs insurer is not deductible from the jury's verdict because the settlement may have included an unspecified amount settling a claim for "damages for bad faith" in addition to the plaintiff's SAB entitlements.

34 In support of their allegation that the settlement may have included compensation for a claim of "bad faith", the plaintiffs rely on the language of the Release that the plaintiff signed as a condition of obtaining the settlement funds. The Release states that it covers not only the plaintiff's SAB entitlements but also "ALL claims for damages including, but not limited to, aggravated, exemplary and punitive damages or damages for alleged bad faith arising as a consequence of the accident and/or the handling of any claims by or on behalf of [the SABs insurer]".

35 I agree with the defendant that the attribution of the settlement funds to particular claims is a question of fact on which this court owes deference to the trial judge. In my view, the record fully supports the trial judge's determination on this issue.

36 In the settlement negotiations, the SABs insurer left it up to plaintiff's counsel to determine the allocation of the settlement amounts. Had that lawyer wished to allocate the monies in any different way, she could have done so. The Settlement Disclosure Notice divided the settlement compensation of $152,000 into $130,000 for income replacement benefits, $20,000 for medical benefits and $2,000 for "other items". Correspondence from the settlement negotiations indicates that, before executing the Release, the plaintiff had agreed to allocate $130,000 of the $152,000 settlement to income replacement benefits, $20,000 to medical benefits and $2,000 to the plaintiff's legal costs. There was no evidence in the record that the plaintiff had negotiated for compensation arising from any allegation of bad faith.

37 Furthermore, the reference in the Release to claims for "aggravated, exemplary and punitive damages or damages for alleged bad faith" is standard language in any form of release. Indeed, the paragraph goes on to explain that the Release covers such claims for damages "whether these claims are past, present or future *and whether these claims are known or unknown at the present time*" (emphasis added). Therefore, there was no reviewable error in the trial judge's determination that the Settlement Disclosure Notice accurately stated the allocation of the settlement.

(c) Past income loss and future income loss

38 The plaintiff argues that the tort damage awards for past lost income (income lost from the date of the accident to the date of trial) and future loss of income (the projected income loss from the date of trial to a future retirement date) are separate heads of damage. Relying on this court's decision in *Bannon v. Hagerman Estate* (1998), 38 O.R. (3d) 659 (Ont. C.A.) he submits that an award can only be reduced by a corresponding statutory accident benefit, on a benefit-by-benefit basis under s. 267.8 of the *Insurance Act*. He says "This reflects the concept that 'apples should be deducted from apples, and oranges from oranges'".

39 As the argument goes, the jury awarded the plaintiff $50,000 for past lost income loss and $100,000 for future loss of income.

40 First, claims advanced in a tort action for both past and future income claims are required to be separately advanced. Pre-judgment interest is owed on past income claims but not on future loss claims. The onus on a plaintiff is different — a plaintiff who claims for pre-trial pecuniary loss must prove the amount of that loss on the balance of probabilities: *Sales v. Clarke* (1998), 165 D.L.R. (4th) 241 (B.C. C.A.), at paras. 9-16. In contrast, a claim for future (i.e., post-trial) pecuniary loss needs only be proved on the basis of a "real and substantial possibility" of impairment of future earnings and a jury instructed accordingly: *Kim v. Morier*, 2014 BCCA 63, 58 B.C.L.R. (5th) 225 (B.C. C.A.), at paras. 7-10; *Basandra*, at para. 24.

41 The claims are still claims for income loss. The *Insurance Act* does not differentiate between past and future losses — it simply refers to "all "*payments* . . . that the plaintiff has received . . . before the trial of the action *for statutory accident benefits in respect of the income loss and loss of earning capacity*" (emphasis added). The statutory text uses the terms "income loss" and "loss of earning capacity" together as the label for both a single head of damage and a single kind of SAB.

42 There can be little doubt on this record that the sum of $159,300 was received by this plaintiff before the trial for SABs in respect of income loss and that amount should be deducted from the totality of the award for past and future income loss.

43 In this court's decision in *Basandra v. Sforza*, 2016 ONCA 251 (Ont. C.A.), the court considered the deductibility of certain payments received by the plaintiff prior to trial including certain amounts for past and future medical rehabilitation and past and future attendant care.

44 In *Basandra*, the questions posed for the jury lumped together damages for medical/rehabilitation, attendant care and housekeeping. The trial judge could not judge how much of the lump sum award related to the different heads in order to make the required deductions for the SABs received by the plaintiff before the trial. At para 8 of the reasons this court noted:

> The trial judge accepted the appellant's evidence that he had received a total of $81,658.67 for medical rehabilitation benefits' $58,271.76 for attendant care benefits and $6,939.84 for housekeeping benefits. These amounts included a 2009 lump sum settlement that allocated $30,000 for past and future medical rehabilitation and $5,000 for past and future attendant care. The trial judge noted that the 2009 settlement did not set out the respective portions related to past and future costs.

45 The trial judge concluded that the jury's entire awards for both past and future care, medical/rehabilitation and housekeeping should be reduced to nil.

46 The single issue before the court was:

> Did the trial judge err by reducing the jurys' award for past and future attendant care, medical/rehabilitation and housekeeping costs from $105,000 to nil in the absence of clear evidence about the quantum of each collateral benefit.

This court concluded that the trial judge made no error, holding at para. 27, that s. 267.8(4) of the *Insurance Act* combines damages for past and future health care expenses into a single amount for the purpose of deducting SABs in respect of health care expenses.

47 This case is similar in that the $130,000 paid to settle past and future income loss did not distinguish or allocate a particular amount to either.

48 The legislation (s. 267.8(1)) does not distinguish between amounts that relate to past and to future income loss. It speaks only to amounts received prior to the trial for income loss. Whether those amounts relate to past or future claims is irrelevant for the purpose of deductibility. Obviously, any amounts received before trial that include a sum for future income loss will, in all likelihood, be received by a plaintiff in settlement of his claims for income loss. Such payments are still payments received before trial for SABs in respect of income loss and are properly deductible from a jury award for both past and future income losses.

49 The apples to apples concept relates to the type of benefit at issue. As Lauwers J.A. noted at para. 5 in *Basandra*:

> [5] An award can only be reduced by a corresponding statutory accident benefit, on a benefit-by-benefit basis, under s. 267.8 of the *Insurance Act*. This reflects the concept that "apples should be deducted from apples, and oranges from oranges": see *Bannon v. McNeely*, at paras. 49, 74; *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526, at para. 44. For example, an award for housekeeping can be reduced by a housekeeping benefit, but not by a medical rehabilitation benefit.

50 The plaintiffs alternatively submitted that before any deduction can be made from the award for future loss of income, there must be an "accounting" for the five years between the time of the SABs settlement and the trial date. The essence of the argument is that some of what was a "future loss" at the time of the settlement will have become a "past loss" by the time of trial. For reasons already given, I do not accept this argument. First, as discussed above, the language of the legislation does not distinguish between awards for past and future losses and secondly, at para 27 of the reasons in *Basandra*, this court dealt with this argument stating:

> Under s. 267.8(4) of the *Insurance Act*, the total amount of any statutory accidents benefits settlement for past losses or for future expenses is to be combined for the purpose of the reducing the jury's awards in respect of those benefits. There was accordingly no need for the trial judge to consider separately the effect of the "5-6 year period during which one might fairly say there were future amounts on the settlement, but past amounts as at the trial."

51 The language of s. 267.8(1) is identical to that of s. 267.8(4) except for the type of benefit it references, income loss and loss of earning capacity as opposed to health care.

52 Since the purpose of the statutory deduction procedure is to prevent double recovery for a single loss, there is no reason in principle to distinguish between pre-trial and post-trial "income loss and loss of income capacity" when deducting SABs from damages.

53 The law of damages distinguishes between pre-trial pecuniary loss and post-trial pecuniary loss primarily for two reasons, calculation of prejudgment interest and proof of damage: *Basandra*, at para. 24.

54 Additionally, as is more fully explained in the reasons for judgment in the *El-Khodr* case, I have serious reservations as to whether the strict matching requirement articulated in *Bannon v. Hagerman Estate* (1998), 38 O.R. (3d) 659 (Ont. C.A.) and *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526 (Ont. C.A.), the cases referenced by Lauwers J.A. in *Basandra*, remains good law in this province for two reasons. First, the legislation has changed significantly since *Bannon* was decided. Secondly, the Supreme Court of Canada in its decision in *Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652 (S.C.C.), if it did not specifically overrule *Bannon*, very clearly stated that the case upon which the matching principle in *Bannon* is based was

"wrongly decided". In my view, *Gurniak* puts in considerable doubt any qualitative or temporal matching requirement that is not mandated by the current legislation.

55 For these reasons, s. 267.8(1) of the *Insurance Act* requires deduction of all income replacement SABs, and all payments in settlement of claims for income replacement SABs, that the plaintiff receives before trial from the total of all damages awarded at trial for past and future income loss arising from the same incident.

56 Accordingly, I would uphold the trial judge's decision to reduce the jury award for past loss income loss and future loss of income to zero.

(2) Issue Two: Did the trial judge err in refusing to put the question of punitive damages to the jury?

57 The plaintiffs submit that the trial judge erred in refusing to allow the plaintiffs to seek an award of punitive damages from the jury.

58 The argument and the basis for the claim relate to the fact that the defendant was convicted of impaired driving on his plea of guilty in relation to this motor vehicle accident.

59 The plaintiffs submit that this court's decision in *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (Ont. C.A.), stands for the proposition that a jury should be permitted to consider punitive damages in any civil action for negligence arising from impaired driving.

60 That is, with respect, not my reading of the *McIntyre* case. As the defendant points out in his factum, the majority in *McIntyre* held, at para. 76, that "a factor of significant importance in assessing whether it would be appropriate to award punitive damages is whether punishment has already been imposed in a separate proceeding for the same misconduct."

61 In the same paragraph, the court quoted the following statement from Binnie J.'s majority reasons in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.), at para. 123: "The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation."

62 In *McIntyre*, this court elaborated on how this principle applies to a tort action when the defendant already has received a criminal conviction for the same wrong:

> [79] While the driver Grigg pleaded guilty to, and received a fine for, careless driving, the evidence in the civil trial established that he was significantly impaired and that his conduct should normally warrant a serious punishment. Where a wrongdoer has already been punished for an offence and the same conduct is in question at a civil trial, punitive damages generally will not serve a rational purpose as the sentence imposed in the criminal or regulatory environment will have already met the necessary objectives of retribution, deterrence and denunciation. In our view, there are sound policy reasons for generally not attempting to re-try those proceedings in a civil action. As this court held in *Fleury v. Fleury*, *supra*, at para. 11:
>
> > Where tortious acts have already been sanctioned by the imposition of a criminal sentence, it is inappropriate to award punitive damages in a civil lawsuit. To do so is to punish twice for the same offence. Where, however, the civil proceedings establish that . . . the sentence does not fully sanction the tortfeasor's behaviour . . . punitive damages may be awarded.
>
> [80] In our view, a court in a civil proceeding should generally demonstrate deference to the decision of the other court. Otherwise, the review of the appropriateness of a penalty administered in a criminal court, for example, could be viewed as a collateral attack on that decision. In our opinion, the "disproportionality" test enunciated by Binnie J. in *Whiten* in relation to the wrongful conduct and the penalty imposed is one that should be approached with considerable caution.

63 The majority concluded that, on the particular facts in *McIntyre*, that case was one of the "rare instances" where the question should go to the jury. The facts in *McIntyre* entirely drove the disposition in that case. Ms. McIntyre had been walking along the curb of a street in Hamilton with a group of friends when Grigg's vehicle struck her. Grigg's blood alcohol level at the time was two to three times over the legal limit. Initially he was charged with "over 80"; later, counts of impaired driving causing bodily harm and dangerous driving causing bodily harm were added. Ultimately, the Crown attorney proceeded only with a charge of careless driving and the other charges were withdrawn. This decision was based on the failure to inform Grigg of his right to counsel before the breathalyzer was administered. The Crown gave evidence at the trial that, had Grigg been convicted as charged, he would, in all likelihood, have received a custodial sentence. As it was, he pleaded guilty to careless driving and received only a fine of $500. There was no license suspension.

64 In *McIntyre*, unlike in this case, the fact of the defendant's impairment at the time of the accident appeared to have gone unpunished in the criminal proceedings. The defendant in *McIntyre* had pleaded guilty only to *careless* driving, whereas Mr. Long pleaded guilty to *impaired* driving.

65 Here, there was no evidence to suggest that the defendant's criminal sentence, consisting of a fine of $1,300 and a one-year driving prohibition, was insufficient to meet the objectives of retribution, deterrence and denunciation. I note that, in support of the common-law principles that I have discussed, in Ontario, s. 4(4) of the *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6 requires a trial judge in a civil case to "take the sentence, if any, imposed on a convicted person into consideration before ordering that person to pay punitive damages to a victim." In my view, the trial judge's decision not to put the question of punitive damages to the jury was reasonable in the circumstances, and his decision is entitled to deference in this court: *B. (M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135, 109 O.R. (3d) 351 (Ont. C.A.), at paras. 51, 92. Therefore, I would not give effect to this ground of appeal.

(3) Issue Three: Did the trial judge err in his determination of prejudgment interest?

(a) Introduction

66 The last of the plaintiffs' grounds of appeal concerns the rate of prejudgment interest applicable to the plaintiff's damages for non-pecuniary loss, in this context also called "general damages". The disputed statutory provision is s. 258.3(8.1) of the *Insurance Act*, which came into force on January 1, 2015. The provision originated in Schedule 3, s. 12 of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9, also known as "Bill 15". The text of s. 258.3(8.1) is as follows:

> (8.1) Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).

The kind of action to which subsection (8) refers is an action "for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile".

67 However, neither Bill 15 nor s. 258.3(8.1) specified whether this amendment to the *Insurance Act* would apply retrospectively to actions commenced before January 1, 2015 but tried thereafter. Whereas some of the provisions in the *Insurance Act* and some of the SABs regulations include a transition rule (see, for example, s. 267.5(8.1.1) and s. 2 of Ont. Reg. 34/10), this amendment to the *Insurance Act* is entirely silent on whether it applies only to proceedings concerning accidents that occurred on or after the provision's enactment.

68 To understand the effect of s. 258.3(8.1) to accident cases to which it applies, one must read it in the context of the statutory regime for prejudgment interest. One begins with s. 128(1) of the *Courts of Justice Act*, which creates an entitlement to prejudgment interest and refers to a default rate:

> **128** (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

69 For the purposes of s. 128, s. 127(1) defines "prejudgment interest rate" as "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced". However, s. 128(2) creates an exception from this default rate of prejudgment interest for damages for non-pecuniary loss arising from personal injuries:

> (2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).

70 The relevant "rule of court" to which s. 128(2) refers is r. 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> **53**.10 The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.

71 Therefore, s. 128 of the *Courts of Justice Act* contemplates two default rates of prejudgment interest: one for damages for non-pecuniary loss in personal injury actions, and one, called "the prejudgment interest rate", for all other money awards for which s. 128 makes prejudgment interest available. The plaintiffs commenced their action on December 8, 2009, so the applicable prejudgment interest rate in s. 128(1) is .5%.

72 I have referred to the regime of prejudgment interest rates in ss. 128 (1) and (2) as one of "default" rates because s. 130 of the *Courts of Justice Act* gives the court discretion to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under s. 128:

> **130** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
>
> (b) allow interest at a rate higher or lower than that provided in either section;
>
> (c) allow interest for a period other than that provided in either section.
>
> (2) For the purpose of subsection (1), the court shall take into account,
>
> (a) changes in market interest rates;
>
> (b) the circumstances of the case;
>
> (c) the fact that an advance payment was made;
>
> (d) the circumstances of medical disclosure by the plaintiff;
>
> (e) the amount claimed and the amount recovered in the proceeding;
>
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
>
> (g) any other relevant consideration.

73 Therefore, the effect of s. 258.3(8.1) of the *Insurance Act* is that, in an action for damages arising out of a motor vehicle accident, the prejudgment interest rate on non-pecuniary damages will now be the rate provided for in ss. 127 and 128(1) of the *Courts of Justice Act*, subject to the overriding discretion of the court in s. 130 of the same statute to increase or reduce the rate, to change the interest period, or to disallow interest altogether.

74 The plaintiffs argue that the 2015 amendment, which reduces the rate of prejudgment interest, should not apply retrospectively to a collision that occurred in 2008. They accept that procedural legislation is presumed to have immediate application, but rely on this court's decision in *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (Ont. C.A.), where this court held

that entitlement to prejudgment interest is a matter of substantive law. They also rely on the trial decision in *El-Khodr v. Lackie*, where the trial judge relied on *Somers*, but also relied on *Angus v. Hart*, [1988] 2 S.C.R. 256 (S.C.C.) for the argument that this prejudgment interest amendment should not apply retrospectively because this would provide a "windfall" to insurance companies that previously had charged premiums on the assumption of a 5% prejudgment interest rate for non-pecuniary damages in personal injury cases.

75 The defence submits that r. 53.10 is a procedural rule and hence, because the new s. 258.3(8.1) amended a procedural rule, the change in the legislation is procedural in nature. The rate of interest or "means" by which entitlement to prejudgment interest is quantified is procedural. Further, the defence submits that s. 52(4) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F codifies the common-law presumption that procedural legislation applies immediately, not only to future proceedings but also to ongoing or pending proceedings that relate to events that took place prior to such legislation's enactment.

76 In this case, the trial judge did not make a determination one way or the other as to whether the amendment applied retrospectively. Instead, he chose what he described as "a third choice" and exercised the discretion available to him under s. 130(1)(b) of the *Courts of Justice Act*. Having "taken into account the factors set out in s. 130(2)" and having "considered the overall circumstances of the case", he fixed the interest rate for non-pecuniary damages at three percent.

77 I would uphold the trial judge's reasons with respect to his "third choice". I see no basis to interfere with the exercise of that discretion in view of the fact that it benefits the plaintiff and the defendant has advised the court that it is content with that rate of interest. Therefore, the disposition of this appeal does not require me to decide on the temporal application of the amendment to the prejudgment interest rate. However, the disposition of the companion case, *El-Khodr v. Lackie*, requires me to resolve this issue of temporal application. I prefer to address the issue in detail in these reasons because other issues in the *Cobb* appeals also require consideration of the temporal application question.

78 For the reasons expressed below, I conclude that the amendment in the *Insurance Act* to the prejudgment interest rate was intended to have retrospective effect and it applies to all actions that are tried after its commencement.

(b) Legislative intention and temporal application

79 The determination of the prejudgment interest amendment's temporal application requires consideration of several rebuttable presumptions that apply in the interpretation of legislation. Before I begin to discuss these principles, I emphasize that the purpose of presumptions concerning the temporal application of legislation is to assist, along with other principles of statutory interpretation, in the determination of *legislative intent*: *Dikranian c. Québec (Procureur général)*, 2005 SCC 73, [2005] 3 S.C.R. 530 (S.C.C.), at para. 36.

80 The common law generally presumes that legislation does not have retrospective application: *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.), at p. 279. However, as *Dikranian* emphasizes, this presumption applies within a contextual analysis of legislative intent, and contextual analysis can rebut the presumption.

81 Two additional presumptions are also relevant to the analysis: (1) the presumption against legislative interference with vested rights and (2) the presumption that procedural legislation applies immediately.

82 Since these presumptions also are relevant to the issues in this appeal concerning the statutory deductible and costs, I will outline each presumption before applying them to the prejudgment interest issue.

83 First, as a matter of statutory interpretation, there is a presumption that the legislature does not intend to interfere with "vested rights": *Dikranian*, at paras. 32-33. *Dikranian*, at paras. 37-40, endorsed Prof. Côté's test for establishing a "vested right": (1) the individual's legal situation must be "tangible and concrete rather than general and abstract" (i.e.: the individual must point to a specific right); and (2) the legal situation must have been sufficiently constituted at the time of the new legislation's commencement. In other words, by the time of the legislation's commencement, the right must have crystallized and become "inevitable" and "certain": *1392290 Ontario Ltd. v. Ajax (Town)*, 2010 ONCA 37, 257 O.A.C. 311 (Ont. C.A.), at

paras. 37-38. The characterization of the "right" at issue is important to the success of the argument that the right had "vested" by commencement: *1392290 Ontario Ltd.*, at para. 39.

84 Second, new legislation that affects substantive rights is presumed to have a purely prospective effect unless a clear legislative intent that it is to apply retrospectively is evident. However, "procedural legislation designed to govern only the manner in which rights are asserted or enforced" applies immediately to both pending and future cases because such legislation does not affect the "substance" of the relevant rights: *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272 (S.C.C.), at para 10. In *Dineley*, the Supreme Court emphasized that this presumption of immediate application *does not* apply to "procedural legislation" if that legislation "affects substantive rights". Therefore, "the key task" lies "not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights": *Dineley*, at para. 11.

(c) The Courts of Justice Act does not create a vested right to a particular rate of prejudgment interest

85 In my view, the plaintiff has not demonstrated that he has a crystallized or certain right to a particular rate of prejudgment interest.

86 Interest rates fluctuate over time and it only makes sense that the interest rates set by the court should reflect these changes as well. Prejudgment interest is meant to compensate for the loss of use of money's worth from the date when the injury is sustained to the time of judgment. The goal is to fairly compensate an injured party and to restore to him or her, so far as money is able to do, all that he or she has lost as result of the injury — but neither too much, nor too little. The provisions of the *Courts of Justice Act* concerning prejudgment interest do this by preserving the court's discretion not to apply the default rate.

87 Although s. 128(1) says that a person "entitled to an order for a payment of money" also is entitled to prejudgment interest, and s. 128(2) contemplates special rates for interest on damages for non-pecuniary loss in personal injury actions, s. 130 provides the court with discretion to disallow prejudgment interest, to vary the rate otherwise applicable, or to vary the period for calculation of interest otherwise applicable.

88 Read together, these provisions in the *Courts of Justice Act* recognize that rates of prejudgment interest require variation to keep pace with economic realities and to ensure that plaintiffs are not overcompensated nor undercompensated for the lost value of their damage award over time.

89 In *R. v. Chatwell*, [1998] 1 S.C.R. 1207 (S.C.C.), the Supreme Court interpreted s. 43(c) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which codifies the common-law "vested rights" presumption, albeit through use of the synonyms "acquired, accrued, accruing or incurred". The court, at para. 14, held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled". This holding relies on a definition of a "vested right" in which a right does not vest until the purported holder of the right can claim on it without meeting any other "substantive conditions": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at paras. 25.145-25.146.

90 In this case, the plaintiff's right to tort damages vested at the moment of the accident: *Dikranian*, at para. 40. However, the rate of prejudgment interest on those damages, as distinguished from the entitlement to prejudgment interest, always was subject to judicial discretion which could only be exercised at the time the damage award was made. Therefore, aside from the fact that there is no *right* to a particular rate of interest, there can be no expectation on the part of a litigant that he or she is entitled to prejudgment interest at any particular rate until the trial judge determines the rate. Any "right" is not crystallized or certain until that determination is made.

(d) The presumption of immediate application of "procedural legislation applies

91 As I indicate above, the defendant, and the appellants in the *El-Khodr* appeal, rely upon the presumption that procedural legislation applies immediately and upon this court's decision in *Somers* for the proposition that while questions of "entitlement" to prejudgment interest involve substantive rights, any determination as to the applicable rate of interest involves the quantification or measurement of damages, which is a question of procedure.

92 In *Somers*, the court was concerned with the choice of law to be applied in an international negligence action commenced in Ontario arising from a two-car motor vehicle collision that occurred in New York State. One of the issues in that case was whether entitlement to prejudgment interest was procedural or substantive in nature. If it was substantive, the law of New York would apply, with the result that no prejudgment interest would be awarded. There was no issue in that case with respect to any particular rate of interest.

93 This reliance on *Somers* assumes that the categories of "substance" and "procedure" in a conflicts of laws context are closely analogous to the categories of "substantive" and "procedural" legislation in determining the temporal application of a law. One must exercise caution in making this analogy and the cases should not be automatically imported from one context to the other. [1] As I have indicated, the *Dineley* decision indicates that the nature of a procedural provision in the transitional law context is narrow; it deals with the methods by which facts are proven and legal consequences are established. Their operation is generally dependent on the existence of litigation. In my view, it would be an error to rely upon *Somers* for the proposition that the rate of interest is procedural in nature for purposes of determining the temporal application of s. 258.3(8.1) of the *Insurance Act*.

94 In my view, it is not necessary to consider the application of the presumptions or to decide whether s. 258.3(8.1) of the *Insurance Act*, which only deals with the *rate* of prejudgment interest and not with the *entitlement* to prejudgment interest, is substantive in nature. Even if the rate of prejudgment interest constitutes a substantive right, the fact that a particular presumption could apply does not necessitate a conclusion that the amendment does not apply in this case. Common-law presumptions on temporal application of legislation are simply aids in the identification of legislative intent. In my view, a contextual analysis of the legislation demonstrates that the legislature intended s. 258.3(8.1) to apply to causes of action that had already arisen but not yet been tried.

95 The decision of this court in *Sidhu v. State Farm Mutual Automobile Insurance Co.*, 2014 ONCA 920, 43 C.C.L.I. (5th) 22 (Ont. C.A.), is of no assistance to the plaintiffs because in this case, the court was determining whether interest owed by the insurer on overdue payments was payable at a rate of two percent as required by the 1996 SABs schedule [2] or at a rate of one percent as required by the 2010 SABs schedule. [3] In holding that the insurer was required to pay the two percent rate, the court noted that s. 2(2) of the 2010 schedule provides that interest shall be paid under that regulation in the amount determined under the previous schedule.

96 As stated, s. 258.3(8.1), and the statute that introduced it, contain no transition language that clearly indicates the temporal application of this amendment. This is in contrast to the legislative evolution of the prejudgment interest provisions. When making significant changes to the prejudgment interest regime in the *Judicature Act* and the *Courts of Justice Act* over the last forty years, the legislature has clearly indicated that the changes were to have only prospective effect. [4]

97 Prior to the enactment of the *Courts of Justice Act* in 1984, prejudgment interest was addressed in the *Judicature Act*. When the interest provisions of the *Judicature Act* were amended in 1977 in S.O. 1977, c. 51, to introduce the concepts of awarding prejudgment interest at the prime rate and of the trial judge's discretion to depart from that prime rate, the amending legislation specifically provided that it had a prospective effect:

> **3** (6)(2) This section applies to the payment of money under judgments delivered after this section comes into force, but no interest shall be awarded under this section for a period before this section comes into force.
>
> [Emphasis added]

98 When the 1980 consolidation of the *Judicature Act* was published in R.S.O. 1980, c. 223, the specific language of s. 36(7) continued the prospective application of the 1977 amendment:

> **36** (7). This section applies to the payment of money under judgments delivered on or after the 25th day of November, 1977, but no interest shall be awarded under this section for a period before that date.

[Emphasis added]

99 When the *Courts of Justice Act* was adopted in S.O. 1984, c. 11, s. 138(4), expressly stated that the prejudgment interest provisions applied only prospectively:

> 138 (4) Where a proceeding is commenced before this section comes into force, this section does not apply and section 36 of the *Judicature Act*, being chapter 223 of the Revised States of Ontario, 1980, continues to apply, notwithstanding section 187.
>
> [Emphasis added]

100 An amendment to the *Courts of Justice Act* in 1989, in S.O. 1989, c. 67, introduced s. 138(1)(a), the provision that is now s. 128(2). It then read, "Despite subsection (1), the rate of [prejudgment] interest on damages for non-pecuniary loss in an action for personal injury shall be the discount rate determined by the rules of court." Subsection 6(2) of the 1989 Act provided that "If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order." The legislation clearly indicated that these amendments applied only prospectively:

> **8** (1) The amendments to the *Courts of Justice Act, 1984*, as enacted by this Act, except for the amendments enacted by section 1, section 4 and subsection 6(2), apply to causes of action arising after the 23rd day of October, 1989.
>
> (2) The amendments to the *Courts of Justice Act, 1984*, as enacted by section 4 and subsection 6(2) of this Act, apply to,
>
> (a) actions commenced but not settled or adjudicated upon before this Act comes into force; and
>
> (b) causes of action arising after this Act comes into force.
>
> [Emphasis added]

101 Because s. 258.3(8.1) of the *Insurance Act* affects the application of the prejudgment interest regime prescribed by the *Courts of Justice Act*, the legislative history relating to the prejudgment interest provisions of the *Courts of Justice Act* is highly relevant. The absence of similar temporal language in s. 258.3(8.1) supports the view that the legislature intended for this change to the prejudgment interest regime to have retrospective effect so as to apply to pre-existing causes of action.

102 I take further support for the view that this amendment was intended to have retrospective effect from a consideration of how such an interpretation would serve the purposes that the legislature must have intended to achieve in Bill 15. During the introduction of the Bill at First Reading,[5] the policy underlying the Bill and the rationale for the prejudgment interest amendment were discussed. The expressed goal was to bring down the cost of claims to achieve a reduction in automobile insurance rates within a two-year window and the adjustment of the prejudgment interest rate was one part of that strategy:

> In August of last year, we announced our cost and rate reduction strategy, which is targeting an industry-wide average of a 15% reduction in authorized auto insurance rates within two years. The measures proposed in this bill would move forward on our strategy by helping to reduce costs in the system and continuing to fight fraud. Auto insurance rates are directly linked to claim costs. Reducing cost and uncertainty in the system would help reduce rates for Ontario drivers.
>
> . . .

Lastly, the bill would implement measures to reform the prejudgement interest rates for general damages and again reduce costs by protecting and expediting matters more quickly for claimants. This rate, actually, hasn't been updated since 1990. Linking the rate to current market conditions would help reduce the cost to bodily injury claims and auto insurance systems while still ensuring fairness for consumers.

TAB 4

ESSENTIALS OF
CANADIAN LAW

THE LAW OF CONTRACTS

THIRD EDITION

JOHN D. McCAMUS
Professor of Law Emeritus
Osgoode Hall Law School, York University

IRWIN LAW

The Law of Contracts, third edition

Published in 2020 by

Irwin Law Inc.
14 Duncan Street
Suite 206
Toronto, ON
M5H 3G8

www.irwinlaw.com

ISBN: 978-1-55221-553-1 | e-book ISBN: 978-1-55221-554-8

Library and Archives Canada Cataloguing in Publication

Title: The law of contracts / John D. McCamus, Professor of Law Emeritus, Osgoode Hall Law School, York University.
Names: McCamus, John D., author.
Series: Essentials of Canadian law.
Description: Third edition. | Series statement: Essentials of Canadian law | Includes bibliographical references and index.
Identifiers: Canadiana (print) 20200302299 | Canadiana (ebook) 202003023022 | ISBN 9781552215531 (softcover) | ISBN 9781552215548 (PDF)
Subjects: LCSH: Contracts—Canada.
Classification: LCC KE850 .M44 2020 | LCC KF801 .M44 2020 kfmod | DDC 346.71.02/2—dc23

Canada Ontario
Ontario Media Development Corporation
Société de développement de l'industrie des médias de l'Ontario

Printed and bound in Canada.

1 2 3 4 5 24 23 22 21 20

CHAPTER 3

CERTAINTY OF TERMS

A. INTRODUCTION

In order for an agreement to be enforceable, the parties must have reached agreement on all the essential terms of their agreement. As is often said, the parties must make the agreement, the courts will not make it for them. Further, the parties "must so express themselves that their meaning can be determined with a reasonable degree of certainty."[1] Where the parties either fail to reach agreement on all the essential terms of the agreement or express themselves in such fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms. In such circumstances, the parties have not reached a sufficient *consensus ad idem* to enable the courts to enforce their agreement. At the same time, the requirement of certainty of terms and its underlying rationale must be balanced against the practicalities of transactional negotiations. Parties may be unable to anticipate and articulate agreements with respect to future events and may intentionally leave gaps in their agreements to provide for future and mutually satisfactory accommodations. Parties, especially those not advised by lawyers, may be unaware of the nature of all the essential terms to be stipulated in the particular context. Parties may assume that reasonable or "the usual" arrangements will apply to an undetermined matter. In all such cases, the parties may intend to enter into binding contractual

1 *Scammell and Nephew Ltd v Ouston*, [1941] AC 251 [*Scammell and Nephew*].

TAB 5

2019 TCC 135
Tax Court of Canada [General Procedure]

Black v. The Queen

2019 CarswellNat 2740, 2019 TCC 135, [2019] 6 C.T.C. 2059, 2019 D.T.C. 1097, 306 A.C.W.S. (3d) 885

CONRAD M. BLACK (Appellant) and HER MAJESTY THE QUEEN (Respondent)

Eugene P. Rossiter C.J.

Heard: January 22-25, 2019
Judgment: June 14, 2019
Docket: 2016-2496(IT)G

Counsel: David C. Nathanson, Q.C., Adrienne K. Woodyard, for Appellant
Arnold H. Bornstein, Christa Akey, for Respondent

Subject: Income Tax (Federal); Restitution

Related Abridgment Classifications

Tax
II Income tax
II.6 Business and property income
II.6.f Expenses
II.6.f.x Interest expenses
II.6.f.x.C Borrowed money

Headnote

Tax --- Income tax — Business and property income — Expenses — Interest expenses — Borrowed money

Taxpayer and related company were ordered to pay damages in proceedings arising out of non-compete agreements — Taxpayer borrowed money to repay amounts owed by himself and related company — Taxpayer claimed that loan arrangement existed between himself and related company, and deducted expenses related to loan — Minister of National Revenue assessed taxpayer under Income Tax Act for 2008 taxation year, disallowing deductions — Taxpayer appealed — Appeal allowed — Taxpayer used loan for purpose of earning income from property and was entitled to deduct interest and other expenses related to loan — Not disputed that taxpayer paid interest on loan during relevant taxation years — Lender operated at arm's length from taxpayer and reasonableness of interest rate was not in dispute — Direct use of loan was to make interest bearing loan to related company, on generally same terms that taxpayer had borrowed money from lender — Taxpayer and related company regarded themselves as being bound by loan agreement — Taxpayer did not make gift — There was no formal approval of arrangement by full board of directors, but there was approval by independent directors, who were only ones who could give approval — Essential terms of loan were to be worked out, although arrangement was not merely agreement to agree — Security was not essential term as taxpayer indirectly controlled lender — Taxpayer had reasonable expectation of income — Taxpayer was making loan to related company which was historically profitable, public company that he controlled indirectly.

Table of Authorities

Cases considered by *Eugene P. Rossiter C.J.*:

Autobus Thomas Inc. c. R. (2000), 2000 CarswellNat 400, 2000 D.T.C. 6165 (Fr.), 2000 D.T.C. 6299 (Eng.), *(*sub nom. *Autobus Thomas Inc. v. Ministre du Revenu national)* 254 N.R. 316, 2000 CarswellNat 3573, [2002] 1 C.T.C. 3, [2000] 4 F.C. i (Fed. C.A.) — followed

Autobus Thomas Inc. c. R. (2001), 2001 SCC 64, 2001 CarswellNat 2131, 2001 CarswellNat 2130, *(*sub nom. *Autobus Thomas Inc. v. R.)* 2001 D.T.C. 5665 (Eng.), *(*sub nom. *Autobus Thomas Inc. v. Ministre du Revenu national)* 277 N.R. 48, [2002] 1 C.T.C. 1, *(*sub nom. *Autobus Thomas Inc. v. Canada)* [2001] 3 S.C.R. 5 (S.C.C.) — referred to

Black and Hollinger, are currently being reviewed and negotiated between Conrad Black and the independent directors of Hollinger." (Exhibit A-2, Tab 7)

120 Over the next several months, Black's relationship with Inc. and Walker deteriorated and became confrontational as time went on. Black was no longer a director or officer of Inc. in the fall of 2004. The loan agreement was never documented, but an agreement need not be in writing for a loan or a contractual obligation to exist.

121 Inc.'s financial statements showed for years that an amount was due to Black, although the explanation evolved as time progressed and management changed.

122 There was technically no formal approval by the full Board of Directors, but there was approval by the independent directors, the only ones who could give approval, albeit in the Audit Committee environment.

123 A reasonable observer would conclude that Black and Inc. intended for there to be a loan agreement, and the key players thought there was a binding loan agreement.

(b) Essential Terms or a Mechanism for Their Resolution

124 An enforceable contract requires that the essential terms be clear or reasonably ascertainable. The essential terms of the loan between Black and Inc. can be determined with a reasonable degree of certainty. The amount is known, $15.3 million; the interest rate is known, the same interest rate that Black was to pay on the Quest loan; the date on which the monies were advanced, and therefore when interest would begin to accrue, is known.

125 The Audit Committee meeting took place before Black borrowed money from Quest, so the terms of the loan agreement between Black and Inc. were not absolutely clear. The standard is whether the terms can be determined with a reasonable degree of certainty, not absolute certainty. It was clear that Black's borrowing was imminent and the essential terms of repayment to Black would match the eventual Quest Loan. It was reasonable to expect that the Quest Loan would reflect market terms at market rates as it was negotiated between arm's length parties. The essential terms of the agreement, matching the Quest Loan, could be determined with a reasonable degree of certainty. A review of the Quest Loan's terms is the mechanism by which the essential terms of the loan to Inc. would solidify. Inc. requested the terms of the Quest Loan from Black, which Black provided in August 2004.

126 Later on, representatives of Black and Inc. discussed whether, when papering the deal, the lender and the borrower would be intermediaries of the parties. I am satisfied that this discussion, which took place after the initial agreement had been reached, after Black advanced the funds, and after the lawyers became involved, represents a discussion to modify or substitute the original agreement rather than negotiations to reach an agreement for the first time.

127 There was no suggestion of security at the time Black and Inc. reached an agreement. While security would ordinarily be expected for such a large amount of money, in these circumstances I am satisfied that security was not an essential term given that Black indirectly controlled Inc. Again, while security was discussed once the lawyers became involved, the essential terms had already been agreed on.

128 The Respondent argues that Black and Inc. merely reached an "agreement to agree" rather than a binding agreement. After hearing the testimony of Black, White, and Walker and counsel for Inc. and after reviewing the Audit Committee meeting minutes and Inc.'s press release, I find that Black and Inc. had agreed that the essential terms or repayment would match the Quest Loan so as to ensure Black was not out-of-pocket after stepping up to help Inc.

129 Given the short timeline to pay the Joint Damages, and the severe consequences to Inc. of not doing so, Black and Inc. reached an agreement on the essential terms of the loan and left the details to be worked out at a later date. The fact that a formal document outlining those essential terms was to be prepared later on and signed, with the independent directors taking on that responsibility on behalf of Inc., does not alter the validity of the earlier contract. Black and Inc. reached an agreement,

not merely an agreement to agree. Neither the lack of a written agreement nor the later discussions once the lawyers became involved altered the binding nature of the agreement with its essential terms.

(c) Exchange of Legal Consideration

130 Black and Inc. exchanged valuable consideration. Black advanced the funds to International. The advance reduced Inc.'s liability to pay the Joint Damages, to the tune of Black's advance. Inc. accepted that benefit and communicated its intention to repay the advance, with interest, as noted in the Audit Committee meeting minutes and a press release. While Inc. did not in fact pay interest to Black, it was obligated to do so under the agreement.

131 Black's direct advancement of funds to International on Inc.'s behalf is not a bar to a loan existing between Black and Inc. As outlined in *Autobus Thomas Inc.*, the absence of direct, physical handing over of money is now commonplace at common law and an advance on another party's behalf can support a binding loan.

132 Black and Inc. entered into a loan agreement. Black's direct use of the Quest Loan was therefore to acquire the loan agreement, which is property to him.

(2) Did Black acquire a right of action founded in unjust enrichment?

133 Since I have found that Black's direct use of the Quest Loan was to acquire the loan agreement, Black's alternative argument that he acquired a right of action founded in unjust enrichment is unnecessary. Had I found that there was no loan agreement between Black and Inc., Black's direct use of the Quest Loan cannot have been to acquire such a right of action because the evidence does not prove a claim for unjust enrichment.

134 To prove unjust enrichment, Black must demonstrate that:

1. Inc. has been enriched;

2. Black has suffered a corresponding deprivation; and

3. There was no juristic reason for the enrichment of Inc. [8]

135 Black's position is that Inc.'s decision to not pay the Joint Damages to International in relation to the non-compete payments, and to instead allow Black to do so on its behalf, means that Inc. was unjustly enriched as it retained the benefit of the non-compete payments it received, at Black's expense.

136 I agree with Black that a right of action for unjust enrichment can be a chose in action, and can therefore be property as defined in subsection 248(1). I disagree with Black on whether he has a claim for unjust enrichment. The evidence in this appeal does not sufficiently support such a claim for unjust enrichment.

137 Inc. may well have been enriched, but it is not clear from the evidence adduced in this appeal. Black led no evidence to support the proper apportionment of the Joint Damages at law. The testimonies of White and Walker were that Inc. considered itself morally responsible for the Joint Damages, and intended to repay them in full, but there was no agreement to the effect that Inc. was required to pay the Joint Damages entirely. As the amount of the damages for which Inc. is legally responsible is unclear, the amount by which Inc. has been unjustly enriched is also unclear.

138 Black suffered a deprivation, but without evidence of Inc.'s enrichment Black's deprivation cannot be said to be a deprivation corresponding to Inc.'s enrichment. Further, if Inc. was enriched there was a juristic reason for the enrichment given that International was entitled to recover the damages fully from Black. Black would then likely seek reimbursement or contribution from Inc. toward the Joint Damages, but that is the proper claim, not unjust enrichment.

2. Did Black's use of the Quest Loan have an income-earning purpose?

139 The leading case on this purpose test is *Entreprises Ludco ltée c. Canada*, 2001 SCC 62 (S.C.C.). In *Entreprises Ludco ltée*, the Supreme Court of Canada outlined that the purpose test for interest deductibility under paragraph 20(1)(c) is:

> whether, considering all the circumstances, the taxpayer had a reasonable expectation of income at the time the investment is made. [9]

140 The purpose test is to be applied objectively:

> Reasonable expectation accords with the language of purpose in the section and provides an objective standard, apart from the taxpayer's subjective intention, which by itself is relevant but not conclusive. [10]

141 The taxpayer need only establish that earning income was a purpose, not the main purpose, of borrowing money:

> [I]t is perfectly consistent with the language of s. 20(1)(c)(i) that a taxpayer who uses borrowed money to make an investment for more than one purpose may be entitled to deduct interest charges provided that one of those purposes is to earn income.
>
> In this connection, the adjectives that have been heretofore used by courts to characterize the requisite purpose in s. 20(1)(c)(i), such as "bona fide", "actual", "real" or "true", are to my mind ultimately useful only when describing whether the transaction at issue was a mere sham or window-dressing designed to obtain the benefit of interest deductibility. Absent a sham or window dressing or other vitiating circumstances, a taxpayer's ancillary purpose may be nonetheless a bona fide, actual, real and true objective of his or her investment, equally capable of providing the requisite purpose for interest deductibility in comparison with any more important or significant primary purpose. [11]

142 Subparagraph 20(1)(c)(i) refers to income generally, not net income. [12] Gross income is sufficient for the purpose of subparagraph 20(1)(c)(i). Black is not required to prove that the Quest Loan was used to generate a profit beyond the Quest Loan's expenses.

143 The use of the word "purpose" suggests that Black is not required to prove that he actually earned income. Black must prove that he used the Quest Loan for the purpose of earning income that would come into income for taxation purposes.

144 Black gave clear, unequivocal, and uncontradicted evidence on this particular point that I found both credible and reliable. Black was clear that one of the purposes for making the loan was to be made whole after stepping up to help Inc. pay the Joint Damages. Since Black had an obligation to pay interest expenses on the Quest Loan, Black had to earn interest income on the loan to Inc. in order for him to be made whole.

145 Black clearly had other purposes in making the loan to Inc. The primary purpose appears to have been to assist Inc. in a time of need and avoid the associated financial and reputational risks. Inc. did not have the financial wherewithal to satisfy the outstanding $21,000,000 US judgment ordered by the Delaware Court. It could pay $6,000,000 through its own resources, but it had no ability to borrow from other lenders due to covenants in an indenture held by Wachovia.

146 Numerous witnesses testified that if Black had not provided the money to pay the judgment it would have resulted in default on the Wachovia indenture, which would have had catastrophic consequences for Inc.

147 Black and White both testified that if International had not been paid by the July deadline, International would, among other things, seize Inc.'s head office at 10 Toronto Street, in Toronto, Ontario.

148 Finally, Inc. would not have had standing in the Delaware Court to file an appeal from the Judgment unless the Joint Damages were satisfied beforehand.

149 When Black used the Quest Loan to make an interest-bearing loan to Inc., one of his purposes was to earn income. While I find that this was an ancillary purpose compared to his primary purpose of helping Inc., that was a bona fide objective of his investment, which is capable of providing the requisite purpose for interest deductibility under paragraph 20(1)(c).

150 In the circumstances, Black had a reasonable expectation of income. Despite Inc.'s later misfortunes, Black made a loan to a historically profitable, public company that he controlled indirectly. As he testified, while he may have expected some interest to accrue in that time of corporate crisis, he always expected to be repaid and made whole. I find that his expectation was objectively reasonable.

151 While I have already found that there was a loan between Black and Inc., and that Black has not made out a claim for unjust enrichment, I would add that I find it difficult to foresee any situation in which a claim for unjust enrichment can support interest deductibility. Remedies for unjust enrichment are restitutionary. They are intended to restore parties to the position they were in before the unjust enrichment took place. There is no income-earning purpose to an unjust enrichment claim. It would be difficult to find any taxpayer that purposefully, unjustly enriched a third party with the intention of earning income.

H. Conclusion

152 For the reasons stated herein, I allow the Appellant's appeal. The Appellant shall have his costs with a hearing on costs to be scheduled forthwith.

Appeal allowed.

Footnotes

1 *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.) at para 28.

2 *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.) at para 31.

3 *Black's Law Dictionary*, 8th Ed., *sub verbo*, "loan".

4 *The Oxford English Dictionary*, 6th Ed., *sub verbo*, "loan".

5 *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, [2008] O.J. No. 1676 (Ont. S.C.J.); Stephen Waddams, *The Law of Contracts*, 7th ed, (Aurora, ON: Canada Law Book, 2017) at 19.

6 *Bawitko Investments Ltd. v Kernels Popcorn Ltd.* [1991 CarswellOnt 836 (Ont. C.A.)], 1991 CanLII 2734 at p 12-13.

7 *McLean v. McLean*, 2013 ONCA 788 (Ont. C.A.) at para 10.

8 *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para 30.

9 *Entreprises Ludco ltée c. Canada*, 2001 SCC 62 (S.C.C.) at para 54.

10 *Entreprises Ludco ltée c. Canada*, 2001 SCC 62 (S.C.C.) at para 55.

11 *Entreprises Ludco ltée c. Canada*, 2001 SCC 62 (S.C.C.) at paras 50-51.

12 *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.) at para 61.

TAB 6

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

DECISION AND RATE ORDER

EB-2019-0164

2019 UNIFORM TRANSMISSION RATES

By Delegation, Before: Theodore Antonopoulos

July 25, 2019

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

The Ontario Energy Board (OEB) established this proceeding on its own motion to issue the 2019 Uniform Transmission Rates (UTRs) on a final basis effective July 1, 2019.

There are five licensed electricity transmitters in Ontario that recover their revenues through Ontario's UTRs: Canadian Niagara Power Inc. (CNPI), Hydro One Networks Sault Ste. Marie LP (Hydro One SSM, formerly Great Lakes Power Transmission Inc.), Five Nations Energy Inc. (FNEI), Hydro One Networks Inc. (Hydro One), and B2M Limited Partnership (B2M LP). The OEB approves the revenue requirements and charge determinants of the individual transmitters in separate proceedings and uses them to calculate the UTRs.

The revenue requirements of the five transmitters are allocated to three transmission rate pools – Network, Line Connection and Transformation Connection – on the same basis as is used for Hydro One Networks Inc. The costs are then divided by forecast consumption (charge determinants) to establish the UTRs. The Independent Electricity System Operator (IESO) charges these rates to all wholesale market participants, including electricity distributors.

The OEB issued an interim decision on December 20, 2018 that established 2019 UTRs on an interim basis effective January 1, 2019.[1]

This Decision and Rate Order sets out the final transmission rates pool revenue requirement for 2019. The final 2019 transmission rates pool revenue requirement (adjusted for the January to June period) represents a 2.9% increase from the interim approved amount and a 0.2% increase on total bill for a typical residential customer.

The final 2019 UTRs effective July 1, 2019 are:

- $3.83/kW/Month Network Service Rate (a $0.12/kW increase)
- $0.96/kW/Month Line Connection Service Rate (a $0.02/kW increase)
- $2.30/kW/Month Transformation Connection Service Rate (a $0.05/kW increase)

The impact of this increase may take some time to materialize, and will vary depending on the customer mix and load characteristics in the different service areas and the

[1] EB-2018-0326, Decision and Interim Rate Order, 2019 Uniform Transmission Rates, December 20, 2018.

proportion of power withdrawn by individual distributors from the bulk transmission system.

Electricity distributors directly connected to the transmission system recover transmission costs from their customers through Retail Transmission Service Rates (RTSRs), which are established for each rate class annually, some on January 1 and some on May 1. The 2019 UTRs will be taken into account when new RTSRs are approved effective January 1, 2020 or later. Existing variance accounts will be used to track differences between a distributor's transmission costs and the associated revenues it receives from its customers, in order to ensure that its customers pay the true cost of transmission service over time.

2 THE PROCESS

The total revenue recovered for transmission services in 2019 derives from the OEB's decisions for the revenue requirements and charge determinants for each of the five OEB rate-regulated transmitters in Ontario. The findings in this Decision and Rate Order involve only the implementation of findings in these previous decisions. Therefore, this Decision is issued by delegated authority, without a hearing, under section 6 of the *Ontario Energy Board Act, 1998*.

3 2019 UNIFORM TRANSMISSION RATES

This Decision and Rate Order incorporates the OEB's findings in the most recent OEB-approved revenue requirements and load forecasts (charge determinants) for each of the rate regulated transmitters.

The final 2019 transmission rate pool revenue requirement is $1,642,007,268 as set out in Table 1 below. This amount was adjusted to address the January to June period. The adjusted transmission rate pool revenue requirement underpinning the final 2019 UTRs is $1,652,282,431.

Table 1 ($)

Revenue Requirement (RR)	Interim UTRs RR	Final 2019 RR	Forgone Revenue/ Credit	Annualized Foregone R/C	Final UTRs RR
Hydro One Networks Inc.	1,521,280,755	1,557,767,027	5,600,000	11,081,550	1,568,848,577
Hydro One SSM LP	39,778,120	38,815,797	(400,000)	(806,387)	38,009,410
B2M LP	32,789,151	32,789,151	-	-	32,789,151
Five Nations Energy Inc.	7,988,092	7,988,092	-	-	7,988,092
Canadian Niagara Power Inc.	4,647,201	4,647,201	-	-	4,647,201
Total	**1,606,483,319**	**1,642,007,268**	**5,200,000**	**10,275,163**	**1,652,282,431**

Table 2 below sets out the adjusted individual revenue requirements for 2019 that underpin the final 2019 UTRs and the individual charge determinants:

Table 2

Transmitters	2019 Adjusted Revenue Requirement[2]	2019 Charge Determinants[3]	OEB File No. for 2019
Hydro One Networks Inc.	$1,568,848,577	684,383 MW	EB-2018-0130 Decision issued June 13, 2019
Hydro One SSM LP	$38,009,410	6,868 MW	EB-2018-0218 Decision issued July 18, 2019
B2M LP	$32,789,151	0 MW	EB-2018-0320 Decision issued December 20, 2018
Five Nations Energy Inc.	$7,988,092	552 MW	EB-2016-0231 Decision issued January 18, 2018
Canadian Niagara Power Inc.	$4,647,201	1,621 MW	EB-2015-0354 Decision issued January 14, 2016

The individual 2019 revenue requirement and charge determinant amounts for each of the five Ontario transmitters in the Ontario transmission rate pool were consolidated to arrive at the 2019 UTRs and revenue allocators as shown in Schedule A.

[2] FNEI and CNPI have not filed applications for 2019. For FNEI, a $1.839 million 2017 foregone revenue amount that was included in the 2018 approved revenue requirement was excluded for purposes of deriving the 2019 revenue requirement. For CNPI, the OEB has incorporated the most recently approved revenue requirement in the determination of the 2019 UTRs.
[3] For transmitters that did not file applications for 2019, the OEB has incorporated the most recently approved charge determinants for that transmitter in the determination of the 2019 UTRs.

4 FINDINGS

The OEB finds that the UTR calculations attached as Schedule A to this Decision and Rate Order appropriately reflect the OEB's decisions for all of the Ontario transmitters in the 2019 transmission rate pool.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The revenue requirements by rate pool, the Uniform Transmission Rates (UTRs) and the revenue allocators for rates effective July 1, 2019, attached as Schedule A, are approved.

2. The 2019 Ontario Uniform Transmission Rate Schedules, attached as Schedule B, are approved.

3. The 2019 Uniform Transmission Rates are to be implemented on a final basis as of July 1, 2019.

DATED at Toronto July 25, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

SCHEDULE A

2019 Uniform Transmission Rates

and

Revenue Disbursement Allocators

EB-2019-0164

Decision and Rate Order

July 25, 2019

2019 Uniform Transmission Rates and Revenue Disbursement Allocators

(for Period July 1, 2019 to December 31, 2019)

Transmitter	Revenue Requirement ($)			
	Network	Line Connection	Transformation Connection	Total
FNEI	$4,541,221	$1,134,788	$2,312,083	$7,988,092
CNPI	$2,641,928	$660,181	$1,345,091	$4,647,201
H1N SSM	$21,608,304	$5,399,616	$11,001,490	$38,009,410
H1N	$891,888,531	$222,870,611	$454,089,436	$1,568,848,577
B2MLP	$32,789,151	$0	$0	$32,789,151
All Transmitters	$953,469,135	$230,065,197	$468,748,100	$1,652,282,431

Transmitter	Total Annual Charge Determinants (MW)**			
	Network	Line Connection	Transformation Connection	
FNEI	230.410	248.860	73.040	
CNPI	522.894	549.258	549.258	
HIN SSM	3,498.236	2,734.624	635.252	
H1N	244,924.157	236,948.242	202,510.123	
B2MLP	0.000	0.000	0.000	
All Transmitters	249,175.697	240,480.984	203,767.673	

Transmitter	Uniform Rates and Revenue Allocators			
	Network	Line Connection	Transformation Connection	
Uniform Transmission Rates ($/kW-Month)	**3.83**	**0.96**	**2.30**	
FNEI Allocation Factor	**0.00476**	**0.00493**	**0.00493**	
CNPI Allocation Factor	**0.00277**	**0.00287**	**0.00287**	
H1N SSM Allocation Factor	**0.02266**	**0.02347**	**0.02347**	
H1N Allocation Factor	**0.93542**	**0.96873**	**0.96873**	
B2MLP Allocation Factor	**0.03439**	**0.00000**	**0.00000**	
Total of Allocation Factors	1.00000	1.00000	1.00000	

** The sum of 12 monthly charge determinants for the year.

Note 1: FNEI Rates Revenue Requirement and Charge Determinants per Board Decision and Order on EB-2016-0231 dated January 18, 2018.
Note 2: CNPI Rates Revenue Requirement and Charge Determinants per OEB Decision EB-2015-0354 dated January 14, 2016.
Note 3: H1N SSM 2019 Rates Revenue Requirement and Charge Determinants per OEB Decision EB-2018-0218 dated July 18, 2019.
Note 4: H1N Rates Revenue Requirement and Charge Determinants per OEB Decision EB-2018-0130 dated June 13, 2019.
Note 5: B2M LP 2018 Revenue Requirement per OEB Decision and Order EB-2018-0320 dated December 20, 2018.
Note 6: Calculated data in shaded cells.

SCHEDULE B

2019 Uniform Transmission Rate Schedules

EB-2019-0164

Decision and Rate Order

July 25, 2019

2019 ONTARIO UNIFORM TRANSMISSION RATE SCHEDULES

EB-2019-0164

The rate schedules contained herein shall be implemented as of July 1, 2019

Issued: July 25, 2019
Ontario Energy Board

TERMS AND CONDITIONS

(A) APPLICABILITY The rate schedules contained herein pertain to the transmission service applicable to: •The provision of Provincial Transmission Service (PTS) to the Transmission Customers who are defined as the entities that withdraw electricity directly from the transmission system in the province of Ontario. •The provision of Export Transmission Service (ETS) to electricity market participants that export electricity to points outside Ontario utilizing the transmission system in the province of Ontario. The Rate Schedule ETS applies to the wholesale market participants who utilize the Export Service in accordance with the Market Rules of the Ontario Electricity Market, referred to hereafter as Market Rules. These rate schedules do not apply to the distribution services provided by any distributors in Ontario, nor to the purchase of energy, hourly uplift, ancillary services or any other charges that may be applicable in electricity markets administered by the Independent Electricity System Operator (IESO) of Ontario.

(B) TRANSMISSION SYSTEM CODE The transmission service provided under these rate schedules is in accordance with the Transmission System Code (Code) issued by the Ontario Energy Board (OEB). The Code sets out the requirements, standards, terms and conditions of the transmitter's obligation to offer to connect to, and maintain the operation of, the transmission system. The Code also sets out the requirements, standards, terms and conditions under which a Transmission Customer may connect to, and remain connected to, the transmission system. The Code stipulates that a transmitter shall connect new customers, and continue to offer transmission services to existing customers, subject to a Connection Agreement between the customer and a transmitter.

(C) TRANSMISSION DELIVERY POINT The Transmission Delivery Point is defined as the transformation station, owned by a transmission company or by the Transmission Customer, which steps down the voltage from above 50 kV to below 50 kV and which connects the customer to the transmission system. The demand registered by two or more meters at any one delivery point shall be aggregated for the purpose of assessing transmission charges at that delivery point if the corresponding distribution feeders from that delivery point, or the plants taking power from that delivery point, are owned by the same entity within the meaning of Ontario's *Business Corporations Act*. The billing demand supplied from the transmission system shall be adjusted for losses, as appropriate, to the Transmission Point of Settlement, which shall be the high voltage side of the transformer that steps down the voltage from above 50 kV to below 50 kV.

(D) TRANSMISSION SERVICE POOLS The transmission facilities owned by the licenced transmission companies are categorized into three functional pools. The transmission lines that are used for the common benefit of all customers are categorized as Network Lines and the corresponding terminating facilities are Network Stations. These facilities make up the Network Pool. The transformation station facilities that step down the voltage from above 50 kV to below 50 kV are categorized as the Transformation Connection Pool. Other electrical facilities (i.e. that are neither Network nor Transformation) are categorized as the Line Connection Pool. All PTS customers incur charges based on the Network Service Rate (PTS-N) of Rate Schedule PTS. The PTS customers that utilize transformation connection assets owned by a licenced transmission company also incur charges based on the Transformation Connection Service Rate (PTS-T). The customer demand supplied from a transmission delivery point will not incur transformation connection service charges if a customer fully owns all transformation connection assets associated with that transmission delivery point. The PTS customers utilize lines owned by a licenced transmission company to connect to Network Station(s) also incur charges based on the Line Connection Service Rate (PTS- L). The customer demand supplied from a transmission delivery point will not incur line connection service charges if a customer fully owns all line connection assets connecting that delivery point to a Network Station. Similarly, the customer demand will not incur line connection service charges for demand at a transmission delivery point located at a Network Station.

(E) MARKET RULES The IESO will provide transmission service utilizing the facilities owned by the licenced transmission companies in Ontario in accordance with the Market Rules. The Market Rules and appropriate Market Manuals define the procedures and processes under which the transmission service is provided in real or operating time (on an hourly basis) as well as service billing and settlement processes for transmission service charges based on rate schedules contained herein.

(F) METERING REQUIREMENTS In accordance with Market Rules and the Transmission System Code, the transmission service charges payable by Transmission Customers shall be collected by the IESO. The IESO will utilize Registered Wholesale Meters and a Metering Registry in order to calculate the monthly transmission service charges payable by the Transmission Customers. Every Transmission Customer shall ensure that each metering installation in respect of which the customer has an obligation to pay transmission service charges arising from the Rate Schedule PTS shall satisfy the Wholesale Metering requirements and associated obligations specified in Chapter 6 of the Market Rules, including the appendices therein, whether or not the subject meter installation is required for settlement purposes in the IESO-administered energy market. A meter installation required for the settlement of charges in the IESO-administered that energy market may be used for the settlement of transmission service charges. The Transmission Customer shall provide to the IESO data required to maintain the information for the Registered Wholesale Meters and the Metering Registry pertaining to the metering installations with respect to which the Transmission Customers have an obligation to pay transmission charges in accordance with Rate Schedule PTS. The Metering Registry for metering installations required for the calculation of transmission charges shall be maintained in accordance with Chapter 6 of the Market Rules. The Transmission Customers, or Transmission Customer Agents if designated by the Transmission Customers, associated with each Transmission Delivery Point will be identified as Metered Market Participants within the IESO's Metering Registry. The metering data recorded in the Metering Registry shall be used as the basis for the calculation of transmission charges on the settlement statement for the Transmission Customers identified as the Metered Market Participants for each Transmission Delivery Point. The Metering Registry for metering installations required for calculation of transmission charges shall also indicate whether or not the demand associated with specific Transmission Delivery Point(s) to which a Transmission Customer is connected attracts Line and/or Transformation Connection Service Charges. This information shall be consistent with the Connection Agreement between the Transmission Customer and the licenced Transmission Company that connects the customer to the IESO-Controlled Grid.

(G) EMBEDDED GENERATION The Transmission Customers shall ensure conformance of Registered Wholesale Meters in accordance with Chapter 6 of Market Rules, including Metering Registry obligations, with respect to metering installations for embedded generation that is located behind the metering installation that measures the net demand taken from the transmission system if (a) the required approvals for such generation are obtained after October 30, 1998; and (b) the generator unit rating is 2 MW or higher for renewable generation and 1 MW or higher for non-renewable generation; and (c) the Transmission Delivery Point through which the generator is connected to the transmission system attracts Line or Transformation Connection Service charges. These terms and conditions also apply to the incremental capacity associated with any refurbishments approved after October 30, 1998, to a generator unit that was connected through an eligible Transmission Delivery Point on or prior to October 30, 1998 and the approved incremental capacity is 2 MW or higher for renewable generation and 1 MW or higher for non-renewable generation. The term renewable generation refers to a facility that generates electricity from the following sources: wind, solar, Biomass, Bio-oil, Bio-gas, landfill gas, or water. Accordingly, the distributors that are Transmission Customers shall ensure that connection agreements between them and the generators, load customers, and embedded distributors connected to their distribution system have provisions requiring the Transmission Customer to satisfy the requirements for Registered Wholesale Meters and Metering Registry for such embedded generation even if the subject embedded generator(s) do not participate in the IESO-administered energy markets.

(H) EMBEDDED CONNECTION POINT In accordance with Chapter 6 of the Market Rules, the IESO may permit a Metered Market Participant, as defined in the Market Rules, to register a metering installation that is located at the embedded connection point for the purpose of recording transactions in the IESO-administered markets. (The Market Rules define an embedded connection point as a point of connection between load or generation facility and distribution system). In special situations, a metering installation at the embedded connection point that is used to settle energy market charges may also be used to settle transmission service charges, if there is no metering installation at the point of connection of a

distribution feeder to the Transmission Delivery Point. In above situations: •The Transmission Customer may utilize the metering installation at the embedded connection point, including all embedded generation and load connected to that point, to satisfy the requirements described in Section (F) above provided that the same metering installation is also used to satisfy the requirement for energy transactions in the IESO- administered market. •The Transmission Customer shall provide the Metering Registry information for the metering installation at the embedded connection point, including all embedded generation and load connected to that point, in accordance with the requirements described in Section (F) above so that the IESO can calculate the monthly transmission service charges payable by the Transmission Customer.

RATE SCHEDULE: (PTS) PROVINCIAL TRANSMISSION RATES

APPLICABILITY:

The Provincial Transmission Service (PTS) is applicable to all Transmission Customers in Ontario who own facilities that are directly connected to the transmission system in Ontario and that withdraw electricity from this system.

	Monthly Rate ($ per kW)
Network Service Rate (PTS-N):	**3.83**
$ Per kW of Network Billing Demand [1,2]	
Line Connection Service Rate (PTS-L):	**0.96**
$ Per kW of Line Connection Billing Demand [1,3]	
Transformation Connection Service Rate (PTS-T):	**2.30**
$ Per kW of Transformation Connection Billing Demand [1,3,4]	

The rates quoted above shall be subject to adjustments with the approval of the Ontario Energy Board.

Notes:

1 The demand (MW) for the purpose of this rate schedule is measured as the energy consumed during the clock hour, on a "Per Transmission Delivery Point" basis. The billing demand supplied from the transmission system shall be adjusted for losses, as appropriate, to the Transmission Point of Settlement, which shall be the high voltage side of the transformer that steps down the voltage from above 50 kV to below 50 kV at the Transmission Delivery Point.

2. The Network Service Billing Demand is defined as the higher of (a) customer coincident peak demand (MW) in the hour of the month when the total hourly demand of all PTS customers is highest for the month, and (b) 85 % of the customer peak demand in any hour during the peak period 7 AM to 7 PM (local time) on weekdays, excluding the holidays as defined by IESO. The peak period hours will be between 0700 hours to 1900 hours Eastern Standard Time during winter (i.e. during standard time) and 0600 hours to 1800 hours Eastern Standard Time during summer (i.e. during daylight savings time), in conformance with the meter time standard used by the IMO settlement systems.

3. The Billing Demand for Line and Transformation Connection Services is defined as the Non-Coincident Peak demand (MW) in any hour of the month. The customer demand in any hour is the sum of (a) the loss-adjusted demand supplied from the transmission system plus (b) the demand that is supplied by an embedded generator unit for which the required government approvals are obtained after October 30, 1998 and which have installed capacity of 2MW or more for renewable generation and 1 MW or higher for non-renewable generation, on the demand supplied by the incremental capacity associated with a refurbishment approved after October 30, 1998, to a generator unit that existed on or prior to October 30, 1998. . The term renewable generation refers to a facility that generates electricity from the following sources: wind, solar, Biomass, Bio-oil, Bio-gas, landfill gas, or water. The demand supplied by embedded generation will not be adjusted for losses.

4. The Transformation Connection rate includes recovery for OEB approved Low Voltage Switchgear compensation for Toronto Hydro Electric System Limited and Hydro Ottawa Limited.

TERMS AND CONDITIONS OF SERVICE:

The attached Terms and Conditions pertaining to the Transmission Rate Schedules, the relevant provisions of the Transmission System Code, in particular the Connection Agreement as per Appendix 1 of the Transmission System Code, and the Market Rules for the Ontario Electricity Market shall apply, as contemplated therein, to services provided under this Rate Schedule.

RATE SCHEDULE: (ETS) EXPORT TRANSMISSION SERVICE

APPLICABILITY:

The Export Transmission Service is applicable for the use of the transmission system in Ontario to deliver electrical energy to locations external to the Province of Ontario, irrespective of whether this energy is supplied from generating sources within or outside Ontario.

	Hourly Rate
Export Transmission Service Rate (ETS):	$1.85 / MWh

The ETS rate shall be applied to the export transactions in the Interchange Schedule Data as per the Market Rules for Ontario's Electricity Market. The ETS rate shall be subject to adjustments with the approval of the Ontario Energy Board.

TERMS AND CONDITIONS OF SERVICE:

The attached Terms and Conditions pertaining to the Transmission Rate Schedules, the relevant provisions of the Transmission System Code and the Market Rules for the Ontario Electricity Market shall apply, as contemplated therein, to service provided under this Rate Schedule.

TAB 7

Milner Power Inc.

Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology

ATCO Power Ltd.

Complaint regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology

Phase 2 Module C – Preliminary Issues

September 28, 2016

Alberta Utilities Commission
Decision 790-D04-2016
Milner Power Inc.
Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology
ATCO Power Ltd.
Complaint regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology
Applications 1606494, 1608563 and 1608709
Proceeding 790
Phase 2 Module C – Preliminary Issues

September 28, 2016

Published by the:
Alberta Utilities Commission
Fifth Avenue Place, Fourth Floor, 425 First Street S.W.
Calgary, Alberta
T2P 3L8

Telephone: 403-592-8845
Fax: 403-592-4406

Website: www.auc.ab.ca

Contents

Alberta Utilities Commission

Calgary, Alberta

Milner Power Inc.
Complaints regarding ISO Transmission Loss Factor Rule and Loss Factor Methodology

ATCO Power Ltd.
Complaint regarding ISO Transmission Loss Factor Rule and Loss Factor Methodology

Decision 790-D04-2016
Applications 1606494, 1608563 and 1608709
Proceeding 790
Phase 2 Module C – Preliminary Issues

1 Introduction

1. This decision is one in a series of related decisions made by the Alberta Utilities Commission (AUC) regarding a complaint filed by Milner Power Inc. (Milner) on August 17, 2005 about the Independent System Operator (ISO) rule 9.2: *Transmission Loss Factors* and Appendix 7: *Transmission Loss Factor Methodology and Assumptions* (collectively the Line Loss Rule) that was subsequently implemented by the Alberta Electric System Operator (AESO) on January 1, 2006. All references to the Line Loss Rule in this decision mean the 2005 Line Loss Rule as adjusted from time to time during the period from January 1, 2006 to the present.

2. On August 8, 2014, the Commission determined that it would proceed to hear Phase 2 of this proceeding, regarding relief and remedy, in three modules.[1] Module C is to address determination of financial compensation and the parties entitled to receive or required to pay monetary compensation.

3. This decision deals with several preliminary issues in Module C that the Commission considers can be addressed without the need for revised loss factors for the period from 2006 to the date new loss factors take effect, based on the compliant loss factor rule being established in Module B.

4. The chronology of determinations made by the Commission and its predecessor, the Alberta Energy and Utilities Board, with respect to Milner's complaint, the Line Loss Rule and related matters is found in Section 2 of AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*.

1.1 Summary of decision

5. In this decision, the Commission has determined the following with respect to each preliminary issue:

- Issue A: All parties that were subject to the line loss component of the ISO tariff since January 1, 2006, should have that portion of their tariff rate adjusted, in accordance with the outcome of this proceeding.

[1] Exhibit 524.01, AUC letter re issues list and schedule for Phase 2, August 8, 2014.

- Issue B: The Commission will provide notice to current and past market participants that interim tariff charges since January 1, 2006 relating to loss factors will be adjusted before being made final based on the Commission's determinations in this proceeding.

- Issue B: The AESO shall provide the Commission with a list of all parties who, at any time since January 1, 2006, received an ISO tariff invoice with a loss factor component.

- Issue B: The ISO tariff and ISO rules provide the AESO with mechanisms to pursue payment from, or reimbursement to, market participants that have paid for or received a credit for line losses under the ISO tariff since 2006.

- Issue C: Market participants that may be required to pay significantly higher charges should work collaboratively with the AESO in arranging a repayment schedule that would assist in mitigating any potentially severe financial impacts.

- Issue D: Because there is no applicable costs regime, no parties are eligible for cost recovery in this proceeding.

- Issue E: It is just and reasonable to account for the time value of money dating back to January 1, 2006 and awarding (and charging) interest is both a practical and just and reasonable method of doing so.

- Issue E: It is reasonable to set the rate of interest equal to the Bank of Canada's Bank Rate plus one and one half per cent to be applied from the date on which the recalculated loss factors become effective to January 1, 2006 consistent with the guidance provided in sections 3(2)(d) and 3(2)(e) of AUC Rule 023.

- Issue F: Aggregation from January 1, 2006 to the effective date of new loss factors is not practical and is unlikely to emulate a competitive market outcome, and is therefore not granted.

- Issue G: Re-doing the merit orders from January 1, 2006 to the effective date of new loss factors is not practical and is unlikely to emulate a competitive market outcome, and is therefore not granted.

- Issue H: If possible, the AESO should use actual data rather than forecast data when recalculating loss factors for the period from January 1, 2011 to the effective date of new loss factors. The Commission will defer making a determination on data use for the period between January 1, 2006 and December 31, 2010, pending the AESO's analysis of data quality and its assessment of the data's suitability for use with the methodology that is ultimately approved in Module B.

1.2 Next steps

6. The Commission will consider the remaining unresolved issues in Module C, including but not limited to potential mismatches between charges to be collected and credits to be paid out, once a compliant line loss rule has been determined.

2 Scope of this proceeding

7. Milner's original 2005 complaint[2] sought relief under Section 25(6) of the 2003 *Electric Utilities Act*. That section provides that the Alberta Energy and Utilities Board may order the ISO to revoke or change a provision of an ISO rule that, in the Board's opinion, is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of the 2003 *Electric Utilities Act* or the regulations.

8. In 2010, the Alberta Court of Appeal remitted Milner's 2005 complaint "…to further investigate or hold a hearing to determine whether there was a contravention of Section 19 of the *Transmission Regulation* as alleged."[3] To this end, the Commission issued a September 20, 2010 notice of proceeding which it designated as Proceeding 790.[4] In a letter dated February 28, 2011, the Commission bifurcated Proceeding 790 into two phases: the first phase to consider whether the 2005 Line Loss Rule contravened Section 19 of the 2004 *Transmission Regulation* and the second phase to determine the relief that might be granted should the complaint be upheld.[5]

9. Effective October 10, 2012, the AESO filed ISO rules Section 501.10 with the Commission and removed ISO rule 9.2, the 2005 Line Loss Rule, as part of the AESO's Transition of Authoritative Documents Project. This was filed by the AESO on an expedited basis under Section 20.6 of the 2003/07 *Electric Utilities Act* as amended to that date in Application 1608876. The AESO's October 2, 2012 notice of filing respecting this rule stated that the changes were not intended to circumvent or dismiss the complaints submitted by Milner and ATCO Power Ltd. (ATCO Power) against ISO rule 9.2. The AESO further stated that it wished to preserve the complaints by Milner and ATCO Power and requested that the Commission transfer the complaints to ISO rules Section 501.10 upon removal of existing ISO rule 9.2.[6]

10. On April 16, 2014, in Decision 2014-110, the review panel upheld the findings of the Commission in Decision 2012-104 that the 2005 Line Loss Rule was unjust, unreasonable, unduly preferential, arbitrarily and unjustly discriminatory and inconsistent with and in contravention of the 2003 *Electric Utilities Act* and the relevant portions of the 2004 *Transmission Regulation* dealing with line losses.

11. On April 24, 2014, the Commission established a schedule to receive submissions from parties on various matters including the relief or remedy that may be available in this proceeding.[7] On July 4, 2014, the Commission issued a notice of proceeding for Phase 2 consideration of relief and remedy in this proceeding.[8]

12. On August 8, 2014, the Commission released an issues list and proceeding schedule directing that Phase 2 of Proceeding 790 be divided into three modules: Module A and Module B, which would run concurrently, and Module C which would proceed only if required,

---

2 Exhibit 2.01, Milner Power Inc. Complaint Application, dated August 17, 2005, pages 1-2.
3 *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236, paragraph 61.
4 Exhibit 64.01, AUC Notice of Proceeding, September 20, 2010.
5 Exhibit 110.01, AUC Ruling re Bifurcation, February 28, 2011.
6 Exhibit 533.02, AESO Line Loss Consultation, September 5, 2014, PDF page 959.
7 Exhibit 312.01, AUC letter polling parties re Phase 2, April 24, 2014.
8 Exhibit 521.01, AUC Notice of Proceeding, July 4, 2014.

based on the outcome of the first two modules.[9] As prescribed in that letter, Module A was to address several issues of fact, law and jurisdiction; Module B was to address the development of a new line loss factor calculation methodology and line loss rule that meets legislative requirements; and Module C was to address the determination of financial compensation and the parties entitled to receive, or required to pay, monetary compensation.

Module A

13. In the letter dated August 8, 2014, the Commission also set out a schedule to receive (1) any factual evidence related to Module A and Module B issues that was not already on the record, (2) written argument and reply argument regarding issues identified in Module A, and (3) submissions on what order(s) the Commission should issue to the AESO in relation to the proposed new rule.[10]

14. After reviewing the submissions from parties, the Commission determined in Module A, among other things, that "[t]he Line Loss Rule and the line loss components of the ISO tariff are subject to a negative disallowance scheme" and "[i]t is not impermissible retroactive ratemaking for the Commission to grant a tariff-based remedy to correct for the payment or receipt of unlawful line loss charges and credits included in the ISO tariff from the date that the unlawful Line Loss Rule went into effect on January 1, 2006."[11]

Module B

15. On November 13, 2014, the Commission set a schedule to gather evidence from parties and hold an oral hearing into the Module B issues,[12] which was followed by argument from the parties. In the Module B decision, issued on November 26, 2015, the Commission, among other things, directed the AESO to (1) replace the marginal loss factor divided by two (MLF/2) methodology with an incremental loss factor methodology (ILF); while (2) using the metering point identifier (MPID) as the definition of location; and (3) keeping load constant and redispatching up the merit order when performing the ILF calculation.[13]

16. During the development of the AESO's implementation plan in Module B, the AESO provided initial estimates of the computational time required to calculate annual loss factors using the methodology it was directed to develop in the Module B decision.[14] More recently, the AESO estimated "that loss factors for 2006 to 2016 could be determined in 12 to 18 months following the calculation and release of 2017 loss factors in late 2016, using the same methodology developed for the 2017 loss factors."[15]

---

9 Exhibit 524.01, AUC Letter re issues list and schedule for Phase 2, August 8, 2014.
10 Exhibit 524.01, AUC Letter re issues list and schedule for Phase 2, August 8, 2014.
11 AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, Phase 2 Module A, January 20, 2015, paragraph 8.
12 Exhibit 0562.01.AUC-790, AUC letter re schedule for Module B, November 13, 2014.
13 AUC Decision 790-D03-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, Phase 2 Module B, November 26, 2015, paragraph 5.
14 Exhibit 790-X0452, AESO Implementation Plan to Develop a Revised Loss Factor Rule in Compliance with Decision 790-D03-2015, February 1, 2016.
15 Exhibit 790-X3015, AESO reply submission re Module C, March 10, 2016.

17. As of the date of this decision, Module B continues to progress towards finalizing a line loss rule and loss factor methodology that are compliant with legislation for purposes of determining line loss factors for the years 2017 and beyond.

Module C

18. On January 28, 2016, the Commission issued a notice of proceeding for Module C and set a schedule to receive statements of intent to participate. The Commission also requested submissions and reply submissions from parties regarding the issues that must be resolved in Module C, their position regarding those issues, and the process they consider the Commission should follow to determine any relief or remedy to be granted.[16]

19. On April 21, 2016, the Commission issued a ruling in which it determined that "[b]ased on [the submissions from parties], the Commission is not persuaded that it would be in the public interest to decide financial compensation in Module C at this point. However, the Commission believes there are several issues that could be addressed without the need for new loss factors from 2006 to the effective date of new loss factors based on the compliant loss factor rule established in Module B."[17] The Commission set out the issues it determined could potentially be addressed (which issues are discussed later in this decision) and established a schedule for submissions from parties regarding those issues.[18] These are hereinafter referred to as the preliminary issues in Module C.

20. In the April 21, 2016 ruling, the Commission also stated that it "will set a schedule at a later date to address the remaining issues in Module C including, but not limited to, whether any parties (and, if so, what parties) will be entitled to receive or be required to pay monetary compensation, including the quantum thereof."[19]

3 Preliminary issues

21. The parties in this proceeding have filed submissions and reply submissions regarding each of the preliminary issues for consideration in Module C. The Commission has carefully considered each of the submissions and notes that there was a broad spectrum of views on many of the issues. Parties differed in how they approached and analyzed various issues, and often focused on different provisions in the legislation and cited different precedents from case law and jurisprudence. In this decision, the Commission does not adopt the approach often followed in other Commission decisions where much time is spent reiterating the arguments made by each party. Instead, with respect to each issue the Commission will set out a condensed summary of the positions of the parties, followed by the Commission's decision and reasons. These summaries are not intended to be exhaustive, and the Commission's findings are informed by the full text of the submissions filed. The full written submissions of each party are available on the record of this proceeding.

---

[16] Exhibit 790-X3000, AUC Notice of proceeding for Module C, January 28, 2016.

[17] To be clear, when the Commission refers to "the effective date of a new loss factor rule" this will be the date that loss factors based on a compliant rule become effective.

[18] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

[19] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

22. In order to provide all parties with a better understanding of the issues in Module C, the Commission, in its April 21, 2016 ruling on the scope and process schedule for Module C, also directed the AESO "to file a description of the method the AESO currently uses to assess the forecast and actual charge or refund to a given pool participant for transmission line losses in Alberta, including a timeline of when the assessments are done and the frequency and method of payments or refunds."[20] The AESO filed a detailed response to this direction on May 12, 2016,[21] clearly setting out the mechanisms and timing of the recovery of the cost of transmission line losses in Alberta.

23. Capital Power Corporation (Capital Power), ENMAX Energy Corporation (ENMAX), TransCanada Energy Ltd. (TransCanada) and TransAlta Corporation (TransAlta) stated that their submissions were made on a "without prejudice basis" in relation to their pending appeals of previous Commission decisions in this proceeding. The Commission has accepted their submissions on that basis.

24. The following sections address the June 9 and June 30, 2016 submissions of parties regarding each of the preliminary issues in Phase 2 Module C of this proceeding, and include the Commission's findings on each issue.

3.1 A. Parties eligible for compensation

25. Issue A, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[22]

> A. Whether Milner and ATCO are the only parties eligible for compensation/payment for the entire period, or some portion thereof, between 2006 and the effective date of new loss factors based on a compliant loss factor rule.

26. Almost all parties took the position that (to the extent possible) all generating units that have been subject to the transmission loss components of the ISO tariff since January 1, 2006, should be eligible for re-adjustments to those components, whether the adjustments result in an increase or a decrease in their tariff rate.[23]

27. One party, ENMAX, submitted that only those generators that complained about the Line Loss Rule should be eligible for compensation, and then only from the effective date of their complaint. Further, ENMAX submitted that if the Commission orders retroactive payments to those generators that complained, such payments should be recovered through a uniform uplift of

---

[20] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.
[21] Exhibit 790-X3030, AESO description of losses cost recovery method, May 12, 2016.
[22] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.
[23] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 12-13; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 5-6; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 4; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 1-2; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, page 3; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 3-4; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 1; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 3-6.

all generators' future loss factors or through some other mechanism such as a pool trading charge.[24]

28. In Decision 790-D02-2015, which dealt with Module A issues in this proceeding, the Commission found that to complain about the Line Loss Rule is to complain about the line loss charge components of the ISO tariff. The Commission determined that the line loss charge components of the ISO tariff have been unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with Alberta legislation since January 1, 2006, because they are the product of a Line Loss Rule that is, and has been, unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with or in contravention of Alberta legislation. Further, the Commission found that the Line Loss Rule and the line loss component of the ISO tariff are subject to a negative disallowance scheme and were automatically effectively interim, and have remained effectively interim, since they went into effect on January 1, 2006.[25] As noted by the City of Medicine Hat (Medicine Hat), these findings were not limited to the loss charges issued to Milner or ATCO Power, but extend to all loss charges issued under the ISO tariff pursuant to the impugned Line Loss Rule since January 1, 2006.[26]

29. As set out in Section 121 of the *Electric Utilities Act*, "the Commission must ensure that the tariff is just and reasonable [and] the tariff is not unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of this or any other enactment or any law…" The Commission considers that this requirement applies not only to approving tariffs for future implementation, but also when considering adjustments to interim tariff rates.

30. ENMAX's proposal to compensate only complainants would require either (1) a non-tariff based solution that relies on some true-up or re-calculation of charges paid and credits received by this limited subset of generators, or (2) adjustments to the interim tariff rates paid by the complainants to the exclusion of all other generators that were also subject to the same interim tariffs during the relevant period. Both avenues effectively arrive at the same result, which is an adjustment to the tariff rates paid by only a subset of all parties that have paid the AESO tariff rates since 2006.

31. As stated by Powerex, the Commission "is not establishing one rate or remedy for Milner, one for ATCO Power Canada Ltd. (ATCO), and/or one for any other ratepayer affected by the unlawful charge. Rather, the remedy must apply to all ratepayers affected by the unlawful line loss charges on a non-discriminatory basis" and "there is no cost-causation basis to distinguish between the treatment of losses for Milner and ATCO on the one hand and for all other generators and marketers taking service from the AESO on the other."[27] Because the Commission has already found that the line loss component of the tariff for all parties was unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with Alberta legislation since 2006, the Commission considers that any re-adjustment of the tariff rates from 2006 must apply to all affected parties.

---

[24] Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 3-4.

[25] AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, January 20, 2015, pages 36-37, paragraph 134 and page 80, paragraph 265.

[26] Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 1-2.

[27] Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 3-4.

32. The Commission confirms, as was argued by ENMAX (and other parties), that there was no wrongdoing by generators, and that generators were required by law to adhere to ISO rules and tariffs at the time.[28] However, the Commission disagrees with ENMAX's submissions that "[a]ny harm that may have been visited upon certain generators in the past…cannot be corrected by visiting harm upon other generators in the future"[29] and "…there is no public-interest benefit to punishing parties who did nothing more than abide by Commission-approved ISO rules and tariffs."[30] [underlining added].

33. In the Commission's view, while generators lawfully complied with the ISO tariff at all relevant times, the portion of the ISO tariff that is based on loss factors has been interim (and unlawful) since January 2006, and is now in the process of being finalized. Any adjustments that may be required to those (unlawful) interim rates will ensure that the final rates are just and reasonable and, hence, lawful. The fact that some generators may be worse off under lawful final rates is not the same thing as visiting harm upon or punishing those generators, as alleged by ENMAX.

34. As such, the Commission finds that all parties that were subject to the line loss component of the ISO tariff since January 1, 2006, should have that portion of their interim tariff rate replaced by a final tariff rate that is just and reasonable and otherwise in compliance with applicable legislation and regulation.

3.2 B. Identify and notify affected market participants

35. Issue B, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[31]

> B. How to identify and notify all affected market participants and how to treat market participants who may have left or joined the Alberta wholesale market for electricity between 2006 and the effective date of new loss factors based on a compliant loss factor rule.

3.2.1 Who should be responsible for identifying and notifying all affected market participants?

36. Several parties noted that the AESO, as the party responsible for administering the ISO tariff, is in a unique position to identify all market participants that have been subject to the impugned line loss factors (for example, counterparties to the AESO's system access service agreements) since January 1, 2006.[32] The AESO is the counterparty to market participants for several types of supply access service (SAS) agreements with loss factor components, including

---

28 Exhibit 790-X3048, EMMAX reply submission on Module C preliminary issues, June 30, 2016, page 15.
29 Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 2.
30 Exhibit 790-X3048, EMMAX reply submission on Module C preliminary issues, June 30, 2016, page 15.
31 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.
32 Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 6-8; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 5-7; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 2; and Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 8-9.

supply transmission service (STS), demand opportunity service (DOS), export opportunity service (XOS) and import opportunity service (IOS). No party suggested that there is any other option to identify affected parties, and the AESO has confirmed that loss factors and loss charges or credits have not been applied to any other services under the ISO tariff.[33] The Commission finds that the AESO is in the best position to identify the market participants that have been subject to tariff charges based on the impugned Line Loss Rule since January 1, 2006.

3.2.2 Nature of the notification to all affected market participants

37. In regard to providing notification to all affected market participants, some parties submitted that sufficient notice has already been provided and nothing further is required.[34] A number of parties proposed that, if further notification is required, it could be provided by either the Commission or the AESO.[35] Some parties suggested that, if additional notice is to be provided, it might include an indication of how market participants may be affected but should, at the same time, make it clear that what has already been decided in this proceeding is no longer open for adjudication.[36]

38. The history of this proceeding is well documented, and market participants have been afforded multiple notices throughout the process, including the following:

- 2005 Alberta Energy and Utilities Board notice regarding Milner's complaint against the Line Loss Rule and the conduct of the ISO.[37]
- 2010 AUC notice regarding the Court of Appeal direction for the Commission to consider Milner's complaint.[38]
- 2012 AUC notice regarding additional Milner and ATCO Power complaints.[39]
- 2012 AUC notice regarding review and variance applications.[40]
- 2013 AUC notice regarding review of decision.[41]
- 2014 AUC letter regarding Phase 2 modules A, B and C.[42]

---

33 Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 2.

34 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 6-8, Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 4-5 and Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 5-7.

35 Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 6-8; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 4; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 5-7; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 8-9.

36 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 6-8; Exhibit 790-X3047, Medicine Hat reply submission on Module C preliminary issues, June 30, 2016, page 7; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 3-4.

37 Exhibit 004.01.AUC-790, AEUB notice of application, September 22, 2005.

38 Exhibit 0064.01.AUC-790, AUC notice of proceeding, September 20, 2010.

39 AUC notice of application re Milner complaint, issued in Application No. 1608563, June 21, 2012, and AUC notice of application re ATCO Power complaint, issued in Application No. 1608709, August 21, 2012.

40 Proceeding ID 1945, exhibit 0005.01.AUC-1945, AUC letter re submissions, June 18, 2012.

41 Proceeding ID 2581, exhibit 0316.01.AUC-2581, AUC notice of review, May 3, 2013.

39. In addition, the Commission has issued five decisions in this proceeding addressing these matters, listed below, all of which have been published on the AUC's website and circulated to an email list of interested market participants:

- Decision 2012-104: *Complaint by Milner Power Inc. Regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*.
- Decision 2012-105: *Complaint by Milner Power Inc. Regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Transmission Must Run*.
- Decision 2014-110: *Applications for review of AUC Decision 2012-104: Complaint by Milner Power Inc. regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*.
- Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Phase 2 Module A.*
- Decision 790-D03-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Phase 2 Module B.*

40. As noted above, the Commission has issued several notices to market participants since 2005 about the subject matter of this proceeding, namely the impugned transmission Line Loss Rule and associated loss factors. In view of this, the Commission finds it reasonable to conclude that market participants knew, or ought reasonably to have known, that the subject matter of Milner's complaint (i.e., the method used to calculate loss factors) could be subject to change or adjustment. As previously found in Decision 790-D02-2015 in this proceeding, "…two of the distinguishing attributes of a negative disallowance scheme are that once a complaint is made, the impugned rate may be subject to change and, if the complaint is upheld, the impugned rate may change effective the date the complaint was first made (unless the governing statute expressly provides otherwise)."[43]

41. The Commission notes, however, that no party has opposed further notice being provided to market participants as long as it does not further delay the proceeding. Out of an abundance of caution, and anticipating that further notice will not delay this proceeding, the Commission will provide notice to current and past market participants that interim tariff charges since January 1, 2006 relating to loss factors will be adjusted before being made final based on the Commission's determinations in this proceeding.

42. The notice will identify: a) the issues that have been decided in this proceeding and that are not open for further consideration, and b) the outstanding issues that must be resolved in Module C. The notice will also alert market participants that all assets subject to SAS agreements since January 1, 2006 with a loss factor component may be affected, but that the magnitude of any impacts, whether positive or negative, has not yet been determined. The notice will be published by the Commission pursuant to its formal notification process including an email to contact lists, publication on the AUC website and publication in major Alberta newspapers.

---

[42] Exhibit 0564.01.AUC-790, AUC letter re Phase 2 modules A, B and C, August 8, 2014.

[43] AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, January 20, 2015, page 60, paragraph 206.

43. While some market participants may no longer be active in the Alberta wholesale electricity market, the AESO has stated that it may have the most recent contact information for parties whose service has been discontinued or transferred to an assignee.[44] The Commission directs the AESO to provide the Commission with a list, in Word or Excel format, that includes the contact name (and alternate contact where possible), company, phone number, mailing address, email address (where possible) and asset ID, for all parties that received an ISO tariff invoice with a loss factor component since January 1, 2006. The Commission directs the AESO to file this information within one month of the release of this decision.

44. TransAlta argued that there have been notification issues throughout this proceeding.[45] TransAlta's concerns appear to be two-fold. First, from 2005 this proceeding dealt with a complaint against an ISO rule and only became a rate proceeding on January 20, 2015 when the Commission issued Decision 790-D02-2015. And second, it is virtually impossible for market participants to know if they will be directly and adversely affected by the outcome of this proceeding.[46]

45. In regard to TransAlta's first concern, market participants have been aware, or ought reasonably to have been aware, of Milner's complaint about the transmission Line Loss Rule and loss factors since 2005. Milner's complaint, including related proceedings, heard through an open and transparent process with numerous opportunities for market participant involvement, led the Commission to determine, on January 20, 2015, that tariff rates with a loss factor component have been interim since January 1, 2006.[47] The Commission is similarly satisfied that the broad notification provisions it has proposed above reasonably address TransAlta's second concern.

3.2.3 Treatment of market participants who entered or exited since 2006

46. Several parties submitted that, because the range of potentially affected market participants includes all those that paid or received certain rates under the ISO tariff, the treatment of market participants that entered or exited the market since 2006 should be in accordance with the terms and conditions of any relevant ISO tariff. Accordingly, they further submitted that the benefit or burden of any adjustments to interim tariff rates should accrue to and reside with the market participant receiving service under the ISO tariff at the time, subject to any subsequent assignment to another market participant or termination of the service.[48]

47. As several parties noted, Section 15 of the ISO tariff contemplates the assignment of an SAS agreement to another party:

> **Assignment**
> **2(1)** A market participant may assign its agreement for system access service or any rights under it to another market participant who is eligible for the system access service

[44] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 2.
[45] Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 3-6.
[46] Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 3-6.
[47] AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, January 20, 2015, page 4, paragraph 8.
[48] Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 8-9; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 5-6; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 7-8.

> available under such agreement and the ISO tariff, but only with the consent of the ISO, such consent not to be unreasonably withheld.
>
> **(2)** The ISO must apply to the account of the assignee all rights and obligations associated with the system access service when a system access service agreement for Rate DTS, Demand Transmission Service, Rate FTS, Fort Nelson Demand Transmission Service, or Rate STS, Supply Transmission Service, has been assigned in accordance with subsection 2(1) above, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments.[49] [underlining added]

48. While there was no evidence on the record about the number of market participants that may have left the Alberta market since January 1, 2006, and were responsible for the costs associated with line losses under the SAS agreements, the Commission considers it quite possible that, after comparing all interim bills to final bills, there will be a mismatch between the amount the AESO is able to recover and the amount the AESO will have to pay out. For example, as noted by the AESO, assignment of SAS agreements can be, and commonly is, used for system access service provided under Rate STS, but is not available under Rate XOS, Rate IOS or Rate DOS.[50]

49. Parties differed as to how the AESO should deal with any mismatches between the amount the AESO has to recover and the amount the AESO has to pay out. Some parties argued that even if receivables were to fall short of payables, the AESO is responsible for ensuring that parties that are owed money are fully compensated.[51] Other parties argued that charges owed by companies that no longer exist or are otherwise unable to pay should not be paid by other market participants.[52] Some parties argued that any uncollected amounts owing should be recovered through a uniform charge to all market participants,[53] while others submitted that such collection would contravene the principles of cost causation and be arbitrary, unjust and unreasonable, not in the public interest, or a distortion of the competitive marketplace.[54]

50. The Commission considers the AESO is in the best position to attempt to recover any costs (and pay out any refunds) owing based on a re-calculation of the tariff rates. Further, the ISO tariff and ISO rules are structured and written to reinforce each other when addressing issues such as non-payment, bad debt or the renegotiation of payment terms, as will be discussed in more detail below. Based on this information, the Commission considers that the provisions in the ISO tariff and ISO rules provide the AESO with the mechanisms to pursue payment from, or reimbursement to, market participants. The Commission finds that the treatment of market participants that have entered or exited the market since January 1, 2006 is best addressed by way of the AESO's reissuance of the line loss portion of the tariff charges dating back to January 1, 2006.

---

[49] 2016 ISO Tariff, Section 15: *Miscellaneous*, effective April 1, 2016.
[50] Exhibit 790-X3043, AESO submission on Module C preliminary issues, June 30, 2016, page 2.
[51] Exhibit 790-X3056, Milner reply submissions, June 30, 2016, pages 6-7.
[52] Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 2.
[53] Exhibit 790-X3046, TCE Reply Submission, June 30, 2016, page 3.
[54] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 2; Exhibit 790-X3058, ATCO Power Reply Submissions, June 30, 2016, pages 10-12; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 5-6.

3.3 C. Large charges may affect viability

51. Issue C, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[55]

> C. How the Commission should address the issue of potentially large charges that could compromise the ongoing viability of an existing generator.

52. Some parties argued that potentially large charges that affect the viability of a generator are not in the public interest and should not be imposed on market participants.[56] Others argued that the viability of any given generator is not at issue in this proceeding and should not be a consideration for the Commission.[57] However, all parties agreed that instances in which the ongoing viability of an existing generator is threatened should be dealt with on a case-by-case basis.[58] ENMAX submitted that the possibility of large charges affecting the viability of companies supports its conclusion that revising interim tariff rates cannot be in the public interest.[59]

53. The Commission has previously found in Decision 790-D02-2015 that the line loss charge component of the ISO tariff has been unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with Alberta legislation since January 1, 2006, and that the line loss component of the tariff was subject to a negative disallowance scheme such that rates have been interim since January 1, 2006.[60] In addition, at paragraph 259 of the same decision, the Commission found that "it would run contrary to the very purpose of such [negative disallowance] schemes were it possible for parties that benefit from unjust and unreasonable rates to permanently (and unjustly) capture for their benefit, at the expense of injured parties, the rewards attending regulatory delay." Further, at paragraph 226 of the same decision, the Commission found that "injustice is not limited to the quantum that injured parties were compelled to pay in excess of what was just and reasonable. Not only did injured parties pay too much, other parties paid too little. The latter injustice is also at issue in this proceeding." And finally, the Commission found at paragraph 263 of that decision that "monetary relief is both necessary and just."

---

55 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

56 Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 15-21; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 4-5.

57 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 9-11; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, page 9.

58 Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 3; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 9-11; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 2-3; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 5-6; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, page 9; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 9-10.

59 Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 4-5. ENMAX also argued that sending a location signal for a time period that has passed and during which irreversible investments in plant have already been made is another reason that revising interim tariff rates cannot be in the public interest.

60 AUC Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, January 20, 2015, page 3, paragraph 8.

54. Having made these findings and determinations, the Commission considers it necessary that the line loss portion of the ISO tariff be recalculated going back to January 1, 2006 pursuant to a compliant loss factor methodology. While locational signals since January 1, 2006 have already been sent, those tariff rates were interim and unlawful. The Commission's statutory duty is to establish just and reasonable tariff rates, not to re-do locational signals since January 1, 2006.

55. The Commission's primary task in this proceeding is to determine a line loss rule and loss factor methodology that are compliant with the legislation and produce loss factors that are not unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory. As previously determined by the Commission in Decision 790-D02-2015, however, the line loss rule and loss factor methodology that will be eventually approved in Module B of this proceeding for the purpose of establishing line loss factors on a going-forward basis (commencing in 2017) need not be identical to the line loss rule and loss factor methodology that satisfies all statutory and regulatory requirements for purposes of finalizing the (still interim) line loss portion of the ISO tariff going back to January 1, 2006. Once compliant loss factors are determined and applied and the tariff bills recalculated from January 1, 2006, the tariff charges will no longer be unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory. They will instead be just and reasonable. And only at that point, when charges and credits have been recalculated and incorporated into the ISO tariff, will it become apparent if there are any large charges that may compromise the ongoing viability of an existing generator. Were such a situation to arise, the Commission considers that the AESO has considerable leeway to negotiate or impose terms for any deferred payment relating to a just and reasonable tariff charge, and expects that such terms will be in compliance with ISO rule Section 103.7: *Financial Default and Remedies*.

56. The Commission considers that ISO rule Section 103.3: *Financial Security Requirements* provides the AESO with flexibility in that it sets out the requirements for the AESO to grant unsecured credit (in some cases up to $25,000,000) to both rated and non-rated market participants as set out in sections 5 and 6 of that rule.

57. ATCO Power submitted that the Commission should have no regard to the issue of potentially large charges that could compromise the ongoing viability of an existing generator and cited paragraph 61 of a recent decision of the Supreme Court, *ATCO Gas and Pipelines v. Alberta (Utilities Commission)*.[61]

> …Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary: [Referring to Ontario v. Ontario Power Generation, 2015 SCC 44 at paragraph 20] [Emphasis added][62]

58. However, ATCO Power also stated that if a generator brought forward evidence that a payment it was required to make would compromise the ongoing viability of that existing generator, the Commission could consider this in determining the manner in which line loss costs

[61] *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 SCR 219, 2015 SCC 45 (CanLII).
[62] *Ibid*, at paragraph 61.

will be collected from that generator, provided that the AESO is compensated when recovery is deferred. ATCO Power pointed to footnote [10] of the decision cited above, where the SCC noted as follows:

> Regulators may, however, take into account the impacts of rates on consumers in deciding *how* a utility is to recover its costs. Sudden and significant increases in rates may, for example, justify a regulator in phasing in rate increases to avoid "rate shock", provided the utility is compensated for the economic impact of deferring its recovery.[63] [emphasis in original].

59. ATCO Power explained that a similar approach was taken by the Federal Court of Appeal in *TransCanada Pipelines Ltd. v. National Energy Board*,[64] where that court agreed that the impact of tolls on customers and consumers should not be taken into account in determining the pipeline company's cost of equity capital, but any resulting increase in tolls may be a relevant factor for the regulator to consider in determining the way in which a utility should recover its costs.[65]

60. ATCO Power argued that similar principles should apply to the line loss charge component of the ISO tariff.

61. The Commission is cognizant that when its ultimate determinations in Module C are made, there is the potential for a material negative effect on some market participants. Should this be the case, the Commission considers that it would be reasonable for the market participant to work collaboratively with the AESO to explore available mechanisms that would mitigate adverse financial impacts while still allowing for charges to be paid. However, the Commission also agrees with ATCO Power, that if a generator brought forward evidence that a payment it was required to make would compromise the ongoing viability of that existing generator, the Commission could consider this in determining the manner in which line loss costs will be collected from that generator.

62. As concerns the risk that the potential viability of a generator could affect the short and long-term adequacy of supply and the reliability of the Alberta Interconnected Electric System, the AESO has stated that it assesses both short and long term adequacy in accordance with ISO rule Section 202.6: *Adequacy of Supply*. The AESO stated that it considers "the risk to supply adequacy that could result from an existing generator's ongoing viability being compromised is no greater than the risk to supply adequacy from other factors, and is appropriately addressed through section 202.6 of the ISO rules."[66] The Commission considers that the AESO has adequate mechanisms in place to provide advance warning of any potential reliability issues that could arise due to changes to the ongoing viability of an existing generator.

---

[63] *Ibid*, at paragraph 61.
[64] *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149.
[65] Exhibit X0413, paragraph 24, page 9.
[66] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, pages 2-3.

3.4 D. Cost recovery

63. Issue D, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[67]

> D. Whether parties to this proceeding are eligible to recover their participation costs and, if so, who is responsible for paying any such costs.

64. Some parties have argued that the success of the complainants or the distinction between being a "winner" and "loser" in this proceeding provides a reasonable basis for an award of costs.[68] Other parties have argued that there is no cost recovery in a complaint proceeding against an ISO rule or a proceeding to consider the conduct of the ISO and that AUC Rule 022*: Rules on Costs in Utility Rate Proceedings*, if it is even applicable, does not permit an award of costs in this instance.[69]

65. This proceeding originated as a complaint against an ISO rule and the conduct of the AESO. The original application in this proceeding, dated August 17, 2005, stated that Milner brought its complaint to the Alberta Energy and Utilities Board, which was the Commission's predecessor, pursuant to Section 25 and Section 26 of the *Electric Utilities Act*, and that "…the grounds of the present complaint are that the Rule and the AESO's conduct in implementing the Rule are inconsistent with or in contravention of the *Regulation* and/or the Transmission Development Policy and are otherwise unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory…" [underlining added] [70]

66. The original notice of this proceeding, issued by the Alberta Energy and Utilities Board on September 21, 2005, stated that Milner's application dealt with a complaint pursuant to sections 25 and 26 of the *Electric Utilities Act* in effect at the time, and requested certain changes to the proposed ISO rule.[71]

67. Sections 25 and 26 that were in effect at the time stated in relevant part:

> **Complaints to the Board**
> **25(1)** Any person may make a written complaint to the Board about
> (a) an ISO rule,
> (b) an ISO fee, or
> (c) an ISO order.

---

67 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

68 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 11-13; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 3-4; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 7-8; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, page 16.

69 Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 21; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 6, and Exhibit 790-X3049, Capital Power reply submission on Module C preliminary issues, June 30, 2016, pages 3-5; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 10-12.

70 Exhibit 0002.01.AUC-790, Milner complaint to the AEUB, August 17, 2005.

71 Exhibit 0004.01.AUC-790, EUB notice re Milner complaint, September 21, 2005.

> **Complaint about ISO**
> **26(1)** Any person may make a written complaint to the Board about the conduct of the Independent System Operator.

68. After the Court of Appeal of Alberta remitted this matter to the Commission, the first notice of this proceeding issued by the Commission on September 20, 2010, stated that the basis of Milner's complaint was that the Line Loss Rule (an ISO rule) did not comply with the relevant legislation.[72] In June and July 2012, the Commission received additional applications from Milner and ATCO Power regarding complaints against the Line Loss Rule (an ISO rule). The Commission included these complaints in this proceeding.[73]

69. Almost two years prior to the Commission's 2010 notice, the Commission issued Bulletin 2008-017 regarding costs for market proceedings. The bulletin stated:[74]

> The Alberta Utilities Commission (the Commission) is issuing this Bulletin to respond to questions that have been raised regarding costs in market proceedings. Markets proceedings include:
>
> - Independent System Operator (ISO) Rule Objections;
> - ISO Rule Complaints;
> - Complaints about the ISO's Conduct;
> - ISO fee Complaints; and
> - Complaints about the Market Surveillance Administrator's Conduct.
>
> The Commission has considered Section 21, Costs of Proceedings, of the *Alberta Utilities Commission Act*, and at this time, will not be establishing a cost regime in connection with markets proceedings. This Bulletin does not impact Commission Rule 015 – *Rules on Costs of Investigations, Hearing or Other Proceedings Related to Contraventions*. [underlining added]

70. Accordingly, when the Commission issued notice of this proceeding in September 2010, there was no costs regime for ISO rule complaints or complaints about the conduct of the ISO. The Commission considers that market participants were, or should reasonably have been, aware of this and made their choice whether or not to participate in this proceeding on that basis. If, for some reason, this was still not clear to parties, it should have become so after the Commission expressly stated the following in a process letter issued on December 3, 2010:[75]

> **Costs**
> Regarding costs, parties are reminded of AUC Bulletin 2008-017 issued on August 15, 2008. In that bulletin the Commission indicated it would not establish a cost regime in connection with markets proceedings, including proceedings dealing with ISO rule complaints.

71. The Commission received no replies, concerns, objections or any other submissions expressing disagreement following the issuance of this December 3, 2010 letter.

---

[72] Exhibit 0064.01.AUC-790, AUC notice of proceeding, September 20, 2010.
[73] Exhibit 0521.01.AUC-790, AUC notice of proceeding regarding Phase 2 consideration of relief and remedy, July 4, 2014.
[74] AUC Bulletin 2008-017: *Costs for Market Proceedings*, August 15, 2008.
[75] Exhibit 0077.01.AUC-790, AUC letter re schedule and technical conference, December 3, 2010.

72. The Commission considers that from the time Milner filed its original application in 2005, it has been clear that the subject of this proceeding has been a complaint against an ISO rule, specifically the Line Loss Rule and methodology, and no party has opposed, refuted or otherwise challenged this characterization. That one of the outcomes of this proceeding may be the re-issuance of invoices pursuant to the ISO tariff does not alter the fact that, from the very outset, this proceeding has dealt with a complaint against an ISO rule (and also, initially, a complaint against the conduct of the AESO in implementing the impugned rule).

73. Given that there is no costs regime for proceedings into complaints against an ISO rule or the conduct of the ISO, and that this was established from the very start of this proceeding, the Commission finds that the argument from the complainants that successful parties or victors in this proceeding should receive costs is moot. The Commission finds that in this proceeding no parties are eligible for recovery of costs.

74. If, as some parties have argued, this is deemed a tariff-related proceeding, the Commission would turn to AUC Rule 022. Section 3 states that the Commission "may award costs to an intervener who has…a substantial interest in the subject matter of a hearing or other proceeding and who does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceeding." Section 4 states, in part, that unless the Commission orders otherwise, electric generators are ineligible to claim costs. As such, the Commission considers that no parties in this proceeding would meet the requirements for cost eligibility.

75. As the Commission has determined that no parties are eligible to recover their participation costs in this proceeding, the question of who is responsible for paying any such costs is moot and will not be addressed.

3.5 E. Interest costs

76. Issue E, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[76]

> E: Whether interest costs should be included in charges payable or compensation receivable by market participants from 2006 to the effective date of new loss factors based on a compliant loss factor rule.

77. Parties were divided on whether[77] or not[78] interest should be awarded on amounts the AESO over or under-charged market participants in respect of line losses since 2006. Some

[76] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

[77] Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 13-14; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 8-10; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 10-11; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 12-15.

[78] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 22; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 7; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 11.

parties supported[79] and some opposed[80] the use of AUC Rule 023: *Rules Respecting Payment of Interest* when considering whether to award interest.

78. The Commission has previously determined "…not only did injured parties pay too much, other parties paid too little. The latter injustice is also at issue in this proceeding. In addition, all affected parties, whether they were overcompensated or undercompensated, have something else in common. They were, and largely remain, active competitors of each other. To inflict financial harm without just cause on one group of competitors, while bestowing on another group of competitors financial benefits to which it has no just claim, is to interfere with the efficient market for electricity based on fair and open competition as required by Section 5 of the *Electric Utilities Act*."[81] As discussed in more detail later in this decision, the Commission finds that reallocation of the costs of losses is best achieved by recalculating the line loss components of the ISO tariff bills dating back to January 1, 2006 and re-issuing those bills. However, the Commission considers that the reallocation of the costs of losses only addresses part of the injustice of some parties paying too much and other parties paying too little. As noted by several parties,[82] losses are a zero-sum game, so money awarded unjustly to one party was money taken unjustly from another party and vice versa. Given the zero-sum nature of line loss cost recovery and the fact that the original complaint was filed over a decade ago, to help remedy the gains that unjustly accrued to some parties and the costs that were unjustly imposed on other parties, the Commission finds that it is just and reasonable to consider the time value of money dating back to January 1, 2006 and that awarding (and charging) interest is a practical and just and reasonable method of doing so.

79. ISO tariff bills that include a component relating to transmission line losses are used by the AESO to recover the total cost of transmission line losses. They are a transaction between the AESO and each individual generator as a counterparty to the ISO service. More specifically, there is no transaction between the generators themselves to recover the total cost of losses; rather, the transactions are between the AESO and each individual generator. The Commission recognizes that AUC Rule 023 applies to utilities and that the AESO is not a utility. However, having decided that awarding interest costs to generators that were overcharged and requiring generators that were undercharged to pay interest is just and reasonable, the Commission finds AUC Rule 023 to be of some assistance in determining a reasonable rate of interest. It may also provide some guidance regarding what amounts should attract interest and over what time period(s).

80. The Commission finds that it would be reasonable to set the rate of interest equal to the Bank of Canada's Bank Rate plus one and one half per cent to be applied from the date on which the recalculated loss factors become effective to January 1, 2006 consistent with the guidance provided in sections 3(2)(d) and 3(2)(e) of AUC Rule 023.

81. Some parties have argued that charging interest unjustly penalizes market participants that owe money, especially as they cannot be faulted for having (subsequently been determined

[79] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 22; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 12-15.

[80] Exhibit 790-X3049, Capital Power reply submission on Module C preliminary issues, June 30, 2016, page 5.

[81] Decision 790-D02-2015: *Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Phase 2 Module A*, January 20, 2015, paragraph 226.

[82] For example, Milner during its opening statement on October 19, 2011 at Tr. Vol. 1, and which has been commonly reference by parties throughout this proceeding.

to have) underpaid.[83] The Commission disagrees with this characterization. The question is not who was at fault, nor whether remedying unlawful rates can be considered as imposing a penalty on parties that are found to have benefitted unjustly at the expense of others. Rather, the Commission must address the fact that, due to the interim nature of the ISO tariff bills since January 1, 2006, some parties had funds at their disposal that they should not have had, while others did not have funds at their disposal that they should have had. Awarding interest helps to rectify the issue of the time value of the money unjustly at the disposal of, or unjustly denied to, each party, respectively.

82. Some parties submitted that if the Commission awards interest, it should either canvas parties for their views or delay a decision on the applicable rate.[84] The Commission has determined that it would be reasonable to set the rate of interest equal to the Bank of Canada rate (plus one and one half percent). This has the further advantage of eliminating any mismatches that would occur due to different costs of capital for different market participants.

3.6 Consideration of actual events and the influence of hindsight

83. The Commission will address issues F, G and H concurrently in this decision, as they are related. In Module B of this proceeding, which is taking place concurrently with the consideration of preliminary issues in Module C, the Commission is in the process of determining a compliant line loss rule and loss factor methodology that can be implemented on a go-forward basis, with loss factors calculated under the new methodology anticipated to be effective January 1, 2017. But, as noted above, in Decision 790-D02-2015, it was already within the Commission's contemplation that a compliant line loss rule for the period January 1, 2006 to the date the Module B line loss rule takes effect, might be different from a compliant line loss rule going forward. At paragraphs 253 and 254 of that decision, the Commission found the following:

> 253. The Commission relies on this ratemaking principle in finding that Section 25(9) of the rulemaking provisions of the 2003/07 *Electric Utilities Act* does not preclude the Commission from adjusting rates with retroactive effect pursuant to its ratemaking powers. The Commission also finds, in this regard, that because it is charged with the responsibility of ensuring that rates are just and reasonable during the entire period such rates are deemed by operation of law to be interim, the process of calculating or determining rates that meet this standard does not require that a new or changed Line Loss Rule be put into effect during the period throughout which unlawful rates were imposed in the first instance.[85] In this proceeding, the Commission has found that the Line Loss Rule produced and continues to produce line loss charges that are unjust and unreasonable and that are contrary to the legislation and regulations. Those impugned

[83] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 22; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 11.

[84] Exhibit 790-X3045, AltaGas reply submission on Module C preliminary issues, June 30, 2016, pages 8-10; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 13-14; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 8-10; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 10-11.

[85] As the previous discussion has shown, AltaGas, TransCanada, Capital Power and ENMAX (at least in its written argument), not to mention the complainants, are also uniformly of the view that the Commission's authority to retroactively revise interim rates is not affected by Section 25(9) of the 2003/07 *Electric Utilities Act*, which requires that a new or changed ISO Line Loss Rule can only come into effect on a prospective basis.

> rates, by operation of the statutorily imposed negative disallowance scheme, must now be treated as, in effect, being interim in nature. In such circumstances, as with similar situations where the Commission is called upon to adjust interim rates, the Commission can have recourse to any information it deems necessary or relevant from the tariff applicant or interveners in setting final tariff rates that meet the test of justness and reasonableness.
>
> 254. What this means in the present context is that it is not strictly necessary for the Commission, in determining what line loss tariff charges would be just and reasonable for parties harmed by (or unjustly benefitting from) unlawful line loss charges, to rely exclusively on the line loss factors (and associated line loss charges) produced by a new or changed ISO Line Loss Rule as the benchmark against which to make this determination. In other words, in the Commission's view, there is no *a priori* reason to assume that what was, or would have been, just and reasonable, from January 1, 2006 to the date future line loss charges come into effect must be identical to those future line loss charges. [underlining added]

84. The Commission found that it is not automatically bound to apply a forward-looking compliant loss factor rule and methodology to the period from January 1, 2006. Rather, it has the discretion, where circumstances warrant, to apply a different (but still compliant) loss factor rule and methodology to that prior period.

85. It is from this perspective that the Commission will consider the issues of aggregation, re-doing the merit orders, and selecting between forecast and actual data, and the Commission's reasoning and analysis here will apply equally to the next three sections of the decision.

86. As was argued by several parties, any attempt to re-construct the market (by relying on aggregation, revised merit orders and forecast data) since January 1, 2006 would be very difficult, time consuming, contentious, unlikely to accurately simulate or recreate what would actually have happened, involve considerable speculation, and would be inherently biased by hindsight.[86] In contrast, other parties argued that if new loss factors are to replace unlawful loss factors from 2006 going forward, there is no choice but to reconstruct past circumstances.[87] Implicit in these latter arguments is the proposition that once the Commission determines a new compliant loss factor methodology, that same methodology must be used both on a going-forward basis and for purposes of remedying past unlawful line loss factors.

87. In addition to the issues identified above, any adjustments to accommodate aggregation or the redoing of merit orders would invariably lead to new historical dispatch levels for generators, both in the energy and ancillary services markets. This would result in different pool

[86] Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 14-16; Exhibit 790-X3043, AESO submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit X790-3031, ENMAX submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, page 5; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, pages 10-13; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 11-13; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 11-12.

[87] Exhibit 790-X3045, AltaGas reply submission on Module C preliminary issues, June 30, 2016, pages 10-12; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 7-10; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 21-23 (however, TransCanada submited that it is not necessary to redo the merit orders unless the Commission were to determine that doing so is necessary to ensure fairness and avoid unjust discrimination and undue preference).

prices (with consequential impacts on hedge contracts which are based on spreads between forecast pool prices and actual pool prices), which, in turn, would require recalculation of pool receipts for all generators dating back to January 1, 2006, recalculation of all charges for retailers and industrial load dating back to January 1, 2006, and could open the door to a plethora of other scenarios where generators were expected to run and didn't or weren't expected to run and did and any associated contractual issues (e.g., minimum or maximum number of restarts, minimum stable generation levels, take-or-pay fuel contracts, etc.).

88. Also, any reconstruction of market conditions would inherently be limited by any investment decisions that have already been made for generation, transmission and distribution facilities. In the Commission's view, there is no reasonable way to go back in time and add or remove facilities from the topology of the system based on a hypothetical investment environment. Finally, there is no way to undo or change the losses that actually occurred on the system. Reconstructing the merit order and dispatches would not change the fact that specific, measured amounts of energy were lost on the Alberta Interconnected Electric System, year in and year out, since January 1, 2006.

89. While the Commission accepts that generators may have made different decisions under a different line loss rule and methodology, it considers it neither reasonable nor feasible to attempt to look back and accurately model what parties would have done in terms of aggregation and offer blocks since January 1, 2006. Such an exercise, by nature, would be speculative and likely to be influenced by hindsight. Rather, as Medicine Hat put it, "[w]hat is attainable, however, is to apportion loss volumes and costs based on the actions that caused past loss volumes and costs. In other words, using information about the actual operation of generating facilities as inputs for the Module C Loss Factor Methodology."[88]

90. With this in mind, the Commission will now address the issues of aggregation, re-doing the merit orders and choosing between forecast and actual data.

3.7 F. Aggregation in prior periods

91. Issue F, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[89]

> F: Whether parties should be given the choice of aggregating their facilities, and for what period the aggregation should apply, from 2006 to the effective date of new loss factors based on a compliant loss factor rule.

92. While most parties argued that aggregation dating back to January 1, 2006 should not be permitted,[90] some parties asserted that the Commission's finding that a compliant line loss rule

---

88 Exhibit 790-X3047, Medicine Hat reply submission on Module C preliminary issues, June 30, 2016, pages 16-18.

89 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

90 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 14-15; Exhibit 790-X3032, AESO Reply Submissions Module C, June 9, 2016, page 3; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, page 10; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 11-13; Exhibit 790-X3037, TransAlta submission on Module C

includes the option of aggregating requires that aggregation be allowed dating back to January 1, 2006.[91]

93. The Commission previously found that "generators should be permitted to choose whether to aggregate or disaggregate based on competitive market conditions."[92] Since aggregation would, by definition, eliminate sets of offer blocks, aggregation from January 1, 2006 would require re-doing the merit order with combined offer blocks for the facility subject to aggregation. There is no clear way to historically combine offer blocks for units that are aggregated, and any combined offer blocks would effectively re-do the merit order. In addition, as noted by Medicine Hat, permitting aggregation from January 1, 2006 would allow an aggregating party to avoid the direct costs of aggregation, including any physical, contractual or operational expenses or encumbrances.[93] Finally, historical aggregation is likely to be influenced by hindsight with a view to altering competitive market outcomes.

94. The Commission finds that aggregation from January 1, 2006 to the effective date of new loss factors is not practical and is unlikely to emulate a competitive market outcome, and is therefore not granted.

3.8 G. Re-doing merit orders

95. Issue G, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[94]

> G: Whether the hourly merit orders should be "re-done" from 2006 to the effective date of new loss factors based on a compliant loss factor rule and, if so, how this would be done.

96. As with the issue of aggregation, parties were divided on whether merit orders should be re-done back to January 1, 2006. Some argued that this should not be permitted,[95] while others argued that the Commission's finding that a compliant line loss rule (on a going-forward basis)

preliminary issues, June 9, 2016, pages 11-12 and Exhibit 790-X3050, TransAlta reply submission on Module C preliminary issues, June 30, 2016, page 5.

91 Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 22-23 and Exhibit 790-X3045, AltaGas reply submission on Module C preliminary issues, June 30, 2016, pages 10-12; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 7; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, page 37 and Exhibit 790-X3046, TransCanada Reply Submission, June 30, 2016, pages 11-13.

92 See Decision 790-D03-2015 for a more fulsome description of the impacts and choices associated with aggregation, specifically Section 4.5: *Commission findings regarding location*.

93 Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 5.

94 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

95 Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 15-16; Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 3; Exhibit 790-X3048, EMMAX Response submission on Module C preliminary issues, June 30, 2016, pages 24-25; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3056, Milner reply submissions, June 30, 2016, page 16; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, page 14; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 21-23; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 12.

should include merit orders that reflect what generators will do means that merit orders should also be re-done for the period dating back to January 1, 2006.[96]

97. In addition to the general concerns raised by parties and acknowledged by the Commission in sections 3.6 and 3.7 of this decision, the AESO has identified concerns about data quality issues associated with the energy market merit order data for the years 2006 to 2010 which "effectively [make] it impractical to "re-do" the merit order for those years, irrespective of the approach taken for the more recent years of 2011 to 2016."[97]

98. The Commission finds that re-doing the merit orders from January 1, 2006 to the effective date of new loss factors is not practical and is unlikely to emulate a competitive market outcome, and is therefore not granted.

3.9 H. Forecast or actual data

99. Issue H, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[98]

> H: Should the AESO use forecast or actual data (which consists of merit orders, transmission system topology and load data) when calculating the loss factors from 2006 to the effective date of new loss factors based on a compliant loss factor rule.

100. Most parties argued that using actual data is preferable to using forecast data. Reasons provided included that: (1) actual data is less susceptible to speculation and judgement; (2) forecast data is only used as a temporary measure until actual data is available; (3) actual data will be more accurate and reduce the need for adjustments through Rider E; and (4) it is not practical to create forecasts for 8,760 merit orders in each year from January 1, 2006.[99]

101. Milner and ATCO Power argued for the use of forecast data because it is readily available and can be used in that version of the AESO's methodology first proposed at the outset of Module B.[100] Capital Power has argued for the use of forecast merit orders, pool prices, and other such inputs because market outcomes would have been different under a different loss factor regime.[101]

---

96 Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, page 24; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 7-10.

97 Exhibit 790-X3043, AESO Reply Submissions Module C, June 29, 2016, page 5.

98 Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

99 Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, pages 3-4; Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 41-42; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 6-7; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, pages 5-6; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, page 14; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, page 12; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 23-24.

100 Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, page 13; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, page 16. ATCO Power indicated in its reply submission that the choice between forecast and actual data could depend on the method used. See Exhibit 790-X3058, ATCO Power Reply Submissions, June 30, 2016, pages 23-24.

101 Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, page 10.

102. The *Transmission Regulation* provides guidance on recovering the actual cost of losses, and states in relevant part:

> **Transmission system loss factors**
> **31(1)** The ISO must makes rules to
>
> …
>
> (c) establish a means of determining, for each location on the transmission system, loss factors and associated charges and credits, which are anticipated to result in the reasonable recovery of transmission line losses,
>
> (d) provide a means by which, annually, a determination will be made of the difference between the anticipated transmission line losses and the actual transmission line losses, and
>
> (e) subject to section 33, provide a means through the application of a single calibration factor to adjust the amounts paid by the application of the loss factor described in clause (c) so that
>
> (i) owners of generating units,
> (ii) importers and the exporters of electricity, and
> (iii) any other opportunity service customers referred to in clause (a)(iv),
>
> are charged or receive a credit so that they pay the actual cost of transmission line losses. [underline added]

103. The Commission considers that the objective of these provisions is to ensure that generating units (and other entities listed above) pay the actual cost of transmission line losses. By necessity, forecast data is used by the AESO in the first step of the process of allocating the cost of actual losses. The final step in the process of allocating the cost of actual losses involves using a calibration factor to recover the actual amount of losses. However, the Commission recognizes the importance of the first step in this process in determining loss factors that reflect cost causation. As noted in Decision 2012-104, "[c]harging everybody the system average [loss factor] is computationally the easiest answer," and applying a calibration factor to the system average would lead to recovery of actual system losses – but no party supports such an approach, and neither does the Commission. This simply illustrates the importance of ensuring that the initial annual loss factors for each generator, prior to the application of any calibration factor, reflect cost causation as much as possible. Put differently, if loss factors do not reflect cost causation from the outset, a calibration factor cannot fix the problem. Since actual transmission system losses were incurred based on actual dispatches and actual system conditions, and not on the basis of forecast dispatches and forecast system conditions, the Commission finds that the initial annual loss factors for generators, calculated using a lawful loss factor methodology and actual data whenever possible (rather than forecast data), will most closely reflect cost causation.

104. The Commission finds that, if possible, the AESO should use actual data rather than forecast data when recalculating loss factors for the period from January 1, 2011. The Commission will defer making a determination for the period between January 1, 2006 and December 31, 2010, pending the AESO's analysis of data quality and its assessment of the data's suitability for use with the methodology that is ultimately approved in Module B.

3.10 I. Is it possible to estimate historical differences?

105. Issue I, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, is as follows:[102]

> I: Whether it is necessary for the Commission to estimate the difference between the loss factors actually produced by the MLF/2 methodology and those a new compliant methodology might have produced for *every* year between 2006 and the effective date of new loss factors based on a compliant loss factor rule in order to determine how much (if any) compensation has to be paid, or whether the Commission should consider other options such as using a sample of a few years to provide an estimate of the difference? Are there any other methods to estimate the difference between loss factors derived from the MLF/2 methodology and a compliant methodology?

106. Some parties have argued that an expeditious resolution of Module C, by as early as the end of 2016 or Q1 2017, requires using the ILF method proposed by the AESO at the outset of Module B, or at the very least the use of sample data for the purposes of interim billing.[103] Several parties have argued that it is not possible to accurately sample or estimate loss factors for past periods. They claim that samples or estimates are likely to be contentious, produce non-compliant results and cause a needless drain on resources. They also claim that any truncated methodology would require its own hearing before it could be approved by the Commission. These parties argue that differences between what was charged and what should have been charged to market participants from January 1, 2006 should be determined by recalculating loss factors using an approved compliant methodology.[104] Other than leaving loss factors unchanged from January 1, 2006 or using the ILF methodology proposed by the AESO at the outset of Module B, no party has proposed what the Commission considers would be a compliant methodology to estimate the differences between loss factors derived under MLF/2 and a compliant methodology.[105]

107. The ILF loss factors provided by the AESO during the course of this proceeding have been based on either (a) load scaling (where load is scaled down in order to rebalance the system after removing a generator) or (b) the use of the generic stacking order (GSO) (where the GSO establishes the order in which generators are dispatched in order to rebalance the system after a generator has been removed). By contrast, in Decision 790-D03-2015, the Commission ordered

---

[102] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

[103] Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 17-19; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 6; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, page 13; Exhibit 790-X3051, Powerex reply submission on Module C preliminary issues, June 30, 2016, pages 19-22.

[104] Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 43-44; Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, pages 4-5; Exhibit790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, pages 17-19; Exhibit 790-X3034, Capital Power submission on Module C preliminary issues, June 9, 2016, pages 10-11; Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 7-8; Exhibit 790-X3047, Medicine Hat reply submission on Module C preliminary issues, June 30, 2016, page 23; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 14-16; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 13-14; Exhibit 790-X3046, TCE Reply Submission, June 30, 2016, pages 23-24.

[105] At Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 7-8, ENMAX proposed the use of linear regression for re-calculating loss factors since January 1, 2006, but the Commission has already rejected the use of linear regression in Decision 790-D03-2015.

the AESO to develop a loss factor rule that requires load to be held constant (i.e. no load scaling) and the use of the merit order for redispatch (i.e. no reliance on the GSO).[106] As several parties have noted, these are significant departures from the ILF methodology proposed by the AESO.[107] Accordingly, absent further and more persuasive reasons, the Commission is not prepared to order the AESO to use the ILF methodology it proposed at the outset of Module B to estimate historical differences in loss factors.

108. The AESO expects it may take 12 to 18 months to recalculate loss factors from January 1, 2006 using the loss factor methodology that is ultimately approved in Module B.[108] The AESO also stated that it is "focusing its resources on Module B implementation matters during 2016 and expects to turn to Module C calculations following the release of 2017 loss factors in late 2016."[109]

109. Having considered the arguments of all parties with respect to Issue I, the Commission is not prepared at this time to exclude any approach it may yet determine to be compliant for purposes of estimating historical differences in loss factors.

3.10.1 Concerns with data for the years 2006 to 2010

110. As noted in Section 3.8 above, the AESO recently identified a possible data issue for the years 2006 to 2010 and submitted that a different approach (from the one it was developing for the years after 2010) might have to be used for those earlier years.[110] Several parties have expressed concerns with this possibility.[111]

111. Ideally, the same approach would apply for the years 2006 to 2010 as for 2011 onward, but the Commission recognizes that without accurate or usable data, the AESO may have difficulty recalculating loss factors that more closely reflect cost causation than the existing (and wholly unsatisfactory) MLF/2 loss factors. Pending receipt of the AESO's filing on potential data issues for the period preceding 2011, which the Commission expects by no later than October 20, 2016,[112] the Commission will defer making any finding on whether it is possible to estimate historical differences for the years 2006 to 2010.

3.11 J and K: The method for and timing of collection and reimbursement

112. Issues J and K, as set out in the Commission's letter regarding the preliminary Module C issues for consideration, are as follows:[113]

J: Whether the collection and distribution of any funds (if determined to be necessary and in the public interest) should be accomplished through the AESO tariff (e.g., by way of a

[106] The AESO has acknowledged that the GSO was never developed or intended for use in redisaptching to balance the system. Exhibit 790-X0409, AESO argument, July 31, 2015, pages 9-10, paragraphs 42-45.
[107] Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, pages 7-8; Exhibit 790-X3047, Medicine Hat reply submission on Module C preliminary issues, June 30, 2016, page 22.
[108] Exhibit 790-X3015, AESO reply submission re Module C, March 10, 2016.
[109] Exhibit 790-X3043, AESO Reply Submissions Module C, June 29, 2016, page 7.
[110] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, pages 4-5.
[111] Exhibit 790-X3049, Capital Power reply submission on Module C preliminary issues, June 30, 2016, pages 1-2; Exhibit 790-X3050, TransAlta reply submission on Module C preliminary issues, June 30, 2016, pages 6-7; Exhibit 790-X3046, TransCanada reply submission, June 30, 2016, pages 23-24.
[112] Exhibit 790-X3070, AUC letter re AESO data concerns, July 22, 2016.
[113] Exhibit 790-X3028, AUC ruling regarding Module C scope and process schedule, April 21, 2016.

deferral account), or by way of some other (non-tariff based) method. If it is the latter, what jurisdiction does the Commission have to order a non-tariff remedy, what would this method be and how would it be administered? How would a possible mismatch between the amount to be collected and the amount to be reimbursed be resolved?

K: Whether the period for collecting any funds should match the period for distributing any funds.

113. The Commission considers these issues are related and address much of the same subject matter. For that reason they will be dealt with concurrently.

114. In the AESO's May 12, 2016 filing (see paragraph 22 above) setting out the mechanisms and timing of the recovery of the cost of transmission line losses in Alberta, the AESO stated that "[t]he recovery of the cost of losses occurs as part of the AESO's transmission settlement process, which addresses amounts charged to market participants with respect to system access service provided by the AESO," and that loss factors apply to system access service provided under the following rates:[114]

- Rate STS, Supply Transmission Service
- Rate XOS, Export Opportunity Service
- Rate IOS, Import Opportunity Service
- Rate DOS, Demand Opportunity Service

115. The AESO also noted that "[a]fter loss factors are established, they are entered into the AESO's transmission settlement system ("TSS", sometimes called the billing system) as monthly values for each system access service to which loss factors apply. The loss factors become effective on January 1 and the cost of losses are then recovered through the calendar year."[115] Further, the transmission settlement system (TSS) "is capable of correcting an aspect of the applicable bills, such as a change to loss factors, and reissuing the bills for any settlement period back to the initial implementation of TSS in January 2006."[116]

116. Most parties argued that any collection and reimbursement should be given effect through the ISO tariff,[117] while ENMAX suggested uniform uplift charges or a pool trading charge[118] and TransAlta argued for payments pursuant to Section 23 of the *Alberta Utilities Commission Act*.[119]

---

[114] Exhibit 790-X3030, AESO description of losses cost recovery method, May 12, 2016, page 4, paragraphs 4 and 6.

[115] Exhibit 790-X3030, AESO description of losses cost recovery method, May 12, 2016, page 6, paragraph 10.

[116] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 5.

[117] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 5; Exhibit 790-X3039, AltaGas submission on Module C preliminary issues, June 9, 2016, pages 45-47; Exhibit 790-X3041, ATCO Power submission on Module C preliminary issues, June 9, 2016, page 19; Exhibit 790-X3033, Medicine Hat submission on Module C preliminary issues, June 9, 2016, page 7 and Exhibit 790-X3047, Medicine Hat reply submission on Module C preliminary issues, June 30, 2016, pages 3-5; Exhibit 790-X3040, Milner submission on Module C preliminary issues, June 9, 2016, page 7; Exhibit 790-X3035, Powerex submission on Module C preliminary issues, June 9, 2016, pages 7-9; Exhibit 790-X3036, TransCanada submission on Module C preliminary issues, June 9, 2016, pages 32-35; Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 14-15.

[118] Exhibit 790-X3031, EMMAX submission on Module C preliminary issues, June 9, 2016, page 8.

[119] Exhibit 790-X3037, TransAlta submission on Module C preliminary issues, June 9, 2016, pages 14-15.

117. The Commission found in Decision 790-D02-2015 that those portions of the ISO tariff related to loss changes were interim since January 1, 2006 and that the Commission has the jurisdiction to grant a tariff-based remedy.[120] In the same decision, the Commission also found that "[t]he tariff provisions of the legislation include all of the remedies available in the legislation and under the applicable common law, including remedies allowing for retroactive and retrospective ratemaking, necessary to remedy the imposition of unlawful tariffs produced by an unlawful ISO rule."[121] The Commission considers that any recalculation or re-assignment of costs would also be done under the ISO tariff, but parties have raised some possible concerns and proposed solutions for the Commission's consideration.

118. ATCO Power identified potential sources of any mismatch between the amounts collected by the AESO and the amounts payable by the AESO, were the line loss components of the ISO tariff to be revised from January 1, 2006:[122]

- Mismatches that arise from the limited precision of loss factors. After raw loss factors are determined, an appropriate shift factor needs to be calculated so that the collected amount matches the actual cost of losses in accordance with Section 31(1)(e) of the *Transmission Regulation*. However, limited precision in the shift factor might prevent an exact match to the actual losses.

- The non-payment of charges by an active market participant.

- The inability of the AESO to notify a former market participant that has previously underpaid.

- The inability of the AESO to notify a former market participant that has previously overpaid.

- The timing difference between the issuance of credits and the collection of charges.

119. For any mismatches, there are ISO rules currently in effect that address non-payment by market participants of their financial obligations to the AESO. These include ISO rule sections 103.3: *Financial Security Requirements*, 103.6: *ISO Fees and Charges* and 103.7: *Financial Default and Remedies*. Further, under the ISO tariff Section 13: *Financial Security, Settlement and Payment Terms*, the AESO has extensive powers to pursue payment from parties and recover any costs associated with non-payment.

120. While the AESO expects there to be minimal mismatches between the amounts to be collected and the amounts to be reimbursed,[123] it also pointed out that any mismatches would likely require two settlement processes for the period: "a first to issue and settle loss charges and credits resulting from the loss factors calculated in Module C, followed some time later by a second to issue and settle Rider E…charges and credits to address any shortfall or surplus balances."[124] The AESO estimated that the application of the Module B methodology to prior

[120] AUC Decision 790-D02-2015, paragraphs 251-253.
[121] AUC Decision 790-D02-2015, paragraph 146.
[122] Exhibit 790-X3058, ATCO Power Reply Submissions, June 30, 2016, page 28.
[123] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 5.
[124] Exhibit 790-X3043, AESO Reply Submissions Module C, June 29, 2016, pages 8-9.

years to recalculate loss factors could take "12 to 18 months following the calculation and release of 2017 loss factors in late 2016, using the same methodology developed for the 2017 loss factors."[125] The AESO added that rebilling via TSS "of all services over a multi-year period may take multiple days to process, which may need to be spread over more than one settlement period to avoid conflict with the AESO's on-going settlement process."[126]

121. As of the date of this decision, the magnitude of any reissued bills that result in charges or reimbursements remains unknown. In addition, the Commission's decision to allow interest charges on amounts to be reimbursed could increase the magnitude and number of potential mismatches.

122. The Commission recognizes that a mismatch between the amount to be collected (charges) and the amount to be paid out (credits) is likely to occur, however, at present, the extent of the potential mismatch remains unknown. The AESO has proposed to settle each period back to 2006 using a two-step settlement process that first involves settling loss charges and credits for a particular period and later settling any shortfall or surplus through Rider E for that period. The Commission is not prepared, at this time, to approve the use of Rider E to recover any mismatches between charges and credits. Only after all charges and credits since January 1, 2006 are finalized will the full extent of any mismatch be known. Therefore, the Commission considers that there may be merit in limiting the total reimbursement for a calendar year to the amount that is collected by the AESO for that calendar year. This would require that the AESO first collect amounts owed for a calendar year and, after allowing a reasonable time to collect, issue the reimbursements for that calendar year on a pro-rata basis. To be clear, under this scenario, a market participant would only be reimbursed based on its share of the total credits in that calendar year. On the other hand, if, after attempting to reimburse all credits owed in a calendar year the AESO is left with a surplus,[127] it could potentially be used to offset any shortfalls in other calendar years.

123. The Commission will make a determination on the approach to be used with respect to a mismatch once it has more information on the extent of any mismatch that may occur. The full extent of the mismatch will only be known after the AESO settles the charges and credits for each calendar year.

124. The Commission considers that a uniform payment as suggested by ENMAX, whether collected through the ISO tariff or as a pool trading charge, would not serve the public interest or achieve the objectives of the governing legislation. As noted by the Commission in Section 3.1 of this decision, the purpose of re-calculating the loss factors is not to punish or harm any generators but, rather, to finalize the interim tariff rates so that they reflect the just and reasonable loss factors calculated by a compliant line loss rule. Since January 1, 2006, some generators have overpaid and some have underpaid for the cost of losses, and it would be contrary to the public interest, unreasonable, and unjust to parties, whether they over or under paid, if the Commission were to order the collection of the funds through a uniform charge on all generators as proposed by ENMAX, rather than adjust the interim rates to reflect cost causation.

[125] Exhibit 790-X3015, AESO reply re Module C, March 10, 2016.
[126] Exhibit 790-X3032, AESO submission on Module C preliminary issues, June 9, 2016, page 5.
[127] For example, if the AESO attempts to reimburse a market participant but, for whatever reason, is unable to do so.

125. Regarding TransAlta's suggestion that reliance be placed on Section 23 of the *Alberta Utilities Commission Act*, there is a readily available and well-understood existing process to reissue ISO tariff bills without the need for the Commission to exercise its broad powers granted under that section. At this time, the Commission is not prepared to exercise its powers pursuant to Section 23 of the *Alberta Utilities Commission Act*.

126. As discussed elsewhere in this decision, the availability of complete and reliable data for the period from 2006 to 2010 remains an issue. As a result, it remains unclear if, and to what extent, if any, the AESO can recalculate loss factors for those years. The Commission will address any data quality issues when more information becomes available.

4 Order

127. The Commission directs the AESO to provide the Commission with a list, in Word or Excel format, that includes the contact name (and alternate contact where possible), company, phone number, mailing address, email address (where possible) and asset ID, for all parties that received an ISO tariff invoice with a loss factor component since January 1, 2006. The Commission directs the AESO to file this information within one month of the release of this decision.

Dated on September 28, 2016.

Alberta Utilities Commission

(*original signed by*)

Mark Kolesar
Vice-Chair

(*original signed by*)

Neil Jamieson
Commission Member

(*original signed by*)

Bohdan (Don) Romaniuk
Acting Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative
Alberta Electric System Operator (AESO or ISO) Keith F. Miller – Stikeman Elliot LLP
ATCO Power Canada Ltd. (ATCO) Marie H. Buchinski – Bennett Jones LLP
Capital Power Corporation (Capital Power) Douglas Crowther – Dentons Canada LLP
City of Medicine Hat (Medicine Hat) Roger Belland and Rod Crockford
ENMAX Energy Corporation (ENMAX)
Milner Power Inc. (Milner) Monte S. Forester Lewis L. Manning – Lawson Lundell Barristers & Solicitors
Powerex Corp. (Powerex) Chris W. Sanderson – Lawson Lundell LLP
TransAlta Corporation (TransAlta) Laura-Marie Berg
TransCanada Energy Ltd. (TransCanada) David Farmer Steven Kley

Alberta Utilities Commission

Commission panel
Mark Kolesar, Vice-Chair
Neil Jamieson, Commission Member
Bohdan (Don) Romaniuk, Acting Commission Member

Commission staff
JP Mousseau, Commission Counsel
Andrew Davison, Senior Market Analyst
Greg Andrews, Market Analyst

Appendix 2 – Abbreviations

Abbreviation	Name in full
AESO	Alberta Electric System Operator
ATCO	ATCO Power Ltd.
AUC	Alberta Utilities Commission
Capital Power	Capital Power Corporation
DOS	demand opportunity service
ENMAX	ENMAX Energy Corporation
exception list	exhibit 790-X0289
ILF	incremental loss factor
GSO	generic stacking order
IOS	import opportunity service
ISO	Independent System Operator
LFA	load flow approach
Line Loss Rule	2005 to current ISO rule 9.2: Transmission Loss Factors and Appendix 7: Transmission Loss Factor Methodology and Assumptions and/or ISO rules Section 501.10 Transmission Loss Factor Methodology and Requirements
Medicine Hat	City of Medicine Hat
Milner	Milner Power Inc.
MLF/2	marginal loss factor divide by two
MLL	marginal line loss
MPID	metering point identifier
Powerex	Powerex Corp.
procedure document	exhibit 790-X0347
proposed line loss rule	exhibit 790-X0345
RLF	raw loss factor
SAS	supply access service
STS	supply transmission service
TransAlta	TransAlta Corporation
TCE or TransCanada	TransCanada Energy Ltd.
XOS	export opportunity service

TAB 8

2019 ABCA 222
Alberta Court of Appeal

ENMAX Energy Corporation v. Alberta Utilities Commission

2019 CarswellAlta 1079, 2019 ABCA 222, [2019] A.W.L.D. 3037, 308 A.C.W.S. (3d) 428

Powerex Corp. (Applicant) and Alberta Utilities Commission (Respondent)

ENMAX Energy Corporation (Applicant) and Alberta Utilities Commission,
Milner Power Inc., ATCO Power Canada Ltd., and Balancing Pool (Respondents)

Capital Power Corporation (Applicant) and Alberta Utilities Commission, Milner Power Inc., ATCO Power Canada Ltd., and Balancing Pool (Respondents)

TransCanada Energy Ltd. (Applicant) and Alberta Utilities Commission,
Milner Power Inc., ATCO Power Ltd., and Balancing Pool (Respondents)

ATCO Power Canada Ltd. (Applicant) and Alberta Utilities Commission (Respondent)

Brian O'Ferrall J.A.

Heard: May 31, 2018; June 1, 2018
Judgment: June 3, 2019
Docket: Calgary Appeal 1801-0025-AC, 1801-0026-AC, 1801-0027-AC, 1801-0028-AC, 1801-0030-AC

Proceedings: refusing leave to appeal *Milner Power Inc., Re* (2016), 2016 CarswellAlta 1910, Bohdan (Don) Romaniuk Member, Mark Kolesar V-Chair, Neil Jamieson Member (Alta. U.C.); and refusing leave to appeal *Milner Power Inc., Re* (2017), 2017 CarswellAlta 2785, Bohdan (Don) Romaniuk Member, Mark Kolesar V-Chair, Neil Jamieson Member (Alta. U.C.)

Counsel: C. Ferguson, C.W. Sanderson (no appearance) for Applicant, Powerex Corp.
D.W. McGrath, Q.C., M. O'Brien for Applicant, ENMAX Energy Corporation
G. Tarnowsky, Q.C., S.T. Kupi for Applicant, Capital Power Corporation
S. Kley, D.J. Farmer for Applicant, TransCanada Energy Ltd.
J.J.P Mousseau, C. Wall (no appearance) for Respondent, Alberta Utilities Commission
M.S. Forster, L.L. Manning for Respondent, Milner Power Inc.
M.H. Buchinski, E.B. Mellett for Applicant (1801-0030-AC) / Respondent (1801-0026-AC/1801-0027-C/1801-0028-AC), ATCO Power Canada Ltd.
P.L. Roche, S.C. Nagina for Respondent, Balancing Pool

Subject: Public
Related Abridgment Classifications
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.c Practice and procedure
IV.5.c.iii Statutory appeals
IV.5.c.iii.B Grounds for appeal
IV.5.c.iii.B.2 Error of law

2019 ABCA 222, 2019 CarswellAlta 1079, [2019] A.W.L.D. 3037, 308 A.C.W.S. (3d) 428

Headnote

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Error of law

After Alberta Utilities Commission decided that certain past transmission line loss charges were unlawful and unfair, it decided to retroactively adjust them by reimbursing certain power generators who paid unlawful charges and ordering others who did not pay fair share to pay more — Applicants, who held power purchase agreements that were surrendered to balancing pool prior to decision, applied for leave to appeal — Application dismissed — Applicants argued that Commission erred in law by ordering independent system operator (ISO) to invoice or credit those entities that held supply transmission service contracts at time that losses occurred and not to entities that held contracts at time of issuance of invoices — Proceedings of Commission and ISO would be unduly hindered by appeal — Commission found that s. 15(2) of ISO tariff did not prevent it from directing ISO to invoice prior holders of power purchase arrangements and former recipients of transmission system access service after they had assigned their arrangements and agreements to another market participant — Commission was owed deference in interpretation of its past decisions, and it was arguable that nothing in cited decisions contradicted its view — Decision requiring those who caused losses to pay and reimburse those who did not cause losses that were attributed to them appeared much more reasonable than alternative and accorded common sense, especially given goal of incentivizing minimization of losses — There was support in Electric Utilities Act for Commission's finding that tariff provisions could not prevent it from discharging its mandate on ensuring consistency of tariffs and rules with Act — Applicants' argument against conclusion that s. 15(2) of tariff was not applicable to invoicing decision for past line loss charges had little merit — Applicants failed to raise question of law with respect to Commission's view that s. 15(2) of tariff contemplated adjustments to lawful tariff in normal course and that substitute line loss charges were not such "adjustments" — Commission afforded all parties opportunity to be heard and fully explained, rationalized and justified its expert decision.

Table of Authorities

Cases considered by *Brian O'Ferrall J.A.*:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 2011 SCC 61, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 339 D.L.R. (4th) 428, 28 Admin. L.R. (5th) 177, 52 Alta. L.R. (5th) 1, [2012] 2 W.W.R. 434, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.))* 424 N.R. 70, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association)* [2011] 3 S.C.R. 654, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 519 A.R. 1, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 539 W.A.C. 1 (S.C.C.) — considered

Alberta Electric System Operator, Re (2003), 2003 CarswellAlta 2090 (Alta. E.U.B.) — referred to

Alberta Electric System Operator, Re (2003), 2003 CarswellAlta 2135 (Alta. E.U.B.) — referred to

Alberta Electric System Operator, Re (2014), 2014 CarswellAlta 648 (Alta. U.C.) — referred to

Altus Group Ltd. v. Calgary (City) (2015), 2015 ABCA 86, 2015 CarswellAlta 303, 33 M.P.L.R. (5th) 183, 382 D.L.R. (4th) 455, 80 Admin. L.R. (5th) 221, [2015] 6 W.W.R. 109, 599 A.R. 223, 643 W.A.C. 223, 12 Alta. L.R. (6th) 217 (Alta. C.A.) — considered

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — considered

British Columbia (Securities Commission) v. McLean (2013), 2013 SCC 67, 2013 CarswellBC 3618, 2013 CarswellBC 3619, 366 D.L.R. (4th) 30, [2014] 2 W.W.R. 415, (sub nom. *McLean v. British Columbia Securities Commission)* 452 N.R. 340, 53 B.C.L.R. (5th) 1, (sub nom. *McLean v. British Columbia (Securities Commission))* [2013] 3 S.C.R. 895, (sub nom. *McLean v. British Columbia Securities Commission)* 347 B.C.A.C. 1, (sub nom. *McLean v. British Columbia Securities Commission)* 593 W.A.C. 1, 64 Admin. L.R. (5th) 237 (S.C.C.) — referred to

Capital Power Corp. v. Alberta Utilities Commission (2018), 2018 ABCA 437, 2018 CarswellAlta 3107 (Alta. C.A.) — considered

Dunsmuir v. New Brunswick (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 329 N.B.R. (2d) 1, 844 A.P.R. 1, 2008 CSC 9, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 170 L.A.C. (4th) 1, 95 L.C.R. 65, [2008] 1 S.C.R. 190 (S.C.C.) — considered

ESBI Alberta Ltd., Re (2002), 2002 CarswellAlta 2006 (Alta. E.U.B.) — referred to

Milner Power Inc. v. Alberta Utilities Commission (2019), 2019 ABCA 127 (Alta. C.A.) — considered

Milner Power Inc., Re (2012), 2012 CarswellAlta 699 (Alta. U.C.) — referred to
Milner Power Inc., Re (2015), 2015 CarswellAlta 81 (Alta. U.C.) — considered
Milner Power Inc., Re (2015), 2015 CarswellAlta 2571 (Alta. U.C.) — referred to
Milner Power Inc., Re (2010), 2010 ABCA 236, 2010 CarswellAlta 1478, 29 Alta. L.R. (5th) 294, 322 D.L.R. (4th) 550, 9 Admin. L.R. (5th) 1, (sub nom. *Milner Power Inc. v. Energy & Utilities Board (Alta.)*) 482 A.R. 327, (sub nom. *Milner Power Inc. v. Energy & Utilities Board (Alta.)*) 490 W.A.C. 327 (Alta. C.A.) — referred to
S. (D.B.) v. G. (S.R.) (2006), 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 61 Alta. L.R. (4th) 1, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, [2006] 2 S.C.R. 231 (S.C.C.) — referred to

Statutes considered:

Alberta Utilities Commission Act, S.A. 2007, c. A-37.2
s. 29 — considered
Electric Utilities Act, S.A. 2003, c. E-5.1
Generally — referred to

s. 5 — considered

s. 17(a) — considered

s. 17(d) — considered

s. 17(e) — considered

s. 17(g) — considered

s. 20(1)(c) — considered

s. 20.5(1) [en. 2007, c. A-37.2, s. 82(4)(f)] — referred to

s. 20.8 [en. 2007, c. A-37.2, s. 82(4)(f)] — referred to

s. 20.9 [en. 2007, c. A-37.2, s. 82(4)(f)] — referred to

s. 25(1)(b)(ii) — referred to

s. 25(1)(b)(iii) — referred to

s. 25(6)(d) — referred to

s. 25(6)(e) — referred to

s. 28 — considered

s. 30 — referred to

s. 116 — considered

s. 119(4) — considered

s. 121 — considered

s. 127(c) — considered

s. 142(1)(d) — considered

Regulations considered:

Electric Utilities Act, S.A. 2003, c. E-5.1
Transmission Regulation, Alta. Reg. 86/2007

Generally — referred to

s. 19 — considered

s. 21(1) — considered

s. 31(1)(a) — considered

APPLICATION by applicants for leave to appeal decisions reported at *Milner Power Inc., Re* (2016), 2016 CarswellAlta 1910 (Alta. U.C.) and *Milner Power Inc., Re* (2017), 2017 CarswellAlta 2785 (Alta. U.C.), dealing with retroactive adjustment of transmission line loss charges that were found to be unlawful and unfair.

***Brian O'Ferrall J.A.*:**

I. Introduction

1 In *Capital Power Corp. v. Alberta Utilities Commission*, 2018 ABCA 437 (Alta. C.A.) [*Capital Power*], permission to appeal an Alberta Utilities Commission (Commission) decision sought by three of the province's electricity generators [1] was denied. In that decision [2], the Commission decided that it had the jurisdiction to grant retroactive relief for the payment of what it determined in 2012 [3], and confirmed in 2014 [4], were unlawful and unfair transmission line loss charges between 2006 and 2016.

2 Transmission line loss charges are charged to power producers to recover the cost of transmission line losses which take place when electricity is transmitted over lengthy alternating current transmission lines. The independent electric system operator (ISO), which is a corporation established by the government to operate the Alberta interconnected electric system, recovers the cost of transmission line losses through a tariff. [5] In 2015, the Commission decided it could order a retroactive or retrospective, tariff-based remedy to correct for a decade of overpayments and underpayments of unlawful line loss charges.

3 In *Capital Power*, permission to appeal that decision was denied on the basis that the law is clear and settled that public utility regulators have the jurisdiction to order such retroactive or retrospective remedies if the appropriate circumstances obtain and the remedy ordered is appropriate. The Commission found that the appropriate circumstances obtained for the ordering of a retroactive or retrospective remedy. The issue the Commission then had to decide was what constituted an appropriate remedy.

4 After deciding that it could order a retroactive or retrospective remedy for the unlawful line loss charges, the Commission approved a methodology for calculating the transmission line loss charges going forward from January 1, 2017 [6]. That decision was not appealed. [7] In two later decisions [8], the Commission decided that the same methodology would be applied to retroactively adjust the line loss charges paid by the province's generators from January 1, 2006 to December 31, 2016.

5 In the second of the two later decisions (Decision 790-D06-2017), also referred to as the "invoicing decision", the Commission decided which power generators were going to be charged for not having paid their fair share of the transmission line losses over the aforesaid period and which generators were to be credited for paying more than their fair share of the transmission line losses over that same period. The Commission decided that the power generators (or holders of power purchase agreements) who paid the unlawful line loss charges would be the parties ordered to pay more or be reimbursed by the independent system operator (ISO). In tariff terms, those power generators which received supply transmission service (STS) on the Alberta interconnected system when the charges were incurred would be the parties receiving invoices for additional line loss charges or credits for line loss charges previously paid. It is this decision which ENMAX Energy Corporation (ENMAX), TransCanada Energy Ltd. (TCE) and Capital Power Corporation (Capital Power) seek to appeal.

6 The problem the impugned decisions presented was that in 2016, several significant power generators surrendered their power purchase agreements and assigned their supply transmission service contracts to the government-funded Balancing Pool. There is a provision in the ISO tariff which permits assignments of supply transmission service; but it stipulates that when such assignments take place, the ISO must apply to the account of the assignee all of the obligations of the assignor associated with system access service, "including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments."

7 In its invoicing decision, the Commission decided that this provision in the ISO tariff did not prevent it from ordering the ISO to invoice those who held supply transmission service contracts at the time the unlawful line loss charges were assessed (i.e., the assignor, not the assignee).

8 The three applicants for permission to appeal that decision are erstwhile holders of power purchase agreements which were surrendered to the Balancing Pool in 2016. They seek to challenge the invoicing decision on the ground that the Commission erred in law in ordering the ISO to invoice or credit those entities which held supply transmission service contracts at the time the losses occurred and not to the entities which hold supply transmission service contracts at the time the invoices are ultimately issued. The applicants for permission to appeal the Commission's invoicing decision argue that the Commission erred in law or jurisdiction by deciding that parties which had assigned their supply transmission service contracts should be invoiced for those adjustments.

9 In seeking permission to appeal on this ground, the applicants pointed to the assignment and novation provision in the ISO tariff which was approved by the Commission and had been a part of the ISO tariff since 2003. Section 15(2) of the ISO tariff stated,

> 2(1) A market participant may assign its agreement for system access service or any rights under it to another market participant who is eligible for the system access service available under such agreement and the ISO tariff, but only with the consent of the ISO, such consent not to be unreasonably withheld.
>
> (2) The ISO must apply to the account of the assignee all rights and obligations associated with the system access service when a system access service agreement for Rate DTS, Demand Transmission Service, Rate FTS, For Nelson Demand Transmission Service, or Rate STS, Supply Transmission Service, has been assigned in accordance with subsection 2(1) above, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments.

II. Applicants' grounds of appeal

10 The applicants' proposed grounds of appeal may be summarized as follows:

> 1) the Commission unreasonably declined to apply the terms of the ISO tariff in determining whom ISO must invoice;
>
> 2) the Commission's interpretation of the assignment provision of the ISO tariff was both incorrect and unreasonable,
>
> a) incorrect in that it ignored the ordinary and plain meaning of the text of the assignment provision; and
>
> b) unreasonable in that it departs from past decisions regarding the treatment of assignments under the ISO tariff, it contradicts findings the Commission made in its decision on its jurisdiction to order a remedy to correct for the payment of unlawful transmission line loss charges, and it was based on unsupported findings that the interpretation argued by the applicants would not promote fair, efficient and open competition (the so-called "FEOC" standard).

III. Context

11 While certainly not determinative, it is important to note that most of the arguments in support of permission to appeal were made to the Commission and ruled on by the Commission. In the proceeding leading to the impugned invoicing decision (Decision 790-D06-2017), the Commission received detailed submissions from the parties regarding section 15(2) of the ISO

tariff and who should be the recipients of invoices for the line loss charges and credits. Although the applicants' proposed grounds of appeal arise out of the Commission's decision, most are not new. Most were argued fully before the Commission.

12 The Commission's invoicing decision dealt with a number of other issues which have not been challenged. The only challenge is to the decision as to who should be invoiced for the substituted line loss charges and who should be reimbursed for having overpaid for line losses in the past. The controversy was over whether the current generators (or assignees under power purchase arrangements) should be invoiced or whether those power generators who underpaid their line losses in the past should receive invoices reflecting what was found to be a more appropriate methodology for calculating line losses.

13 In order to determine whether permission to appeal the invoicing decision ought to be granted, it is important to put the decision in context. In a prior decision (Decision 790-D03-2015), the Commission determined that going forward from January 1, 2017, the previous methodology for calculating transmission line losses should be replaced with a new methodology which the Commission directed the ISO to base its line loss charges on. That decision was not challenged.

14 In the invoicing decision, the Commission decided that the go-forward methodology would also be applied to the historical period from January 1, 2006 to December 31, 2016. The methodology was modified somewhat to reflect the actual operation of the Alberta interconnected electric transmission system over the years in question. The Commission's decision to apply the go-forward methodology to the historical period was also not specifically challenged; although at the time that decision was made, the Commission's decision on its jurisdiction to order retroactive relief was the subject of several applications for permission to appeal. But although some market participants had taken issue with the Commission's decision to order a retroactive or retrospective remedy or relief to correct for payment or receipt of past line loss charges and credits, they did not seek permission to appeal the Commission's decision to adopt the methodology it ultimately adopted for calculating transmission line losses, either going forward or those experienced between 2006 and 2016.

15 Specifically, what the applicants seek in the within applications is permission to appeal the Commission's decision as to who should receive invoices for the recalculated line losses. In their submissions to the Commission, the applicants (ENMAX, Capital Power and TCE), as well as the City of Medicine Hat had argued that the invoices ought to be sent to current STS contract holders. The Balancing Pool, Milner Power Inc. (Milner) and ATCO Power Corporation (ATCO), the respondents herein, as well as the Alberta Direct Connect Consumers Association, the Industrial Power Consumers Association and the Utilities Commission Advocate had argued that those who paid the original line loss charges should be invoiced or credited for line loss charges between 2006 and 2016.

16 After considering the arguments of the proponents of invoicing current STS contract holders, which were pretty much the same as those advanced by the applicants on the within application for permission to appeal, the Commission ordered ISO to issue final invoices to the same parties which received the original invoices for line losses during the period, January 1, 2006 to December 31, 2016.

17 As indicated above, the proponents of invoicing current STS contract holders argued that subsection 2(2) of section 15 of the ISO tariff, which had been part of the Tariff since 2003, required the ISO to invoice the current STS holders. I have repeated that Tariff provision for the convenience of the reader.

> 2(1) A market participant may assign its agreement for system access service or any rights under it to another market participant who is eligible for the system access service available under such agreement and the ISO tariff, but only with the consent of the ISO, such consent not to be unreasonably withheld.
>
> (2) The ISO must apply to the account of the assignee all rights and obligations associated with the system access service when a system access service agreement for Rate DTS, Demand Transmission Service, Rate FTS, Fort Nelson Demand Transmission Service, or Rate STS, Supply Transmission Service, has been assigned in accordance with subsection 2(1) above, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments.
>
> (emphasis added)

18 The applicants also point to prescribed assignment, assumption and novation agreements which must be executed when STS contracts are assigned. Under the terms of these agreements, a STS assignee agrees to be bound by the terms of the STS contract which, in turn, is subject to the terms and conditions of the ISO tariff. That is, a market participant, by accepting transmission service access from the ISO, agrees to be bound by the terms of the ISO tariff (s. 1).

19 The Commission found that section 15(2)(2) of the ISO tariff did not apply to relieve a market participant which assigned its transmission access service to another from having to pay any substituted line loss charges assessed for past transmission line service because to assess the assignee would conflict with the purposes of the *Electric Utilities Act*, SA 2003, c E-5.1 and the dictates of the *Transmission Regulation*, Alta Reg 86/2007 made by the Lieutenant Governor in Council pursuant to section 142(d) of the *Electric Utilities Act*.

20 The purposes of the *Electric Utilities Act* are set forth in section 5 and include providing for "rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant."

21 Subsections 17(a) and (d) of the *Electric Utilities Act* also impose a duty on the ISO to operate the power pool in a manner that promotes the fair, efficient and openly competitive exchange of electric energy and to manage and recover the costs of transmission line losses.

22 Subsection 31(1)(a) of the *Transmission Regulation* authorizes the ISO make rules to reasonably recover the cost of transmission line losses by establishing loss factors for generating units, importers and exporters based on their respective locations and their respective contributions to transmission line losses.

23 Finally, section 116 of the *Electric Utilities Act* makes the ISO tariff subject to regulation by the Commission and section 121 of the Act requires the Commission to ensure, when approving a tariff, that the tariff is not unduly preferential, arbitrary or unjustly discriminatory or inconsistent with or in contravention of the Act or any other Act or any law. In other words, the Commission is the final arbiter of how the ISO tariff will be applied, guided by the aforementioned principles.

24 In its decision, the Commission found the ISO tariff to be subordinate to the Commission's statutory obligations. The Commission found that the ISO tariff conflicted with these provisions and that the legislation trumped the tariff. The Commission's reasons for not applying the tariff in making its invoicing decision included the following:

> To satisfy the Commission's statutory obligations to safeguard the fair, efficient and openly competitive operation of the market and to ensure that rates are just and reasonable, invoices for final rates to replace interim rates must be issued to the original cost causers and cost savers, not only because they were competitors of each other, but because they were the parties unjustly and unduly advantaged or disadvantaged by the unlawful interim rates.
>
> . . .
>
> From the Commission's perspective, it would be contrary to the principle of cost causation . . . to allow predecessor STS contract holders to avoid responsibility for the losses they caused by not invoicing them for lawful final rates. . . . [R]equiring that current STS contract holders be initially invoiced in these circumstances could be perceived as creating an incentive for opportunistic behavior.
>
> . . .
>
> [T]he effect of invoicing current STS holders could potentially do that which the Commission previously found to be impermissible, i.e., to bestow on a group of competitors financial benefits to which they may have no just claim. In the Commission's view, this could potentially interfere with the efficient market for electricity based on fair and open competition as required by Section 5 of the *Electric Utilities Act*.
>
> . . .

The remedy for an interim rate that has been determined to be neither just nor reasonable, is to issue a lawful final rate in its place. However, such remedy is imperiled if the final invoices are not issued to the right market participants.

25 The Commission was of the view that section 15(2) of the ISO tariff was not intended to apply to the unique circumstances of this case. The Commission found that the purpose of section 15(2) was to provide the ISO and market participants with certainty with respect to the effects of assignments of STS service in the normal course. The Commission also found that it was reasonable to require assignees to assume responsibility for obligations associated with the facilities they acquired and also to have a single, readily identifiable point of contact for all market participants accessing the Alberta interconnected electric transmission line system.

26 But the Commission interpreted the retrospective adjustments to which section 15(2) referred to be those "due to deferral account reconciliation" or "other [like] adjustments". The Commission interpreted the phrase "other adjustments" in section 15(2) to refer to those "adjustments" provided for in section 13(5) of the ISO tariff. The Commission found that examples of such "other adjustments" included adjustments for unavailable or incomplete metering data, inaccurate estimates of metering data (s. 13(3)(4) permitted the ISO to use estimated values when metered demand or metered energy data was not available) or reconciliation with updated estimates of metered data (s. 13(3)(6) permitted the ISO to make "adjustments" to amounts determined on an interim basis for the period two months prior to the settlement period and even to amounts determined on a "final" basis for the period four months prior to the settled period).

27 In short, the Commission considered the adjustments contemplated by section 15(2) of the ISO tariff were adjustments required to true up or update lawful rates which were just and reasonable, not rates which were unlawful and had to be later replaced with lawful rates.

IV. Summary of applicants' arguments

28 The applicants take issue with the Commission's invoicing decision and seek permission to appeal it. The respondents, Milner, ATCO and the Balancing Pool support the Commission's invoicing decision and urge this Court to not grant leave to appeal.

29 The applicants' arguments may be summarized as follows:

1. The Commission unreasonably refused to apply the terms of the ISO tariff, which clearly set out the consequence of assignments of system access service on tariff-based liabilities. They argue that the language of section 15(2) of the tariff permits assignment of system access service and that upon such assignments the ISO is limited to collecting from the assignee "any and all retrospective adjustments due to deferral account reconciliation or any other adjustments", not merely adjustments made to lawful rates. That is, the language of section 15(2) cannot exclude adjustments that were made due to rates being found unlawful.

2. The Commission used the broad objectives of fair, efficient and open competition to adopt an implausible reading of section 15(2). They argue this is so especially considering the Commission's remedies decision (Decision 790-D02-2015). In that decision, the Commission found that one of the exceptions to retroactive ratemaking which operated to allow the Commission to order a remedy for the payment or receipt of unlawful line loss charges was that the applicants knew or ought to have known that once Milner had made their complaint that the line loss rate was subject to change. The applicants argue that if this is the case, the STS contracts transferred after the line loss rule was challenged were transferred with the knowledge that the new holder might be liable for any losses or charges incurred as a result of a change to the line loss rule.

3. The Commission's acknowledgement that it could only determine who to invoice, not who would bear ultimate responsibility, shows that the statutory purpose it identified (namely, to debit and credit the actual loss savers and causers), could not be fulfilled.

4. The Commission's interpretation of section 15(2) departs from the decision of the Commission's predecessor (the Energy and Utilities Board or EUB) directing the ISO to propose amendments to its terms and conditions of service to deal with amounts due from previous generators or power purchase arrangement holders (EUB Decision 2003-054). The EUB was of the view that deferral account reconciliation must be collected/refunded from/to the current owner of the generation facility or power purchase arrangement holder. The applicants argue that there is inconsistency between the decisions which mandated and ultimately approved section 15(2) of the ISO tariff and the Commission's decision to invoice the holders of system access service at the time the line loss charges were originally assessed.

5. The Commission's decision to not apply section 15(2) creates commercial uncertainty.

6. Though section 15(2) is a departure from the principle of cost causation, it is an approved tariff provision. To the extent that it allocates to the current STS contract holder costs triggered by former holders of the STS contract holder, this does not make it unjust and unreasonable, as the Commission suggested, especially as it was approved by the EUB on a just and reasonable standard.

7. No evidentiary support for the Commission's assertion that its interpretation of the applicability of section 15(2) of the ISO tariff promotes fair, efficient and open competition and that in any event, the Commission cannot have recourse to the broad fairness, efficiency and open competition objectives to adopt an implausible reading of section 15(2) of the tariff.

30 The applicants' arguments are really two-fold and are encapsulated in their grounds of appeal (paragraph 10 herein):

1. The Commission's decision that section 15(2) of the ISO tariff is inapplicable is unreasonable; and

2. The Commission's interpretation of section 15(2) of the ISO tariff was both incorrect and unreasonable.

V. Test for permission to appeal and relevant considerations for determining same

31 The parties agree that the test for these applications for permission to appeal ought to be:

1. whether the appeal is *prima facie* meritorious (one might also characterize this consideration as one of whether there is a question of law or jurisdiction which requires an answer from the Court, regardless of the merit of the particular positions being taken by the applicants on the question);

2. whether the question of law and/or jurisdiction is of significance to the practice (the parties did not identify what constitutes "the practice", i.e., is it merely the practice before the Commission or is it the practice of rate-regulation generally or does it extend to practices other than rate-regulation?);

3. whether the question of law and/or jurisdiction is of significance to the action itself;

4. whether permitting an appeal would unduly hinder the progress of the Commission's proceedings;

5. the standard of appellate review which would likely be applied if permission to appeal was granted.

32 I have suggested in two related applications for permission to appeal Commission line loss decisions (*Capital Power Corp. v. Alberta Utilities Commission*, 2018 ABCA 437 (Alta. C.A.) at para 30-38 and *Milner Power Inc. v. Alberta Utilities Commission*, 2019 ABCA 127 (Alta. C.A.) at paras 10-13) that the test is much simpler. The test is set out in the *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s. 29. The test is whether there is a question of law and/or jurisdiction which merits or requires an answer from the Court of Appeal.

33 However, the factors which the parties agree ought be considered in determining whether the test is met, while not exhaustive, are certainly relevant considerations. There may be other considerations which are also relevant.

34 A consideration which the parties argued weighed heavily on the question of whether there is a good reason to grant permission to appeal is what standard of appellate review would likely be applied on the appeal. With the exception of ENMAX, the parties agreed that the standard of review to be applied on appeal of this Commission decision would be reasonableness. ENMAX suggested a correctness standard. A specialized tribunal interpreting its home statute in an area that is core to its mandate, time and time again, has been recognized as a matter which attracts a standard of review of reasonableness (*British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para 21, [2013] 3 S.C.R. 895 (S.C.C.), citing *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at para 54, [2008] 1 S.C.R. 190 (S.C.C.) and *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at para 34, [2011] 3 S.C.R. 654 (S.C.C.)). More so when a Commission is interpreting a tariff provision which it directed to be adopted in the first place. That is, the ISO tariff provision had its origins in an EUB decision directing the ISO to apply for approval of such a provision. Indeed, the Board suggested the wording of the provision which was ultimately approved. This Board-initiated action was taken in its decisions dealing with an application by the then transmission administrator for directions with respect to certain deferral accounts and the refund of roughly $91.7 million held in trust by the ISO (EUB Decisions 2003-054 and 2003-099) [9] .

VI. Analysis

A. The Question

35 Properly characterizing the question or questions of law and/or jurisdiction upon which an application for permission to appeal is based can be critical to determining whether a question has been raised which requires a determination by this Court. Elsewhere (paras 29-30) I have summarized the applicants' arguments; but the overriding question sought to be determined by the Court is whether section 15(2) of the ISO tariff prevents or ought to prevent the Commission from directing the ISO to invoice prior holders of power purchase arrangements and former recipients of transmission system access service after they have assigned their power purchase arrangements and their transmission system access service agreements to another market participant.

B. Importance of the Question to the parties

36 No doubt this is a question of importance to the parties and to the resolution of the complaint made by Milner in 2005. I have been advised that there is the potential for the transfer of tens or even hundreds of millions of dollars from one power generator or utility customer to another. However, it is important to keep in mind that no new charges are being levied. Rather the charges which have already been levied and paid are now to be distributed more fairly and in accordance with the *Electric Utilities Act* and *Transmission Regulation*. As well, interest (Bank of Canada rate plus 1.5%) has been ordered to be paid to those who were over-charged and charged to those who under-paid.

C. Significance of the Question to the practice

37 It has been argued, and certainly the Commission was of the view, that the circumstances surrounding this complaint are unique which might suggest that although the question is significant to the parties, it may not be significant to the practice. It must be kept in mind that the Commission's decision in this case was no more than a decision on how a prior decision of the Commission (Decision 790-D02-2015), which has now been found to raise no question of law or jurisdiction, was to be implemented. To the extent that the implementation decided upon appeared to contravene a tariff provision upon which industry participants were said to have reasonably relied, the question is said to have significance to utility rate regulation going forward. Why the question is of such significance was not made entirely clear to me. However, as stated at the outset, while ordering retroactive rate remedies is permissible, such remedies can only be ordered in appropriate circumstances and then only if they are appropriate. Among other things, they must not be unduly preferential, arbitrary, unjustly discriminatory or inconsistent with or in contravention of the *Electric Utilities Act* or *Transmission Regulation*. So if the Commission's invoicing decision is unduly preferential, etc. or in contravention of the Act or Regulations, then the question could be of significance to the practice.

D. Hindering proceedings?

38 In considering whether permitting an appeal would unduly hinder the progress of the Commission's proceedings, there is no doubt that not only the Commission's proceedings, but also those of the ISO, will be unduly hindered by an appeal. One need only look at what the Commission ordered in the impugned decision (Decision 790-06-2017 at 46). The ISO is ordered to produce final loss factors for 2006 to 2016, no mean task which one of the applicants suggested could take more than a year to complete. The ISO was also ordered to consult with market participants in the process and to implement a system of collection whereby surcharges and reimbursement of overpayments occur simultaneously. The ISO was ordered to account to market participants for their final line loss charges on a year-by-year basis as they are calculated before a final true-up takes place, including calculating the interest to be paid or charged on a monthly basis for each market participant. It was also ordered to come up with a payment plan for those market participants who may have difficulty paying their surcharges immediately. And prior to doing much of the foregoing, the ISO was ordered to file a compliance plan for approval by the Commission. While some of the recalculation may have taken place following the issuance of the Commission's decision in December of 2017, an appeal would obviously hinder the progress of the proceedings.

39 Furthermore, the unanimous view of the Commission was that this matter had gone on long enough. In January of 2018, its Chairman, the late Willie Grieve, Q.C., notified participants that the Commission would not review the impugned decisions because it would prolong market uncertainty. He expected that the permission to appeal process would proceed expeditiously. Whether the permission to appeal process proceeded as expeditiously as Chairman Grieve expected, the fact is that granting permission to appeal would further hinder the progress of the Commission's proceedings. This consideration might not be sufficient to justify a denial of permission to appeal. After all, these proceedings have been going on for over a decade and the decision sought to be appealed is simply one of who gets invoiced as between a handful of industry participants most of whom were not involved in any assignments of system access service but who were affected by the initial unfairness. Those industry participants would have to wait for the remedy to which they have been found to be entitled pending an appeal. My view is that the fact that the Commission's proceedings have already taken more than a decade to complete, at the very least, may be a reason to apply heightened scrutiny to the issue of whether there is a compelling question of law or jurisdiction which requires a decision by this Court.

E. Does the Question merit an opinion from the Court of Appeal?

40 The answer to the foregoing question depends in part on the "merits" of the question of law or jurisdiction raised by the applicants. The question is the applicability of section 15(2) of the ISO tariff to the remedy the Commission ordered. The applicability of the tariff provision turns not only on its interpretation, but also on its place in the regulation of electric utilities under the *Electric Utilities Act*. I will now deal with whether the question raised by the applicants merits an answer from this Court.

1. Is the Commission's interpretation of s. 15(2) an unreasonable departure from past practices?

41 The applicants contend that the invoicing decision unreasonably departs from what its predecessor, the Energy and Utilities Board, decided and approved in two 2003 decisions (EUB Decisions 2003-054 and 2003-099).

42 In arriving at its invoicing decision, the Commission expressly indicated that it considered its past decisions and recognized that those decisions informed its decision whether to invoice current supply transmission service holders or those of record when the losses occurred. At the very least, the Commission cannot be accused of completely ignoring what had gone before. However, there is no indication in the Commission's reasons that its predecessor's decisions in 2003, which were the genesis of section 15(2), were expressly considered by the Commission, or that they were even argued by the applicants.

43 However, in their applications for permission to appeal, the applicants did argue that the Commission essentially ignored the two 2003 EUB decisions. They argued that the decisions were not only applicable but binding on the Commission with respect to the purpose and intent of section 15(2).

44 In Decision 2003-054, the EUB directed the ISO to propose an amendment to the ISO tariff for its approval. The proposed amendment was to deal with the collection and refund of amounts due from power generators or power purchase arrangement

holders where there had been "buy/sell agreements." The provision was to require collection from or refunding to the current owner of the particular generation facility in question or the current power purchase arrangement holder. In Decision 2003-99, the EUB approved the wording which is now contained in section 15(2) and such wording has not substantially changed since then.

45 The applicants argue that the ISO tariff provision governs and that the invoicing decision is unlawful or unreasonable in that it fails to comply with the ISO tariff which it approved and, furthermore, that it contradicts the prior Commission decisions referred to above. The applicants' arguments, taken to their extreme, are that the Commission delegated away any jurisdiction it might have had to determine who would be invoiced for substituted tariff charges. At the very least, they argued, the Commission's invoicing decision directly conflicts with prior decisions of its predecessor tribunal (the EUB) and such conflict requires appellate review (citing *Altus Group Ltd. v. Calgary (City)*, 2015 ABCA 86, 599 A.R. 223 (Alta. C.A.)).

46 A careful reading of EUB Decision 2003-054 suggests that the Board did not intend to fetter its authority to determine who would be invoiced for retrospective adjustments. Indeed, the Board expressly preserved the right of aggrieved parties to come before it and complain about the impact of the ISO rule or tariff on them. Moreover, there is arguably nothing in the EUB's decision which contradicts what the Commission decided in its impugned invoicing decision. And to the extent there is any doubt, deference is due the Commission's interpretation of its prior decisions.

47 In EUB Decision 2003-054, as in this case, the Board was considering the refunding of a rather large non-recurring amount ($91.7 million) to ISO's system access customers. In the second decision (EUB Decision 2003-099) the Board dealt with deferral account reconciliation for the years 2000, 2001 and 2002.

48 In Decision 2003-054, the Board had to first decide was who was to receive a $91.7 million refund as between two different customer rate classes: holders of supply system transmission service (STS) or holders of demand service transmission service (DTS). The Board decided the refund would be shared by the two rate classes. The Board was then called upon to decide which parties within those rate classes would receive the refund. With respect to the latter issue, the Board decided that because the refund amounts were substantial, fairness required that it order "retrospective allocation of the Article 24 Refund on a customer-by-customer basis such that the customer who paid the charges at the time received the refund." The Board considered that this method "fairly distributes the Article 24 Refund to the [ISO] customer of record that made the overpayments." The Board was of the view that the refund amounts were sufficiently substantial to "warrant the additional effort to distribute them to the parties that paid the amounts at the time they were charged". The Board ruled that while there might be pragmatic constraints on refunding specific customers, its view was that customers who paid the charges at the time should receive the refunds based on each customer's proportion of billed operating service charges. In so doing the Board stated that it considered that its decision on allocation of the refund was consistent with a prior decision. [10] .

49 Having reviewed EUB Decision 2003-054, I am not persuaded that the Commission's invoicing decision is as inconsistent with Decision 2003-054 as the applicants have argued. The EUB employed exactly the same principles in refunding the Article 24 funds as the Commission did in the invoicing decision.

50 In dealing with the 2000, 2001 and 2002 deferral account reconciliation, the Board directed the ISO to make a further application to the Board to reconcile the deferral accounts because an issue had arisen as to the methodology used to calculate refunds and surcharges. The Board also noted a desire on the part of the ISO and a number of intervenors for a consistent methodology for refunding and collecting of outstanding amounts. As a consequence, the Board directed the ISO to propose an amendment to the ISO's terms and conditions to deal with the collection or refund of amounts due from previous generators or power purchase arrangement holders who had assigned their transmission system access rights. But in so doing, the Board made it clear that even with respect to deferral accounts, it was not abdicating its jurisdiction to deal with the collection or refund of such amounts if there were complaints such as there were in the present case. Here is what the Board said in EUB Decision 2003-054 which the applicants relied upon for permission to appeal:

> Also, the Board directs the AESO, at the time of the joint final Deferral Account Reconciliation Application, to propose an amendment to the AESO's terms and conditions of service to deal with the collection/refund of amounts due from previous

> generators/PPA holders and/or DTS customer locations that must now be collected/refunded from/to the current owner of the generator or PPA holder. The Board considers that the onus is on owners of generators/PPA holders and DTS customers to include commercial arrangements for STS/DTS amounts owing or refunds that apply to a prior period in any buy/sell agreements. Although the Board anticipates that such an amendment would be made on a going forward basis, the Board acknowledges that such a method may be necessary in the upcoming deferral account settlement, given that at least one customer is no longer a customer of the AESO. The Board considers that an amendment of this nature would provide direction and guidance for future Deferral Account Reconciliation thereby permitting Deferral Account Reconciliations beyond the year 2002 to be filed "for information purposes only". The Board's view is that, if practical, its role in the future would be narrowed to dealing with such future filings on a complaint basis only. (emphasis added)

51 The last sentence is key. An amendment to the ISO's terms and conditions of service would not deprive an industry participant of the right to complain to the Board about who ought to be refunded or charged with paying extraordinary surcharges. Nor, as a matter of law, could the proposed amendment deprive the Board of its statutorily-conferred jurisdiction to deal with such complaints. In the case sought to be appealed, there were complaints. There was also an industry-wide divergence of views as to who was entitled to the remedy the Commission indicated it intended to order. There could have been no reasonable expectation on the part of any industry participant arising out of EUB Decision 2003-054 that the Commission would no longer deal with such disputes just because its predecessor had approved section 15(2) of the ISO tariff. One need look no further than the "Summary of Board Directions" in EUB Decision 2003-099 which arose out of its Decision 2003-054. The Board, once again, made it clear that even with respect to deferral account adjustments, it retained the jurisdiction to deal with reconciliations on a complaints basis. At page 52 of Decision 2003-099, the Board stated:

> 14. The Board directs the AESO to include in its evaluation the possibility of filing future (2005+) deferral account reconciliations on a complaint basis. The Board considers that the AESO's performance in handling future deferral account matters will weigh on the ultimate decision in this matter. The Board considers that it retains the discretion to invoke an appropriate process should any party be concerned with the AESO's filing or handling of any deferral account matter. (emphasis added)
>
> *A fortiori*, the Commission retained the jurisdiction to deal with extraordinary, one-time, non-recurring distributions or redistributions of funds paid by utility customers.

52 In the Board's subsequent decision (EUB Decision 2003-099), the Board considered and approved the ISO's proposed amendment to the terms and conditions of its tariff which is now section 15(2) of the ISO tariff. The applicants argue that the approved wording went beyond deferral account reconciliation to include all rights and obligations associated with system access service, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments. They argue that the Commission's interpretation of section 15(2) raises of questions of law and/or jurisdiction because they argue there is an inconsistency between the Commission's decision to invoice holders of system access service at the time the line loss charges were originally assessed and section 15(2) of the ISO tariff which requires the ISO to apply to the account of the assignee of system access service retrospective adjustments due to deferral account reconciliation or any other adjustments.

53 First, in its invoicing decision, the Commission did not engage in much interpretation of section 15(2). The Commission simply found that section 15(2) was not applicable to the decision as to whom the invoices for line loss surcharges ought to be sent or the decision as to whom would be credited for having paid more than their fair share of the line losses. And it based that decision on the dictates of the *Electric Utilities Act* and the *Transmission Regulation* made pursuant to that Act. I will have more to say about that later.

54 On the application for permission to appeal, I heard little from the applicants on the applicability of section 15(2), other than they relied upon this statement by the Commission in its Decision 790-D04-2016 (the preliminary issues decision) at paragraph 50:

> [T]he Commission considers that the provisions in the ISO tariff and ISO rules provided the AESO with the mechanisms to pursue payment from or reimbursement to, market participants.

> The applicants argue that in finding that section 15(2) did not apply, the Commission contradicted its own findings in the same proceeding.

55 Even assuming the Commission's finding in its invoicing decision did contradict its finding in Decision 790-D04-2016 (the preliminary issues decision), there is no error of law and/or jurisdiction in that. The second proceeding would not have been necessary if there had not been an issue about who should be invoiced. It was an issue which required a decision, not an issue already decided. I also note that one of the market participants, the Balancing Pool, which held a significant percentage of the assigned system access service contracts, was not a participant in the first proceeding dealing with preliminary issues. Perhaps, the Commission wished to give it an opportunity to be heard. This Court's comments in *Altus Group Limited*, about the reasonableness standard of review not shielding directly conflicting decisions of an administrative tribunal from review by an appellate court are of little assistance. It should also be noted that in *Altus*, the Local Assessment Review Board was held to have interpreted a bylaw authorizing the assessment of business tax completely opposite to an interpretation which two-years prior had been approved by the Court of Queen's Bench and confirmed by this Court.

56 Nothing like that occurred here. The Commission's decision-making process was staged. There were at least seven Commission proceedings and decisions dealing with the line loss matter from 2012 to 2017 and over 300 pages of reasons given. Furthermore, the Commission was clearly wrestling with many complex issues as it proceeded to its final invoicing decision. It would be surprising if one could not find examples of the Commission's thinking evolving. But evolving thinking does not amount to an unreasonable departure from past practices. There may be examples where the Commission, in its invoicing decision, appear to contradict a previous finding in the same proceeding. But there were also examples where the Commission's decision was entirely consistent with prior pronouncements it made in the same proceeding. For example, in its decision, the Commission pointed to its decision declaring the line loss rule unlawful wherein it stated that line loss savers should receive the credit and those who caused the higher losses should pay. If the Commission had not decided that those who paid less than they should have for line losses they caused should be responsible to pay more or had not decided that those who paid more than they should have for line losses they caused should be credited, there might have been a different group of market participants seeking permission to appeal the Commission's invoicing decision. Certainly when viewed from the perspective of consistency with the Commission's reasons for declaring the previous line loss rule unlawful, a decision requiring those who caused the losses to pay and reimburse those who did not cause the losses that were attributed to them, the Commission's invoicing decision appears to be much more reasonable than the alternative. In other words, the decision accords with common sense. That the Commission acknowledged that it could only order to whom the invoice would be sent, but could not dictate ultimate liability if assignees and assignors had contracted otherwise, is not a reason for the Commission to refrain from making an order that is consistent with prior practice and which attempts to reward those who utilized the transmission system in a manner which reduces losses and charge those who utilize the transmission system in a manner which increases line losses. After all, the goal is to incent the minimization of those losses.

2. Applicability of section 15(2)

57 The Commission found that the ISO tariff is "subordinate to the Commission's statutory obligation to safeguard the fair, efficient and openly competitive operation of the market and to ensure that rates are just and reasonable" (Decision 790-D06-2017 at para 121). The Commission went on:

> To the extent that there are inconsistencies between the tariff . . . and the Commission's statutory obligations, the statutory obligations must prevail.

58 The *Electric Utilities Act* confirms the Commission's views. The independent system operator's (ISO) duties include managing and recovering the cost of transmission line losses (s. 17(e)), providing system access service on the transmission line system (ss. 17(g) and 28) and preparing an ISO tariff for that service (s. 17(g)). But the independent system operator must apply to the Commission for approval of its tariff (s. 30)) and its tariff must comply with the *Electric Utilities Act* (s. 119(4)). The ISO tariff must not be unjust, unreasonable, unduly preferential, arbitrary or unjustly discriminatory or inconsistent with or in contravention of the *Electric Utilities Act*; and in applying that tariff the ISO itself must not act in any manner that is

unjust, unreasonable, unduly preferential, arbitrary or unjustly discriminatory or inconsistent with or in contravention of the *Electric Utilities Act* (s. 127(c)). The ISO may make rules for the operation of the interconnected electric system (s. 20(1)(c)) and market participants must comply with those rules (s. 20.8); but those rules also require Commission approval if there is an objection to them. The Commission may allow such objections, disallow them or direct the ISO to change the rule (s. 20.5(1)). Furthermore, the Commission may make rules governing the procedure and processes that the ISO uses to develop ISO rules (s. 20.9). A market participant may complain to the Commission about an ISO rule on the ground that it does not support the fair, efficient and openly competitive operation of the market (s. 25(1)(b)(ii)) or that it is not in the public interest (s. 25(1)(b)(iii)). The Commission, after the hearing the complaint, may disallow the rule (s. 25(6)(d)) or direct the ISO to change the ISO rule (s. 25(6)(e)).

59 Clearly there is support in the *Electric Utilities Act* for the Commission's finding that an ISO tariff provision cannot prevent it from discharging its mandate to ensure that the independent system operator (ISO) and its tariffs and rules are consistent with the purposes and dictates of the *Electric Utilities Act* and that those purposes and dictates may require a finding by the Commission that a particular ISO tariff provision which it approved could not have been intended to apply in circumstances such as those which presented themselves in this case.

60 In short, there is little merit to the applicants' argument that the Commission's decision that s. 15(2) was inapplicable to the surcharges and refunds ordered as a consequence of its finding that the ISO's line loss charges were unlawful was erroneous or unreasonable.

3. Interpretation of section 15(2)

61 The Commission's invoicing decision was based not only on the Commission's view that its statutory obligations trumped the ISO tariff ("To the extent that there are inconsistencies between the tariff . . . and the Commission's statutory obligations, the statutory obligations prevail") but also on its view that section 15(2) of the ISO tariff applied only to "retrospective adjustments due to deferral account reconciliation" and any other *like* adjustments. Clearly the invoicing decision did not involve a retrospective adjustment due to deferral account reconciliation. The question was whether it might involve "any other adjustments." Essentially the Commission applied *ejusdem generis* (of the same kind, class or nature) to the phrase "any other adjustments" in section 15(2). It pointed to section 13(5) of the ISO tariff as providing examples of the types of "other adjustments" contemplated in section 15(2). Section 13(5) provides for adjustments to a market participant's statement of account for system access service for unavailable or incomplete metering data, inaccurate estimates of meter data or reconciliation with updated estimates of meter data.

62 One must also keep in mind the dictate of the *Electric Utilities Act* and the *Transmission Regulation* that transmission line losses must be recovered by the ISO, no matter what (s. 17(e) of the Act and ss. 19 and 210 of the Regulation). For example, loss factors may be *adjusted* by a calibration factor to ensure that the actual cost of the transmission line losses is recovered through charges and credits on an annual basis (s. 21(1) of the *Regulation*). If the actual cost of losses is over- or under- recovered in any given year, the over- or under- recovery must be collected or refunded in the next year or subsequent years, yet another adjustment.

63 The Commission was of the view that section 15(2) of the ISO tariff contemplated adjustments to a lawful tariff in the normal course. If one goes back to the genesis of section 15(2) in the EUB's Decisions 2003-054 and 2003-099, the Board defined what it considered to be a "retrospective adjustment" (The issue at the time was whether refunds or surcharges for adjustments should be made on a retrospective or prospective basis).

> The Board considers a "retrospective" adjustment to occur when a utility collects or refunds any deferral account balance by using the actual billing determinants that existed at the time the variance arose, to adjust the revenue due from the customers that were actually on the system and receiving service at that time.
>
> EUB Decision 2003-099 at 5

64 A deferral account is something that exists. Other like adjustments exist or are foreseeable. They are obligations which can be readily assigned or deemed to have been assigned on an assignment of transmission system access service.

65 Transmission line losses are incurred and then paid for, give or take, in the year they are incurred. Ordinarily, there is no contingent liability or entitlement which continues to exist as in the case of deferral accounts. In the case of transmission line loss charges, there is nothing to assign or to be deemed to be assigned by a provision such as s. 15(2) of the ISO tariff.

66 In this case, new, substituted line loss charges were being imposed and new, substituted line loss credits were being granted, both well after the fact. The Commission was of the view that these substituted line loss charges were not "adjustments" as contemplated by section 15(2). The substituted line loss charges were not a retrospective adjustment due to a deferral account reconciliation or even an analogous adjustment. They were a remedy ordered to correct for unfair subsidization of one group of utility customers by another group of customers as a consequence of an unfair and unlawful line loss rule. And in order for the remedy to be corrective, the surcharges and credits had to go to the appropriate customers. To quote the Commission at paragraphs 126 and 127 of Decision 790-D06-2017:

> 126. The Commission finds that invoicing current STS holders for charges or credits for the line losses of predecessor STS holders could create unfair advantages for some market participants that could potentially distort both the market and the structure of the industry. The Commission notes, in this regard, that the effect of invoicing current STS holders could potentially do that which the Commission previously found to be impermissible, i.e., to bestow on a group of competitors financial benefits to which they may have no just claim. In the Commission's view, this could potentially interfere with the efficient market for electricity based on fair and open competition as required by Section 5 of the Electric Utilities Act. This is not to say that market participants are not free to contractually shift liabilities for past unlawful rates they were charged. Rather, it simply recognizes that such transactions fall outside the statutory scheme and the Commission's purview.
>
> 127. The remedy for an interim rate that has been determined to be neither just nor reasonable, is to issue a lawful final rate in its place. However, such remedy is imperiled if the final invoices are not issued to the right market participants. Disadvantaged loss savers and undercharged loss causers are treated justly and reasonably if they receive final invoices that correct the competitive injustice wrought by unlawful interim charges. This is consistent with the Commission's express intention throughout this proceeding. Subject to the ongoing caveat in this decision that the Commission is only determining which market participants the AESO must invoice, and that the ultimate responsibility for payment may rest with others pursuant to separate commercial agreements, the Commission finds it is just and reasonable to issue final invoices to the same party that received the original (currently interim) invoices for line losses during the historical period.

67 And no question of law is raised by those who argue that the Commission's acknowledgment that it could only determine who to invoice, not who would bear ultimate responsibility, shows that the statutory purpose (to debit and credit the actual loss savers and causers) could not be fulfilled. The question of law is whether section 15(2) prevents or ought to prevent the Commission from directing the ISO to invoice the holders of transmission system access service who paid the unlawful transmission line loss charges. Whether the invoicing decision achieved the Commission's regulatory objective is irrelevant except to the extent that there is a rational connection between the invoicing decision and the statutorily prescribed objective or purpose. The applicants' argument that the Commission's assertion that its interpretation of s. 15(2) promotes fair, efficient and open competition lacked evidentiary support also fails to raise a question of law upon which this Court can rule. The Commission is a specialized, expert tribunal steeped in almost a century of utility rate regulation and its views on what will or will not promote fair, efficient and open competition must be accorded great deference and can be made without direct evidence.

68 Employing the logic of Bastarache, J. in *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37 (S.C.C.) at para 68, [2006] 2 S.C.R. 231 (S.C.C.), the Commission's order does not involve imposing an obligation on a payor that did not already exist. The payor's obligation is independent of any Commission order that may have been previously made. Accordingly, even where the payor has made payments consistent with an existing Commission order, it has not discharged its obligation if those payments did not compensate for the transmission line losses it caused the system. While the obligation is presumed to be the amount ordered, the obligation is not necessarily the amount ordered because it is the responsibility of the generator to ensure that it discharges

its obligation. When a generator is shown to have failed in its obligation, the Commission may make a decision which corrects the failure. Such a decision is not in any way unfair to the payor. To the contrary, it serves to enforce an obligation which should have been discharged already. To direct the order against an assignee fails to recognize and correct the failure by the generator which had the obligation.

69 Also, when section 15(2) of the ISO tariff states that the ISO must apply all the rights and obligations associated with system access to the account of the assignees of system access service, it is the rights and obligations associated with the utility service (namely, the provision of transmission for electricity) which are being addressed. Section 15(2) does not address to whom the ISO must look for rights and obligations imposed by the Commission on system access service holders, whether they be current holders or former holders.

VII. Conclusion

70 In declining to grant permission to appeal, I have adopted an approach employed by the Supreme Court in *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682 (S.C.C.). Once the decision of the Utilities Commission that it had the power to make a remedial order was found not to raise questions of law or jurisdiction, deference had to be accorded to its decision on any remedy ordered, absent a statutory provision prohibiting such remedy or other palpable and overriding error or unreasonableness. In denying permission to appeal this and the other two decisions of the Commission relating to the transmission line loss issue, I was cognizant of the fact that had permission to appeal not been granted by this Court in connection with the dismissal of Milner's complaint about the line loss charges in the first instance, [11] the unfairness and unlawfulness of the line loss rule might never have come to be determined. But permission to appeal was granted then because the Commission's predecessor denied an industry participant a proper opportunity to be heard, to advance its complaint. It was a breach of procedural fairness in respect of which this Court often intervenes. In the case of the three decisions sought to be appealed, a full opportunity to be heard was afforded by the Commission to all affected parties and its decisions were clearly within its expertise and fully explained, rationalized and justified in accordance with the law governing its regulatory decision-making. There is nothing this Court could usefully add or correct. There is no question of law or jurisdiction which requires this Court's intervention.

71 As a consequence, the within applications for permission to appeal are denied.

Application dismissed.

Footnotes

1 ENMAX Energy Corporation, Capital Power Corporation, and TransAlta Corporation

2 *Milner Power Inc., Re* [2015 CarswellAlta 81 (Alta. U.C.)] (20 January 2015), 790-D02-2015, online: auc.ab.ca [Decision 790-D02-2015].

3 *Milner Power Inc., Re* [2012 CarswellAlta 699 (Alta. U.C.)] (16 April 2012), 2012-104, online: auc.ab.ca [Decision 2012-104]

4 *Alberta Electric System Operator, Re* [2014 CarswellAlta 648 (Alta. U.C.)] (16 April 2014), 2014-110, online: auc.ab.ca [Decision 2014-110]

5 Alberta Electric System Operator, "ISO tariff" (1 January 2019), online (pdf): Alberta Electric System Operator aeso.ca/rules-standards-and-tariff/tariff/

6 *Milner Power Inc., Re* [2015 CarswellAlta 2571 (Alta. U.C.)] (26 November 2015), 790-D03-2015, online: auc.ca [Decision 790-D03-2015]

7 Applications for permission to appeal that Decision 790-D03-2015 were filed by ENMAX Energy Corporation and TransAlta Corporation but both were discontinued.

8 *Milner Power Inc., Re* [2016 CarswellAlta 1910 (Alta. U.C.)] (28 September 2016), 790-D04-2016, online: auc.ab.ca [Decision 790-D04-2016]) and *Milner Power Inc., Re* [2017 CarswellAlta 2785 (Alta. U.C.)] (18 December 2017), 790-D06-2017, online: auc.ab.ca [Decision 790-D06-2017]

9 *Alberta Electric System Operator, Re* [2003 CarswellAlta 2090 (Alta. E.U.B.)] (8 July 2003), 2003-054, online: auc.ab.ca [EUB Decision 2003-054] and *Alberta Electric System Operator, Re* [2003 CarswellAlta 2135 (Alta. E.U.B.)] (16 December 2003), 2003-099, online: auc.ab.ca [EUB Decision 2003-099]

10 *ESBI Alberta Ltd., Re* [2002 CarswellAlta 2006 (Alta. E.U.B.)] (23 May 2002), 2002-048, online: auc.ab.ca [EUB Decision 2002-048]

11 *Milner Power Inc., Re*, 2010 ABCA 236, 482 A.R. 327 (Alta. C.A.)

TAB 9

2020 CarswellAlta 1248
Alberta Utilities Commission

ATCO Electric Ltd., Re

2020 CarswellAlta 1248, [2020] A.W.L.D. 2412

ATCO Electric Ltd.

2018-2019 General Tariff Application Compliance Filing - Information Technology Common Matters

Kristi Sebalj Chair, Bill Lyttle Member, Bohdan (Don) Romaniuk Member

Judgment: July 6, 2020
Docket: 24805-D01-2020

Counsel: See Appendix 1, for Counsel

Subject: Public
Related Abridgment Classifications
Public law
IV Public utilities
IV.2 Operation of utility
IV.2.h Miscellaneous
Headnote
Public law --- Public utilities — Operation of utility — Miscellaneous
Table of Authorities
Cases considered by *Kristi Sebalj Chair, Bill Lyttle Member, Bohdan (Don) Romaniuk Member*:
ATCO Electric Ltd., Re (2019), 2019 CarswellAlta 1404 (Alta. U.C.)
ATCO Electric Ltd., Re (2019), 2019 CarswellAlta 2099 (Alta. U.C.)
ATCO Gas, Re (2015), 2015 CarswellAlta 1557 (Alta. U.C.)
ATCO Pipelines, Re (2019), 2019 CarswellAlta 1297 (Alta. U.C.)
ATCO Pipelines, Re (2020), 2020 CarswellAlta 1270 (Alta. U.C.)
ATCO Utilities, Re (2010), 2010 CarswellAlta 448 (Alta. U.C.)
ATCO Utilities, Re (2016), 2016 CarswellAlta 421 (Alta. U.C.)
Rate Regulation Initiative, Re (2012), 2012 CarswellAlta 2557 (Alta. U.C.)
The ATCO Utilities, Re (2019), 2019 CarswellAlta 1171 (Alta. U.C.)

***Kristi Sebalj Chair, Bill Lyttle Member, Bohdan (Don) Romaniuk Member*:**

1 Decision summary

1 This decision provides the Alberta Utilities Commission's finding on the compliance of ATCO Electric Ltd. (AET) with Decision 20514-D02-2019 (IT Common Matters decision), [1] for information technology common matters and the associated costs. This decision refers to both AET and to ATCO Pipelines, a division of ATCO Gas and Pipelines Ltd. (referred to as AP), the two transmission utilities that were the subject of the IT Common Matters decision. The Commission will collectively refer to AET and AP as the ATCO Transmission Utilities. A separate decision was concurrently issued by the Commission for AP in Proceeding 24817. [2]

2 ATCO Gas, a division of ATCO Gas and Pipelines Ltd., and ATCO Electric's distribution function also incur IT common matters costs, which will be addressed separately under performance-based regulation (PBR). The two distribution utilities will be referred to as the ATCO Distribution Utilities.

3 In this decision, the Commission has approved the majority of AET's IT common matters compliance application but there are outstanding items that will require a second compliance filing. A summary of Commission directions can be found in Appendix 3 of this decision.

4 The Commission's determinations on AET's compliance with non-IT common matters directions issued in Decision 22742-D01-2019 [3] and the directions issued in Decision 22742-D02-2019, [4] both of which relate to the 2018-2019 general tariff application (GTA), will be the subject of a future decision to be issued in this proceeding.

2 Introduction

5 AET filed an application with the Commission on August 8, 2019, requesting approval of its compliance filing to Direction 1 in the IT Common Matters decision, Decision 22742-D01-2019 and Decision 22742-D02-2019. This decision solely addresses AET's compliance to Decision 20514-D02-2019, the ATCO Utilities IT Common Matters decision and the IT common matters directions in Decision 22742-D01-2019.

3 Process summary

6 The Commission issued a notice of the application on August 9, 2019, that required parties to provide a statement of intent to participate (SIP) by August 22, 2019. SIPs were filed by The City of Calgary, the Consumers' Coalition of Alberfta (CCA), and the Office of the Utilities Consumer Advocate (UCA).

7 A detailed description of the regulatory process of the current proceeding is provided in Appendix 2 of this decision.

8 The Commission considers the close of record for the IT common matters portion of Proceeding 24805 to be April 7, 2020, the deadline date for filing reply argument on IT common matters.

9 In reaching the determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

4 Background

10 In the IT Common Matters decision, the ATCO Transmission Utilities were directed to apply:

> (i) a reduction of 13 per cent in pricing in year one (2015) of the master service agreements (MSAs); and
>
> (ii) a glide path that reduces prices on a weighted average across towers by 4.61 per cent in each of years two through 10 of the MSAs, as approved by the Commission.

11 The ATCO Transmission Utilities were directed to file their compliance applications to the IT Common Matters decision in the compliance filings to their general rate application (GRA) or GTA. Separate directions were issued for the ATCO Distribution Utilities.

12 In Proceeding 24817 and Proceeding 24805, the Commission must determine whether AP and AET, respectively, have complied with the findings and directions issued by the Commission in Decision 23793-D01-2019, [5] Decision 22742-D01-2019, Decision 22742-D02-2019, and the IT Common Matters decision. The Commission addresses AET's compliance with the IT Common Matters decision in the sections that follow. The Commission's decision on AP's compliance with the IT Common

Matters decision has been issued concurrently with this decision. The Commission's findings on AET's compliance with the remaining GTA directions from decisions 22742-D01-2019 and 22742-D02-2019 will be issued in a separate decision in due course.

5 Discussion of issues

5.1 Directions related to IT common matters costs

13 This decision includes the following Commission directions on IT common matters costs for the ATCO Transmission Utilities, which includes AET, that are contested or otherwise require findings from the Commission in this proceeding.

14 Direction 17 of Decision 22742-D01-2019 stated:

> 223. Further, on June 5, 2019, the Commission issued Decision 20514-D02-2019 regarding the ATCO Utilities IT common matters proceeding. AET is directed to reflect any changes arising from the directions in that decision in its compliance filing to this decision. AET is further directed to provide schedules detailing how the determinations from Decision 20514-D02-2019 are reflected in its compliance filing.

15 Direction 33 of Decision 22742-D01-2019 stated:

> 595. Further, on June 5, 2019, the Commission issued Decision 20514-D02-2019 in the ATCO Utilities IT common matters proceeding. With respect to USA 934, AET is directed to reflect any changes arising from the directions in that decision in its compliance filing to this decision. AET is further directed to provide schedules detailing how the determinations in Decision 20514-D02-2019 are reflected in the compliance filing to this decision.

16 Direction 1 of the IT Common Matters decision stated:

> 379. In summary, to account for the considerations listed above and to achieve just and reasonable rates, adjustments to the MSA pricing are required. The ATCO Utilities are directed to apply (i) a reduction of 13 per cent in MSA pricing in year 1 (which automatically flows through to all subsequent years as in the example shown above); and (ii) a glide path reduction in MSA pricing of 4.61 per cent (on a weighted average across towers) in each of years 2 through 10.

17 Direction 4 of the IT Common Matters decision stated:

> 398. Similar to the IT and CC&B disallowance determined in the Evergreen II decision and related compliance filings, ATCO Pipelines and ATCO Electric Transmission will apply a first-year disallowance for 2015 and a glide path reduction as set out in Section 6 of this decision. ATCO Pipelines and ATCO Electric Transmission are directed to file their compliance applications to this decision in the compliance filings to their ongoing GRA/GTAs, clearly showing the directed IT disallowance on an annual basis by capital, indirect capital and O&M.

ATCO Transmission Utilities responses to the directions

18 In accordance with directions 1 and 4 of the IT Common Matters decision, the ATCO Transmission Utilities provided schedules [6] referencing the placeholder dollars for capital, indirect capital, and O&M from the previous GTA proceedings on a total dollar basis per annum. The schedules included in AET's compliance filing detailed the first-year pricing reduction of 13 per cent and glide path reductions, which are calculated as the difference between the 4.61 per cent as approved in the IT Common Matters decision and the average glide path set out in the MSA. [7]

19 For the years 2015-2020, the ATCO Transmission Utilities calculated the amounts owed by AET and AP to customers because of IT rate adjustments from the IT Common Matters decision in the following two tables:

Table 1. Summary of net amounts owed by ATCO Electric Transmission (2015-2019) [8]

	2015	2016	2017	2018	2019	Total
				($ million)		
O&M (Sch 2)	(0.9)	(1.2)	(1.5)	(1.3)	(1.2)	(6.1)
Direct Capital (Sch 3)	-	-	(0.1)	-	(0.1)	(0.2)
Other Capital (Sch 4)	0.2	0.1	0.1	(0.1)	0.1	0.4
Total	(0.7)	(1.1)	(1.5)	(1.4)	(1.2)	(5.9)
Interest per (Sch 8)						(0.2)
Total amounts owed by ATCO Electric Transmission						(6.1)

Table 2. Summary of net amounts owed by ATCO Pipelines (2015-2020) [9]

	2015	2016	2017	2018	2019	2020	Total
				($000)			
O&M (Sch 2)	(463)	(594)	(674)	(686)	(582)	(602)	(3,601)
Direct Capital (Sch 3)	8	7	(23)	(98)	(83)	(118)	(307)
Other Capital (Sch 4)	56	55	70	11	124	72	388
Total	(399)	(532)	(627)	(773)	(541)	(648)	(3,520)
Interest per (Sch 8 & 9)							(207)
Total amounts owed by ATCO Pipelines							(3,727)

20 While the IT Common Matters decision did not require a line-by-line or tower-by-tower assessment, the ATCO Transmission Utilities submitted an alternative approach to their original IT placeholder adjustment. [10] In a November 15, 2019, supplementary filing, the ATCO Transmission Utilities provided a detailed back-up for a Service ID-by-Service ID analysis, which applied the 13 per cent reduction on the first-year pricing and the 4.61 per cent glide path for years two to 10 to the individual Service IDs and approved volumes. [11]

21 Table 3 shows the incremental differences in applying the first-year pricing adjustment of 13 per cent and glide path for years two to 10 using the total dollar approach compared with applying the IT adjustments on a Service ID-by-Service ID approach:

Table 3. Total dollar approach versus the Service ID-by-Service ID approach [12]

Utility	Total dollar approach	Service ID-by-Service ID approach	Variance
		($ million)	
ATCO Electric Transmission	6.1	5.9	**0.2**
ATCO Pipelines	3.7	3.7	**0.0**
ATCO Gas	10.3	10.3	**0.0**
ATCO Electric Distribution	6.4	6.4	**0.0**

22 A discussion of specific issues regarding AET's compliance with directions on IT common matters costs is provided in the subsections below. Where the submissions and findings are applicable to both AET and AP, the subsections refer to the ATCO Transmission Utilities collectively.

5.1.1 Placeholders

Calgary

23 Calgary argued that IT costs must be adjusted to realize just and reasonable rates. Calgary stated that although the ATCO Transmission Utilities have provided two models showing IT adjustments and refunds, the amounts and methods used to demonstrate compliance contain a number of deficiencies.

24 Calgary noted that the IT Common Matters decision discussed placeholders and the finalization of IT rates and revenue requirement, as follows: [13]

> 19. A placeholder is created when specific costs for a utility are not finalized because those costs are contingent upon some other event or proceeding. The IT costs included in the revenue requirement for those utilities affected by the IT common matters proceeding have been treated as a placeholder until the MSA prices are determined in this proceeding. The approved IT rates will be multiplied by utility-specific IT volumes to determine costs that will be approved for inclusion in revenue requirement in a future rate proceeding. The IT costs for each of the ATCO Utilities will then be finalized and included in revenue requirement and rates.

25 While Proceeding 20514 tested IT rates contained in the MSAs, Calgary argued the proceeding did not test IT prices/rates or dollar amounts that are contained in the ATCO Transmission Utilities' placeholders and proposed adjustments. Calgary also argued that some of the ATCO Transmission Utilities placeholders contain Service ID numbers, service descriptions and IT service prices that do not exist in the MSA price schedule. If Service ID numbers, service descriptions and IT service prices are presented in the placeholders but do not exist in the tested MSA price schedule, then those items were not tested in Proceeding 20514 and should not be adjusted, or even included in the costs to be recovered from ratepayers. Calgary argued that untested prices included in the placeholders must, therefore, be treated as zero amounts for placeholder purposes and, therefore, zero amounts for compliance purposes. Calgary also suggested that the ATCO Transmission Utilities should be required to provide the volumes that are associated with the Service IDs. [14]

26 In addition, Calgary argued that the ATCO Transmission Utilities' approach included applying the Commission directed glide path for all towers. The compliance process should utilize individual glide paths by tower as recommended by PA Consulting (PAC). Calgary asked that the ATCO Transmission Utilities be ordered to recalculate all price adjustments after 2015, applying the specific tower glide path recommended by PAC for both (i) contractual labour arbitrage; and (ii) automation, as was accepted by the Commission in the IT Common Matters decision.

27 Calgary recommended that the ATCO Transmission Utilities be directed to make adjustments to customer rates and refunds based on the method used in the Evergreen compliance filing, in Proceeding 3378. [15]

28 Consistent with the method used in Proceeding 3378, Calgary recommended the use of net present value (NPV) to account for the payment of adjusted property, plant and equipment (PP&E) balances going forward as it offers a simple, transparent and easy-to-understand approach to ensure the adjustments required from the IT Common Matters decision are implemented. [16] Calgary estimated that the use of a one-time present value payment for disallowed actual capital would equate to an additional refund to customers of $9.4 million.

29 Calgary's comparison of the refund to customers using the method from Proceeding 3378 and the ATCO Transmission Utilities' proposed method is provided in Table 4, below: [17]

Table 4. Customer refunds from directed adjustments

Proceeding	Refund using ATCO Transmission Utilities' method as filed	Refund using Proceeding 3378 method	Difference
		($000)	
24817 — AP	(3,460)	(7,217)	(3,757)
24805 — AET	(5,279)	(14,106)	(8,826)

Total refund	**(8,739)**	**(21,323)**	**(12,583)**

UCA

30 With respect to the adjustments to placeholders, the UCA agreed with Calgary that the ATCO Transmission Utilities should adjust IT rates using price multiplied by quantity and not dollar value adjustments to placeholders when computing its compliance amounts, consistent with the Commission's findings in the IT Common Matters decision. [18]

ATCO Transmission Utilities

31 The ATCO Transmission Utilities stated that placeholder volumes and dollars have not been altered or adjusted, as previously ruled by the Commission and that the placeholder IT forecast rates and volumes, used to determine the placeholder true-up from the IT Common Matters decision, have not changed. AET provided a detailed IT forecast volume by Service ID for 2018 and 2019 in its 2018-2019 GTA.

32 The ATCO Transmission Utilities argued that it would be inappropriate to make any adjustments to the approved Service IDs and volumes or to seek to eliminate these approved Service IDs and volumes in a true-up application. [19] Where a Service ID identified in the approved placeholder schedules is not traced to the price schedules or where the Service ID is not volume based, the ATCO Transmission Utilities indicated that they had applied the 13 per cent first-year reduction and the 4.61 per cent glide path to the placeholder rate or dollar value consistent with the directions from the IT Common Matters decision. [20]

33 In response to an IR, the ATCO Transmission Utilities explained that they utilized the total IT placeholder spend for O&M, indirect capital and capital in service, and applied the first-year pricing reduction and glide path difference between the glide path that was embedded in the MSA and the approved glide path percentage. Given the directions in the IT Common Matters decision, a line-by-line model was not utilized or necessary in determining the true-up amounts, as the direction from the Commission requires an across the board first-year pricing adjustment and an approved average glide path for years two to 10. [21] ATCO Transmission Utilities submitted that a line-by-line review, as conducted in Proceeding 3378 was not required or warranted and has proven to cause significant regulatory burden.

Commission findings

34 In the IT Common Matters decision, the Commission approved an adjustment to IT rates on a weighted-average tower basis. The Commission is of the view that the placeholder adjustment, when compared with the detailed line-by-line adjustment results in the same refund amounts. The more detailed line-by-line Service ID approach offers greater transparency into how the ATCO Transmission Utilities applied the first-year pricing reduction of 13 per cent and the 4.61 per cent glide path to years two to 10 of the MSA prices. The Commission notes that, in the circumstances, the variance between the two methods was not material. However, the Commission is mindful of its comments in the IT Common Matters decision, regarding placeholders and the finalization of IT rates and revenue requirement, which are reproduced below:

> The approved IT rates will be multiplied by utility-specific IT volumes to determine costs that will be approved for inclusion in revenue requirement in a future rate proceeding. The IT costs for each of the ATCO Utilities will then be finalized and included in revenue requirement and rates. [22]

35 The Commission is of the view that to properly assess adjustments to IT placeholders the ATCO Transmission Utilities must show their adjustments to MSA rates based on the IT rates being multiplied by volumes and the resulting adjustments to IT placeholders. The Commission considers that the proposed adjustment to IT rates by applying the 13 per cent first-year reduction and the 4.61 per cent glide path thereafter to the placeholder rate or dollar value is reasonable for Service IDs not traced to the price schedules or where the Service ID is not volume based.

36 In the IT Common Matters decision, the Commission did not approve the use, or direct the application, of the true-up methodology from Proceeding 3378 in other proceedings and the Commission sees insufficient reason or merit for doing so here. The Commission approved a specific approach to lowering the first-year rate followed by applying a 4.61 per cent glide path annually to simplify the reductions to IT costs and reduce the regulatory burden associated with those IT costs. In view of the evidence on alternative approaches provided by the ATCO Transmission Utilities, the Commission is satisfied that the ATCO Transmission Utilities' proposed IT adjustments are consistent with the Commission's directions in the IT Common Matters decision, and are supported by the analysis and summary information provided in Table 1.

37 With respect to Calgary's submissions on NPV, a determination on whether the ATCO Transmission Utilities should adopt the NPV approach to account for the payment of adjusted PP&E balances going forward is provided in Section 5.1.8 of this decision.

5.1.2 Custom unit rates

Calgary

38 Calgary argued that the ATCO Transmission Utilities compliance approach for custom unit rates is inappropriate for the following reasons:

> • ATCO Transmission Utilities denies the propriety of using a P ? Q [price times quantity] approach for Custom Unit Rate adjustments.
>
> • ATCO Transmission Utilities applies the Commission's 13% first year reduction to Placeholder dollars and/or Placeholder prices/rates rather than the specific prices/rate provided in the MSA.
>
> • ATCO Transmission Utilities uses hard coded IT prices/rates and/or dollar amounts.
>
> • ATCO's Transmission Utilities compliance filing contains numerous errors in Service ID numbers and Service Descriptions, which confounds the compliance process.
>
> • ATCO Transmission Utilities has included, in its 2015 Placeholders, Custom Unit Rates services which were not contained in the MSA. [23]

39 Calgary asserted that since the IT common matters proceeding did not test IT prices/rates or dollar amounts that are contained in the placeholders, the Commission should require the ATCO Transmission Utilities to compute the 2015 adjustments for custom unit rates by applying the Commission's required reduction of 13 per cent to MSA rates rather than placeholder rates.

40 Calgary argued that all approved volumes from the MSA are in units, with the exception of pass-through, usage-based and serviced-based items [24] and it provided more detail in its confidential evidence on this issue. [25]

41 Calgary added that the ATCO Transmission Utilities' unsupported claim that price times quantity (i) does not apply to custom unit rates; and (ii) is contrary to the facts of their own compliance filings with respect to the Commission's findings in Decision 3378-D01-2016, relates to the Evergreen II compliance filings. In that compliance proceeding, the reductions to IT prices/rates for many Custom Unit Rate Services used a price times quantity approach. [26] As a result, Calgary argued that the 2015 custom unit rate provided in the price schedules should be reduced by 13 per cent. For each of the years subsequent to 2015, the foregoing adjusted 2015 rate should be adjusted by the glide path reduction required by the IT Common Matters decision.

ATCO Transmission Utilities

42 The ATCO Transmission Utilities argued that the custom rate table from the MSAs shows there are no billing metrics, demonstrating that custom rates do not follow the common rates approach where the rate is set in the first year and a glide path/inflation is applied to subsequent years. The ATCO Transmission Utilities argued that custom rates are similar to "service-based"

or "usage-based" services, and Calgary has not taken issue with this position. In AP/AET-CAL-2019DEC03-003 CONF, the ATCO Transmission Utilities explained the treatment of custom unit rates, charges and changes to services. They also explained the true-up of services reflecting custom unit rates. [27]

43 The ATCO Transmission Utilities stated that they applied the IT common matters directions to the placeholder dollar amounts for custom rates, consistent with past decisions related to truing-up placeholder costs.

Commission findings

44 In the IT Common Matters decision, the Commission directed the ATCO Transmission Utilities to apply (i) a reduction of 13 per cent in MSA pricing in year one (which automatically flows through to all subsequent years); and (ii) a glide path reduction in MSA pricing of 4.61 per cent (on a weighted average across towers) in each of years two through 10. The decision did not provide any specific direction with regard to custom unit rates or new services. The Commission has determined that, in compliance with the Commission's directions, the ATCO Transmission Utilities have multiplied the approved placeholder dollar amounts by the first-year pricing reduction and applied the difference in the annual glide path between the MSA and the approved IT common matters' glide path. This approach is consistent with the adjustments to IT rates required as a result of the Commission's directions in the IT Common Matters decision.

45 The Commission denies Calgary's request to reduce by 13 per cent the 2015 custom unit rate provided in the price schedules. Instead, the Commission accepts the ATCO Transmission Utilities' explanation that custom unit rates are more like a fixed charge than a service-based charge using IT volumes. The Commission notes, moreover, that the ATCO Transmission Utilities have reduced the placeholder dollar amounts by both the first-year pricing reduction and the difference in the annual glide path. No further reduction is required for the ATCO Transmission Utilities to comply with the directions in the IT Common Matters decision.

46 The Commission finds that the ATCO Transmission Utilities' proposed IT adjustments to custom unit rates demonstrate a reasonable approach to ensure these utilities have complied with the directions in the IT Common Matters decision. The Commission accepts the ATCO Transmission Utilities' method to adjust custom unit rates, as filed.

5.1.3 New services

Calgary

47 Calgary noted that although there was no guidance in the IT Common Matters decision for new services, there is a need for IT price/rate adjustments to apply to all IT rates including new service rates. Calgary indicated that while the ATCO Transmission Utilities have reduced the IT price/rate by 13 per cent in the year each new service was introduced, these new services were not tested for fair market value (FMV).

48 In addition, Calgary stated that the ATCO Transmission Utilities have implemented the glide path for years after new services were introduced. For new services introduced in years after 2015, Calgary proposed a "reverse engineering" process to reflect the Commission's two adjustments to new services, which would apply (i) the initial year reduction of 13 per cent to new services; and (ii) the required glide path for that new service. Calgary provided the following steps, for its proposed adjustment to new services:

> Determine a 2015 price:
>
> > 1) Establish the Wipro price of the New Service (from a year after the initial 10 year in the MSA that ATCO has used in its Placeholder).
> >
> > 2) For that service, ascertain the glide path inherent in the MSA, the Inflation Factor for each year for that service, together with the Commission required adjustments for each of 2015 initial year and the glide path.
> >
> > 3) For 2017 remove the Inflation Factor to get back to the uninflated price in 2017.

4) Using that 2017 uninflated price, remove the glide path factor inherent in the MSA to get back to the inflated price that would have been in place in 2016.

5) For 2016, remove the 2016 Inflation Factor to get back to the uninflated price in 2016.

6) For 2016, remove the glide path factor inherent in the MSA to get back to the price that would have been in place in 2015.

7) The above noted steps would place the [sic] of the New Service to a price that would have been in place had the service been included in the 2015 Price Schedule. Apply Commission Ordered Adjustments.

8) Adjust that newly found 2015 price by the Commission's 2015 adjustment factor of 13%.

9) Then proceed with the application of the allowed glide path factors and inflation factors for each year until the year of the introduction of the New Service is reached.

10) Subtract the resulting price in Step 9 from the price of the New Service introduced by ATCO to determine the price adjustment for the introduction year of the New Service. [28]

49 In the absence of the above adjustments, Calgary submitted that prices for new services would not lead to just and reasonable rates.

UCA

50 The UCA stated that prices for any new services had not been tested in Proceeding 20514. Further, the UCA indicated that there was no evidence that the prices for such new services would not be affected by the sale of ATCO I-Tek Inc. (ATCO I-Tek) to Wipro Solutions Canada Limited (Wipro) as found in the IT Common Matters decision. The UCA submitted that where the ATCO Transmission Utilities have introduced new services, new Service IDs and new custom unit prices, any amounts should be treated as a zero-dollar entry for the placeholder. [29]

ATCO Transmission Utilities

51 The ATCO Transmission Utilities stated they ensured that all new services were priced at FMV. While the IT Common Matters decision was silent on new services, the ATCO Transmission Utilities applied the same 13 per cent reduction to the actual pricing of new services (since the MSAs commenced in 2015) when the service was introduced to be consistent with the Commission's directions. Further, they applied the glide path of 4.61 per cent for years thereafter. [30] If the Commission considers that future new services should be tested further on a go-forward basis, the ATCO Transmission Utilities submitted that any of the new services should be tested in the respective GTA/GRA of the utility that is using those services.

52 The ATCO Transmission Utilities stated that Calgary's additional recommended adjustment of using a "reverse engineering" process to determine what prices would have been in 2015 and to then apply a glide path to that hypothetical 2015 rate is entirely inappropriate. New services were never part of the directions contained in the IT Common Matters decision, as they were not subject to the tender process that the Commission determined affected first-year pricing. [31]

Commission findings

53 In the IT Common Matters decision, the Commission provided no specific direction with respect to new services. The Commission accepts that new services may be required over the term of the MSA and similar to custom unit rates, the ATCO Transmission Utilities' approach of applying a 13 per cent adjustment in year one and then a glide path adjustment for years two to 10 from the date service begins is reasonable to account for new services. Calgary's methodology to calculate the price of new services based on a hypothetical start date of 2015 followed by the application of the first-year reduction and glide path

from that point onward is inconsistent with the start date for a new service and when new IT services are required by the utility. The Commission considers that the ATCO Transmission Utilities' method for adjusting IT rates for new services complies with the Commission's general direction in Direction 1 of the IT Common Matters decision. On this basis, the Commission rejects Calgary's proposed adjustment to IT rates for new services.

54 In addition, the Commission considers that although new services have not been tested for FMV, the IT price adjustments from the IT Common Matters decision are a reasonable proxy for IT services and rates, absent an FMV being determined for every new service. Continual assessment of the FMV of new services is both inefficient and unnecessary, especially given that a reasonable and effective process already exists to reduce over the term of the MSA the prices of IT services that were the subject of the IT Common Matters decision. For these reasons, the Commission will not adopt the recommendations of Calgary and the UCA. The Commission considers that the ATCO Transmission Utilities should apply the first-year reduction of 13 per cent and the approved glide path from the start date for any new service.

55 Based on these findings, the Commission approves the ATCO Transmission Utilities' approach to calculating the IT rates for new services and the resulting prices.

5.1.4 True-up for capital amounts for 2018 and 2019 Calgary

56 Calgary submitted that the ATCO Transmission Utilities have not included adjustments to property, plant and equipment (PP&E) to account for actual amounts for direct capital and other capital and the impacts of those adjustments with respect to 2018 and 2019. Based on the current dates of the compliance filings, adjustments to actual amounts and their impacts for years after 2017 should be provided. Calgary recommended that the ATCO Transmission Utilities update their actual filings for both 2018 and 2019 so that the adjustments which are currently known can be addressed in the current proceedings. [32]

UCA

57 The UCA agreed with Calgary that actual adjusted amounts for 2018 and 2019 should be included in the current compliance proceedings. [33]

ATCO Transmission Utilities

58 The ATCO Transmission Utilities indicated they have trued up actual IT capital spend up to 2017, as the 2017 closing rate base was the latest year incorporated into the revenue requirement calculations.

59 The ATCO Transmission Utilities submitted that 2018 and 2019 actual PP&E will be trued-up in the next GRA for AP and the next GTA for AET. For 2018 and beyond, actual rate base will reflect IT capital allowed for ratemaking purposes. Including 2018 and 2019 in these compliance filings would be inconsistent with how revenue requirement has been calculated for the years being trued up.

Commission findings

60 The Commission accepts the ATCO Transmission Utilities' explanation that for both AP and AET, the true-up of non-IT rate base items in the original AP and AET GRA/GTA proceedings included actual amounts up to 2017.

61 For AET, capital true-up of 2018 and 2019 should be addressed in AET's next GTA. Otherwise, there would be an inconsistency in calculating closing rate base for IT capital-related costs and non-IT capital-related costs. Calgary's request for further information is denied. However, the Commission directs AET to clearly show any rate base related impacts from the IT Common Matters decision when truing up its 2018 and 2019 actuals in its next GTA filing.

5.1.5 Opening rate base and accumulated depreciation

Calgary

62 Calgary noted that the ATCO Transmission Utilities' calculations in Schedule 3 (Impact of Direct IT) and Schedule 4 (Impact of Other Capital) do not properly or fully track accumulated depreciation, such that revenue requirement impacts and refunds are understated for both direct and indirect capital. Calgary submitted that the formulas included on line 4 of each schedule are incorrect in a number of cases, because the formula is missing the depreciation effects of prior years.

63 Calgary noted that in Proceeding 3378 for the Evergreen II compliance filing, a separate schedule was filed for each test year, which allowed full visibility and confirmation of annual and accumulating depreciation charges for each year that IT capital was included in rate base. Applying the method from Proceeding 3378 to the compliance filing test period, Calgary calculated the potential loss of customer refunds, due to the ATCO Transmission Utilities' proposed calculation on accumulated depreciation, to be over $650,000. [34]

64 Calgary submitted that the UCA's recommendation in this proceeding supports Calgary's request for the ATCO Transmission Utilities to file separate schedules for each year, consistent with Proceeding 3378, so that accumulated depreciation and opening rate base can be properly tracked in compliance with the IT Common Matters decision.

UCA

65 In its argument, the UCA noted, by way of example, that AP had included an "opening rate base" balance of zero for 2019 in both Schedule 3 and Schedule 4. It argued that this approach was incorrect and non-compliant with the Commission's direction in the IT Common Matters decision, and recommended that the ATCO Transmission Utilities be required to "reduce the actual volumes from the placeholder prices to the approved prices and carry that figure forward into the opening balance of rate base for the new test period." [35]

66 The UCA made a similar recommendation in its argument concerning AET's compliance with the IT Common Matters decision, in respect of AET's opening balances for 2018 in Proceeding 24805. [36]

ATCO Transmission Utilities

67 The ATCO Transmission Utilities argued that they calculated accumulated depreciation using the methodology that was put forth and accepted in Proceeding 3378. [37] The ATCO Transmission Utilities stated that Calgary's assumption that both accumulated depreciation and previous opening rate base are continued into the future test periods/rate applications when calculating the impact on the forecast test periods is incorrect and results in a double counting, first in the original forecast opening rate base and, subsequently, in the updated adjustment of the actual opening rate base put forward in the next test period.

68 The ATCO Transmission Utilities stated that schedules 3 and 4 calculate the revenue requirement true-up on the forecast IT capital in the applicable test period and that after a test period is completed, the forecast accumulated depreciation is not continued to future test periods, which would be the case if Calgary's incorrect assertions were used. The ATCO Transmission Utilities indicated that after each forecast test period is complete, the forecast opening rate base is zeroed out, including the accumulated depreciation, and the previous opening rate base would be replaced with actual going-in rate base for the new test period, as is calculated in Schedule 5 (Revenue Requirement Calculation by Year — Direct Capital) and Schedule 6 (Revenue Requirement Calculation by Year — Indirect Capital). [38] As a result, the ATCO Transmission Utilities submitted that no changes are required to the refund schedules.

Commission findings

69 The Commission finds that the ATCO Transmission Utilities have calculated the rate base adjustments, and depreciation amounts to be refunded or collected, in a manner consistent with Decision 3378-D01-2016.

70 Unlike Decision 3378-D01-2016, which calculated placeholder and actual adjustments to prior GRA or GTA revenue requirement periods, the IT Common Matters decision affects prior periods (2015-2018 for AP, and 2015-2017 for AET), current periods (2019-2020 for AP, and 2018-2019 for AET), and future GRA and GTA test periods.

71 In Decision 23793-D01-2019, the Commission provided the following direction regarding IT disallowances on an annual basis for capital, indirect capital and O&M:

> 336. As set out by the Commission in Decision 20514-D02-2019 and reproduced below, ATCO Pipelines is directed to incorporate the adjustments to the IT disallowances on an annual basis by capital, indirect capital and O&M, resulting from the MSA in a compliance filing to this decision:
>
> > Similar to the IT and CC&B (customer care and billing) disallowance determined in the Evergreen II decision and related compliance filings, ATCO Pipelines and ATCO Electric Transmission will apply a first-year disallowance for 2015 and a glide path reduction as set out in Section 6. ATCO Pipelines and ATCO Electric Transmission are directed to file their compliance applications to this decision in the compliance filings to their ongoing GRA/GTAs, clearly showing the directed IT disallowance on an annual basis by capital, indirect capital and O&M. [footnote removed]

72 And in Decision 22742-D01-2019, the Commission gave the following directions:

> 223. Further, on June 5, 2019, the Commission issued Decision 20514-D02-2019 regarding the ATCO Utilities IT common matters proceeding. AET is directed to reflect any changes arising from the directions in that decision in its compliance filing to this decision. AET is further directed to provide schedules detailing how the determinations from Decision 20514-D02-2019 are reflected in its compliance filing.
>
> . . .
>
> 595. Further, on June 5, 2019, the Commission issued Decision 20514-D02-2019 in the ATCO Utilities IT common matters proceeding. With respect to USA [Uniform System of Accounts] 934, AET is directed to reflect any changes arising from the directions in that decision in its compliance filing to this decision. AET is further directed to provide schedules detailing how the determinations in Decision 20514-D02-2019 are reflected in the compliance filing to this decision.

73 In Proceeding 24805, the Commission asked where prior period adjustments to the 2018 opening balances and current GTA test periods were reflected, and why AET had separately calculated and included a 2018 and 2019 revenue requirement adjustment for the effects of the IT Common Matters decision, when the adjustments for those years could be incorporated into the GTA minimum filing requirement (MFR) compliance schedules. [39]

74 AET provided the following response to these IRs: [40]

> (b-d) AET has calculated the impact related to the IT Common Matters separately for simplicity and ease of review, as the IT Common Matters Decision impacts and trues-up [*sic*] multiple placeholder years, spanning multiple proceedings. The true-up includes the forecast years 2015 to 2019 and 2015 to 2017 actual rate base. It was determined at the time of the IT Common Matters Decision that the separate calculation would make it most efficient to show the total impact of the IT Common Matters Decision, without the added complexities that are associated to trueing up [*sic*] balances for multiple years which span multiple proceedings. For example, absent a separate calculation, AET would have shown parts of the adjustments through a separate calculation, specifically for the forecast years 2015 to 2017 and 2015 to 2016 actual rate base. Then, it would have incorporated these adjustments and the adjustments for the forecast years 2018 to 2019 into the GTA schedules as referenced in Exhibit 24805-X0005.01. This lack of continuity and flipping from separate calculations to the GTA schedules was determined to be overly complex and difficult to follow.
>
> The separate calculations have also proven beneficial throughout the proceeding, as AET has received hundreds of information requests on the IT Common Matters true-up specifically. These IRs have included the request to recalculate

the refund and revise calculations using a service ID-by-service ID approach (AP-AET-AUC2019NOV07-001) and various alternative calculations that have been requested (AP-AET-CAL-2019DEC03-002), to name a few. The separate calculations made it easier to run the various scenarios and requests, as well as display the overall refund under these scenarios. Absent the separate calculation, multiple workbooks and GTA schedules would have been required to be uploaded to the eFiling system.

75 The Commission agrees with the ATCO Transmission Utilities that the true-up of the IT Common Matters decision includes adjustments to prior period forecasts and to actual rate base adjustments, which will require the refund or collection amounts to be settled outside of the current compliance filing test period revenue requirements. The Commission finds that the opening 2018 rate base balance and the revised 2018, 2019 and 2020 capital expenditures and capital additions should be directly adjusted in the MFR schedules, consistent with the schedule previously filed for AP in the 2019-2020 GRA in Proceeding 23793 and for AET in the 2018-2019 GTA for Proceeding 22742. The IT service volumes for AP's 2019-2020 GRA and AET's 2018-2019 GTA (subject to any adjusted FTE amounts) were approved in decisions 23793-D01-2019 and 22742-D01-2019, respectively, and were to be adjusted by the revised IT services pricing approved in the IT Common Matters decision. Thus, the forecast amounts included in the MFR schedules were to be adjusted in the compliance filing and the forecasts were not adjusted by AET or AP.

76 Accordingly, the ATCO Transmission Utilities have not complied with directions provided in Decision 23793-D01-2019 and Decision 22742-D01-2019 to reflect changes relating to the IT Common Matters decision. To ensure that the proper adjustments are made in accordance with previous compliance filing directions for AP and AET, and for consistency amongst the ATCO Transmission Utilities, the Commission directs the ATCO Transmission Utilities to provide the following in their second compliance filing MFR schedules:

- the adjusted opening 2018 rate base balance;
- the opening 2018 undepreciated capital expenditures balance;
- the 2018 opening future income tax reserve balance for the adjustments related to the IT common matters 2015 to 2017 actual rate base adjustment;
- the adjusted 2018, 2019 and 2020 forecasted capital expenditures and rate base;
- the 2018, 2019 and 2020 undepreciated capital expenditure balance adjustments;
- the 2018, 2019 and 2020 tax adjustments for the purposes of calculating current tax and future tax; and
- the 2018 and 2019 future income tax reserve adjustments related to the IT Common Matters decision in each of the ATCO Transmission Utilities individual second compliance filings.

5.1.6 Tax deductions

Calgary

77 Calgary argued that the ATCO Transmission Utilities are claiming the reversal of two tax deductions: (i) for capital cost allowance on the amount of reversed capital additions; and (ii) for the total amount of reversed capital under the heading "running costs." In Calgary's view, the ATCO Transmission Utilities have not explained why there are two reversals of tax deductions pertaining to the same capital amount, nor have the ATCO Transmission Utilities referenced any tax law that allows two deductions for the same capital amount. Calgary submitted that the ATCO Transmission Utilities should be required to remove the double counting for the reversal of tax deductions that currently exists in their calculations of revenue requirement impacts.

78 In its evidence, Calgary stated that the ATCO Transmission Utilities have altered the methodology for other capital rate adjustments in Schedule 4 to include the tax impact of "running costs" from schedules 5 and 6, and that they have included

the revenue requirement impact for the initial forecast year for the actual opening PP&E adjustment for direct capital and other capital, for each of 2015, 2016 and 2017.

79 Calgary provided adjusted calculations in the attachments to its evidence to supports its position. However, in response to Calgary-AUC-2020FEB03-004, Calgary stated it was unaware that a full capital amount, capitalized as an overhead, is deductible for income taxes purposes. Calgary noted that the ATCO Transmission Utilities were taking capital cost allowance, for income tax purposes, as a separate line item.

80 Calgary also noted that each of the utilities appeared to be using inconsistent income tax rates, both between years and between AP and AET: [41]

Table 5. Income tax rates used by ATCO Transmission Utilities in their current compliance filings

	AP						AET				
	2015	**2016**	**2017**	**2018**	**2019**	**2020**	**2015**	**2016**	**2017**	**2018**	**2019**
Federal	15%	15%	15%	15%	15%	15%	15%	15%	15%	15%	15%
Provincial	11.1%	12.0%	12.0%	12.0%	12.0%	12.0%	11.01%	12.0%	12.0%	12.0%	11.5%

81 Noting that AET and AP are using different provincial income tax rates for each of 2015 and 2019, Calgary recommended that they be directed to use consistent and correct statutory income tax rates.

ATCO Transmission Utilities

82 The ATCO Transmission Utilities argued that the tax treatments used are the same as those found in each of the respective GTAs and GRAs and that there is no overlap or double counting as the schedules clearly show each component for tax purposes. The ATCO Transmission Utilities further submitted that Calgary has not properly accounted for all of the years that comprise the test periods covered by the applications. Instead, Calgary has simply removed the first year, with no explanation as to why, apparently in order to create a higher customer refund, which is against the well-established revenue requirement methodology that has been used for decades in the utility industry.

83 The ATCO Transmission Utilities submitted that the tax rates used in the compliance filings of AP and AET mirror the tax rates approved in the various proceedings covering the specific test years. The ATCO Transmission Utilities indicated that their approach is correct as the IT common matters schedules calculate the refund related to those specific test periods. The ATCO Transmission Utilities stated that changing the income tax rates to rates that were not approved in the original proceeding, and where the placeholders were established, would create a difference between the test period calculations and the IT common matters refund and that such a change to the income tax rates is inappropriate. [42]

84 As a result, the ATCO Transmission Utilities submitted that there are no changes required to the refund schedules filed on the record due to tax deductions. [43]

Commission findings

85 The Commission has reviewed the provincial income tax rates used and the adjustments made to calculate net income for tax purposes, for direct capital and indirect capital, and agrees with the ATCO Transmission Utilities that they are consistent with the provincial tax rates and the method used to calculate taxable income as approved in Decision 23793-D01-2019 for AP and in Decision 22742-D01-2019 for AET. The Commission denies Calgary's request to apply different statutory income tax rates because no adjustment to the tax rates and the net income is required for the ATCO Transmission Utilities to comply with the Commission's directions.

86 The Commission notes that AET has a tax deferral account should a tax rate change in the future and, therefore, further comment on AET's application is required.

87 As stated in a Commission IR response, quoted below, AET did not include the refund of previously collected future income tax in its calculated refund amounts to customers:

> AET has not included the revenue requirement effects of future income tax (FIT). FIT is collected based on forecast tax inputs (e.g. CCA [capital cost allowance] and depreciation) at the time of the rate application, which are not subsequently trued-up. Therefore, AET did not consider it necessary to adjust FIT as a result of the IT Common Matters directions. [44]

88 AET calculated future income tax (FIT) expenses as part of its 2015, 2016 and 2017 revenue requirement amounts. As explained by AET, FIT is calculated based on forecast tax inputs [45] (e.g., capital cost allowance, depreciation and "running costs"). These inputs include IT costs, which have been adjusted in response to the IT Common Matters decision. As a result, the amount of future income tax that was collected for 2015, 2016 and 2017 should also be adjusted for the change in the tax inputs. AET estimated that a total of $0.5 million of FIT was overcollected for the years 2015 to 2017 as a result of tax inputs being adjusted to comply with the IT Common Matters decision. [46] AET is directed to refund the FIT amounts for the years 2015, 2016 and 2017 that it should not have collected from customers as a result of its adjusted IT costs. Consistent with the direction in paragraph 76 above, AET is also directed to reflect the effects of the 2018 and 2019 test period adjustments in its corresponding MFR schedules.

5.1.7 Carrying costs

89 Calgary argued that the unique circumstances of Proceeding 20514 for IT common matters warrants the use of weighted average cost of capital (WACC) for determining carrying charges, [47] consistent with the Commission's findings from Decision 3378-D01-2016. In that decision, the Commission directed the use of WACC for carrying costs:

> 162. In the present case, final approved pricing was applied to both O&M and capital projects and the resulting adjustments by the ATCO Utilities were all in the form of refunds to customers. Consequently, the use of WACC to determine carrying costs would not be unreasonable in the circumstances. Calgary's argument that the ATCO Utilities had earned a return on projects incorporating MSA pricing prior to their approval or adjustment in Decision 2014-169 (Errata) is also of some merit.
>
> 163. The Commission is satisfied that in these specific circumstances, the ATCO Utilities' use of WACC to calculate the carrying charges is acceptable. Accordingly, the ATCO Utilities are directed to calculate these amounts using WACC. [48]

UCA

90 The UCA agreed with Calgary that the use of WACC for carrying costs was warranted. [49]

ATCO Transmission Utilities

91 Absent some special circumstances, the ATCO Transmission Utilities argued the AUC has traditionally applied Rule 023 [50] to both refunds to and collections from customers. The ATCO Transmission Utilities noted that Rule 023 has been used in previous decisions, such as the past IT benchmark proceeding, [51] Decision 2012-237 [52] for Y factor true-up under PBR, and decisions related to the true-up of capital trackers, [53] and Decision 2010-496 regarding the removal of carbon-related assets from utility service. [54] These examples clearly indicate that Rule 023 is appropriate in the true-up of IT common matters costs. [55]

Commission findings

92 The Commission has discretion to apply Rule 023 or WACC in the individual circumstances that are applicable to a GRA or GTA. In Decision 3378-D01-2016, [56] the Commission found:

162 In the present case, final approved pricing was applied to both O&M and capital projects and the resulting adjustments by the ATCO Utilities were all in the form of refunds to customers. Consequently, the use of WACC to determine carrying costs would not be unreasonable in the circumstances. Calgary's argument that the ATCO Utilities had earned a return on projects incorporating MSA pricing prior to their approval or adjustment in Decision 2014-169 (Errata) is also of some merit.

163. The Commission is satisfied that in these specific circumstances, the ATCO Utilities' use of WACC to calculate the carrying charges is acceptable. Accordingly, the ATCO Utilities are directed to calculate these amounts using WACC.

93 The Commission is of the view that the ATCO Transmission Utilities have failed to provide persuasive reasons why Rule 023 should apply given the express wording of the rule and the circumstances of the refund directed in the IT Common Matters decision. Other AUC decisions that apply Rule 023 for performance-based regulation and the carbon refund [57] are not determinative of the refund applied to both O&M and capital projects for IT carrying costs. Consistent with the method used in Decision 3378-D01-2016, which is the most recent IT common matters decision that applied interest for carrying costs, the Commission finds that WACC should be used when calculating interest on IT refund balances.

94 The Commission directs the ATCO Transmission Utilities to recalculate the balances using its WACC as the interest rate applied to its carrying costs, and to file the resulting refund and regulatory schedules for AET and AP in the compliance filing to this decision.

5.1.8 Net present value

Calgary

95 Calgary recommended the use of net present value (NPV) to account for the payment of adjusted PP&E balances going forward because it offers a simple, transparent and easy-to-understand approach to ensure the adjustments required from the IT Common Matters decision are fully captured. Calgary estimated that the use of a one-time present value payment for disallowed actual capital equates to an additional refund to customers of $9.4 million. [58]

ATCO Transmission Utilities

96 The ATCO Transmission Utilities considered that it should be up to the utility to determine and justify the appropriateness of using a one-time NPV methodology in specific circumstances, as opposed to adopting this approach as a normal course of action.

97 In Proceeding 3378, the ATCO Utilities (AP, AET and the ATCO Distribution Utilities) outlined the benefits of the one-time payment for IT costs in that proceeding. The circumstances in the current proceeding are dissimilar to Proceeding 3378. Particularly, the I-Tek MSA, contemplated in Proceeding 3378, was at the end of its term and did not affect future proceedings and costs, unlike the situation with the current proceeding.

98 The use of the NPV methodology in Proceeding 3378 was the result of a prudency review, which was not intended to continue beyond Decision 3378-D01-2016. In contrast, the Wipro MSAs are in the middle of their contract term, creating different accounting treatments of the costs prior to and after the issuance of the decision. For example, after July 2019, only the portion allowed to be included in rate base will be capitalized for accounting purposes.

99 The ATCO Transmission Utilities submitted that although the short term administrative burden to remove the past costs is higher, given the impact to future years and different accounting treatment required, the use of the NPV methodology would not alleviate the overall administrative burden as was the case in Proceeding 3378.

100 The ATCO Transmission Utilities argued that their approach fully and appropriately captures the impact of disallowed capital. These utilities explained that they have not requested nor are they requesting to utilize the NPV methodology in this

compliance filing. [59] The directions contained in the IT Common Matters decision span future years (to cover the entire 10-year MSA) and, as such, the circumstances are not the same as in Proceeding 3378. Therefore, the ATCO Transmission Utilities are not proposing an NPV of future PP&E reductions because they have removed from rate base the portion of the reductions disallowed for ratemaking purposes related to the directions in the IT Common Matters decision. In future rate applications, the ATCO Transmission Utilities confirmed that they will exclude from rate base the IT portion of costs that is affected by the IT Common Matters decision. [60]

Commission findings

101 In Decision 3378-D01-2016, the Commission approved the use of the NPV method to refund IT balances and explained that one of the reasons for approving this approach was that it was more efficient than directing the utility to make annual rate base adjustments. NPV calculations are often used to apply an adjustment instead of removing costs of assets from rate base. Although the NPV method was used in some prior decisions, [61] the Commission considers that whenever possible, costs should be removed from rate base consistent with the method traditionally applied to PP&E - capital project disallowances. Further, the Commission finds that Calgary failed to offer compelling reasoning for the continued use of the NPV methodology beyond referencing that it was used in Proceeding 3378.

102 The Commission agrees that the ATCO Transmission Utilities' approach fully captures the impact of disallowed capital, without any added concerns associated with the inputs required to be used in an NPV calculation. The Commission further agrees with the ATCO Transmission Utilities that the findings in the IT Common Matters decision reflected the entire 10-year period of the MSA and, therefore, is distinguishable from the findings of the prudency review for a more limited time span in Decision 3378-D01-2016. As cost-of-service regulated utilities, AP and AET are able to exclude IT costs from rate base as a result of the IT Common Matters decision.

103 On this basis, the Commission rejects Calgary's NPV proposal. The Commission directs the ATCO Transmission Utilities to remove all IT directed adjustments to direct and indirect capital from rate base in compliance with the IT Common Matters decision in the compliance filing to this decision and in future IT common matters, GRA, GTA or other relevant transmission proceedings and compliance proceedings.

104 The ATCO Distribution Utilities were subject to different directions for complying with the Commission's findings in the IT Common Matters decision, as follows:.

> ATCO Gas and ATCO Electric Distribution shall incorporate the Commission determined reduction of 13 per cent to the first year of the master services agreements, 2015, and apply a glide path that reduces prices on a weighted average basis across towers by 4.61 per cent for the purposes of recalculating their notional 2017 revenue requirement and base K-bar.
>
> . . .
>
> ATCO Gas and ATCO Electric Distribution are to file their compliance applications to this decision in their next annual performance-based regulation filings. [62]

105 The full directions to the distribution utilities are set out in the Commission's findings in Section 7 of the IT Common Matters decision.

106 A determination of how the ATCO Distribution Utilities apply their directed IT adjustments or disallowances from the IT Common Matters decision is a matter to be determined at the relevant PBR-related proceeding or proceedings. [63] In this decision, the Commission has not evaluated the NPV methodology as it would apply to either of the ATCO Distribution Utilities under the PBR framework. This decision is not determinative of whether the Commission would find acceptable any NPV methodology, or NPV-based adjustment, as might be proposed by the two distribution utilities in a PBR proceeding in order for them to comply with directions in the IT Common Matters decision. In other words, the Commission's directions in this decision

are not intended to bind or preclude in any way any future panel from making such findings as it considers just and reasonable, and warranted in the public interest, related to the application of directed IT adjustments or disallowances in the context of PBR.

5.1.9 Future rate proceedings Calgary

107 Calgary identified several principles that should guide the Commission and the ATCO Transmission Utilities in reflecting the adjustments from the IT Common Matters decision in future rate proceedings, which are reproduced below:

> • the ordered reductions to the Wipro MSA prices must be readily identifiable and fully transparent to the Commission and interested parties through appropriate filing requirements;
>
> • IT prices used by ATCO [Transmission Utilities] in test year forecasts and in PP&E reconciliations must be demonstrated, through appropriate filing requirements, to comply with the formulas set out in paragraphs 371 and 372 of Decision 20514-D02-2019 to show the application of the initial year (2015) reduction as well as the compounding glide path effect;
>
> • regulatory efficiency and burden should be pursued where possible in the adoption of the previous principles; and
>
> • the recommended changes to methodologies and accounting set out in the Calgary Evidence should be applied. [64]

108 Calgary explained that future rate filings of the ATCO Transmission Utilities must demonstrate full compliance with the adjustments ordered in the IT Common Matters decision. Calgary argued that the ATCO Transmission Utilities' proposed concepts of year-over-year comparisons and average cost reductions do not appear to lessen regulatory burden or promote efficiency.

109 Calgary recommended that to comply with the directions from the IT Common Matters decision:

> • each ATCO [Transmission] Utility should be required to file with its GRA/GTA application a workbook, similar to the attachments filed in these Compliance Proceedings, showing the adjusted MSA prices for each test year included in the application, which would be applied against the corresponding forecast volumes. The resultant forecasted IT costs in each application would then be reconciled to these prices. Given the filing of the adjusted MSA prices, the reconciliation would be relatively simple and efficient to conduct as they would be based on the current templates already used. [65]

110 Calgary also recommended that for direct and other capital, a calculation of the NPV of future rate adjustments could be performed against the forecast projects with the NPV period beginning after the last test year. Reconciliations to actual PP&E balances could be performed in the next GRA or GTA. [66]

UCA

111 The UCA agreed with Calgary that detailed information and workbooks should be filed in future applications to efficiently assess IT costs, in a transparent manner. [67]

ATCO Transmission Utilities

112 For future rate applications, the ATCO Transmission Utilities submitted that year-over-year comparisons and average cost per user forecasts should be utilized to avoid an overly burdensome regulatory process. To ensure transparency to the IT Common Matters decision, the ATCO Transmission Utilities proposed to show the total costs, for example, O&M at Wipro rates and the overall reduction on a total cost approach. [68] The ATCO Transmission Utilities argued that this approach is appropriate considering that within this proceeding and AET's current 2020-2022 GTA, [69] it has been demonstrated that this methodology renders the same result as the extensive line-by-line analysis. The ATCO Transmission Utilities submitted that if the Commission determines that it requires a detailed line-by-line analysis, there would be no need to show the costs using Wipro rates. Rather,

the rates per the IT Common Matters decision, as presented in the line-by-line workbooks, should be sufficient. For usage-based rates, the ATCO Transmission Utilities submitted that the same formula would be applied on a go-forward basis, as within this compliance filing. [70]

Commission findings

113 The Commission is of the view that the placeholder and line-by-line adjustments that were provided in this proceeding offer greater transparency into the ATCO Transmission Utilities' compliance with directions from the IT Common Matters decision than any of the other alternatives the Commission was asked to consider. Although the total cost approach delivers the same result as the line-by-line analysis, the Commission agrees with the principles articulated by Calgary regarding (i) the need for transparency; (ii) the need to ensure reductions to the MSA prices are readily identifiable; and (iii) the need to allow interested parties to review test year forecasts and PP&E reconciliations. As the ATCO Transmission Utilities have already provided both placeholder and detailed line-by-line adjustments in the current proceedings, the Commission considers that populating Excel worksheets with forecast and actual volumes, new services and approved IT rates in future proceedings, as recommended by Calgary, should not be overly burdensome. For future rate applications, the Commission directs the ATCO Transmission Utilities to provide the following information, to comply with directions from the IT Common Matters decision and this decision:

- Each of AP and AET is required to file with its GRA/GTA a workbook, in a manner similar to the attachments filed in Proceeding 24817, [71] showing the adjusted MSA prices for each test year, that would be applied against the corresponding forecast volumes. The resultant forecasted IT costs in each application must be reconciled to these prices.

- For direct and other capital, a calculation of the NPV of future rate adjustments must be performed against the forecast projects with the NPV period beginning after the last test year. Reconciliations to actual PP&E balances are to be included in the next GRA and GTA, or in a related compliance filing.

6 Order

114 It is hereby ordered that:

(1) ATCO Electric Ltd. is directed to file a second compliance filing in accordance with the findings and directions in this decision. The Commission will provide the filing deadline for the IT Common Matters second compliance filing in its decision addressing non-IT common matters, which will be issued on or before August 12, 2020.

Appendix 1 — Proceeding participants

Name of organization (abbreviation) Company name of counsel or representative

ATCO Electric Ltd. (AET)
Bennet Jones LLP
The City of Calgary (Calgary)
McLennan Ross Barristers & Solicitors
Office of the Utilities Consumer Advocate (UCA)
Brownlee LLP
Consumers' Coalition Advocate (CCA)
Bema Enterprises Ltd.
Alberta Utilities Commission
Commission panel
K. Sebalj, Panel Chair
B. Lyttle, Acting Commission Member
B. Romaniuk, Acting Commission Member
Commission staff
A. Sabo (Commission counsel)
C. Strasser

F. Alonso
J. Cameron
D. Cherniwchan

Appendix 2 — Detailed description of the regulatory process of the current proceeding

1. On August 26, 2019, Calgary filed a request that the Commission address a number of concerns and preliminary matters regarding the ATCO Transmission Utilities compliance with directions from the IT Common Matters decision. Calgary raised procedural matters for the Commission's consideration that affect both Proceeding 24817 for AP and Proceeding 24805 for AET (collectively, the compliance proceedings). Calgary requested the Commission to direct that certain documents be placed on the record of the compliance proceedings. The documents in question had earlier been filed in Proceeding 3378, a compliance filing for IT common matters costs. The decision for Proceeding 3378 was issued on March 4, 2016. [72]

2. In a letter dated September 17, 2019, the Commission ruled that it would not require the information filed in Proceeding 3378 to be placed on the records of the compliance proceedings. For the filings on IT common matters issues, the Commission agreed with Calgary's recommendation that common process schedule deadlines for these issues be established in the compliance proceedings.

3. On October 7, 2019, the Commission granted confidential treatment to certain information related to the compliance proceedings.

4. By letter dated October 25, 2019, AET asked the Commission to confirm that its approach to IT placeholder adjustments complies with directions from the IT Common Matters decision and that the information requested by interveners was outside the scope of the compliance filing for IT common matters. Both AP and AET submitted that the schedules within their respective applications and information request (IR) responses clearly show the calculations of the directed IT disallowances.

5. In response to AET's submission, Calgary filed letters, [73] [74] asserting that the request for an omnibus ruling from the Commission to be applied to the four proceedings [75] was inappropriate, unfair and contrary to the provisions of Rule 001: *Rules of Practice*. Calgary submitted that the substance of the directions, and the methodologies to test compliance, go to the core of the compliance matters. Further, Calgary submitted that the directions in the IT Common Matters decision are not the only directions related to placeholder adjustments, indicating that AP and AET are subject to additional directions in each of Decision 23793-D01-2019 and Decision 22742-D01-2019 that relate to implementing the disallowances ordered in the IT Common Matters decision. Calgary submitted that AET's request should be denied.

6. Calgary submitted that the ATCO Transmission Utilities possess all the data required to effect the necessary IT adjustments to each service line item, as demonstrated by the evidence filed in Proceeding 20514 and the calculations to support the permission to appeal application. Calgary argued that AP and AET should answer all of Calgary's IRs.

7. In a ruling dated November 7, 2019, the Commission, following a review of the directions from the IT Common Matters decision, found that AP and AET, in their respective compliance proceedings, have applied the directed first-year and subsequent glide path adjustments to the existing IT placeholders. However, the Commission indicated that the information provided by AP and AET failed to show how adjustments were made to IT rates and the glide path on a weighted tower basis. The Commission considered that information at this level was required for it to assess compliance with the directions from Decision 23793-D01-2019 and Decision 22742-D01-2019.

8. With respect to Calgary's request that AP and AET be directed to answer all of its IRs, the Commission found that the information requested by Calgary on a line-by-line basis or at the tower-by-tower level related to past proceedings, and was not required for the purposes of the compliance proceedings. However, the Commission issued supplemental IRs to address information gaps with respect to compliance with Commission directions on IT common matters. The Commission stated that

while the supplemental IRs were required to complete the record, they were not designed to retest information provided in past proceedings.

9. On December 6, 2019, the Commission issued a ruling on a motion filed by AET on December 4, 2019, regarding the scope of the proceedings and the relevance of certain Calgary IRs. The Commission also extended the deadline for filing responses to additional IRs from December 9, 2019, to December 12, 2019.

10. In a December 18, 2019, letter, Calgary requested that the Commission revise its process schedule to permit Calgary to file evidence on IT common matters issues.

11. On December 20, 2019, the Commission approved Calgary's request to file evidence. The Commission confirmed that it would not consider evidence that sought to relitigate issues previously determined in the IT Common Matters decision or that would, in any way, expand the scope of the compliance proceedings for AP and AET.

12. Calgary requested an extension for filing its evidence from the original date of January 10, 2020, to January 13, 2020, and the time extension was granted by the Commission.

13. By letter dated January 17, 2020, the Commission set the remainder of the process schedule for the IT common matters:

Process step	***Deadline date***
Argument (on all matters for Proceeding 24817 and on IT common matters only for Proceeding 24805)	March 16, 2020
Reply argument (on all matters for Proceeding 24817 and on IT common matters only for Proceeding 24805)	March 30, 2020

14. On March 5, 2020, Calgary filed a letter concerning the ATCO Transmission Utilities' updated workbooks filed in rebuttal evidence. Although the rebuttal evidence explained these adjustments, Calgary submitted that the revisions were not clearly identified in the workbooks as required by Section 22.3 of Rule 001. Calgary requested that the Commission order each of the ATCO Transmission Utilities to refile its rebuttal evidence attachments in compliance with Section 22.3 of Rule 001. Calgary further requested that the process schedule be revised.

15. On March 10, 2020, the Commission found that it was not necessary to direct AP and AET to refile the information using a blacklined format for the Excel worksheets, as set out in Section 22.3 of Rule 001. However, the ATCO Transmission Utilities were directed to update their respective compliance filing applications to make clear the amounts for which they were seeking approval and to update certain exhibits related to IT common matters. The Commission granted Calgary's request for an extension to the deadlines for filing argument and reply argument.

16. Due to the time extension request by the ATCO Transmission Utilities, the Commission also amended the deadline for reply argument.

Appendix 3 — Summary of Commission directions

This section is provided for the convenience of readers. In the event of any difference between the directions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

1.	For AET, capital true-up of 2018 and 2019 should be addressed in AET's next GTA. Otherwise, there would be an inconsistency in calculating closing rate base for IT capital-related costs and non-IT capital-related costs. Calgary's request for further information is denied. However, the Commission directs AET to clearly show any rate base related impacts from the IT Common Matters decision when truing up its 2018 and 2019 actuals in its next GTA filing.	paragraph 61
2.	Accordingly, the ATCO Transmission Utilities have not complied with directions provided in Decision 23793-D01-2019 and Decision 22742-D01-2019 to reflect changes relating to the IT Common Matters decision. To ensure that the proper adjustments are made in accordance with	

previous compliance filing directions for AP and AET, and for consistency amongst the ATCO Transmission Utilities, the Commission directs the ATCO Transmission Utilities to provide the following in their second compliance filing MFR schedules:
• the adjusted opening 2018 rate base balance;
• the opening 2018 undepreciated capital expenditures balance;
• the 2018 opening future income tax reserve balance for the adjustments related to the IT common matters 2015 to 2017 actual rate base adjustment;
• the adjusted 2018, 2019 and 2020 forecasted capital expenditures and rate base;
• the 2018, 2019 and 2020 undepreciated capital expenditure balance adjustments;
• the 2018, 2019 and 2020 tax adjustments for the purposes of calculating current tax and future tax; and
• the 2018 and 2019 future income tax reserve adjustments related to the IT Common Matters decision in each of the ATCO Transmission Utilities individual second compliance filings. ..... paragraph 76

3. AET calculated future income tax (FIT) expenses as part of its 2015, 2016 and 2017 revenue requirement amounts. As explained by AET, FIT is calculated based on forecast tax inputs (e.g., capital cost allowance, depreciation and "running costs"). These inputs include IT costs, which have been adjusted in response to the IT Common Matters decision. As a result, the amount of future income tax that was collected for 2015, 2016 and 2017 should also be adjusted for the change in the tax inputs. AET estimated that a total of $0.5 million of FIT was overcollected for the years 2015 to 2017 as a result of tax inputs being adjusted to comply with the IT Common Matters decision. AET is directed to refund the FIT amounts for the years 2015, 2016 and 2017 that it should not have collected from customers as a result of its adjusted IT costs. Consistent with the direction in paragraph 76 above, AET is also directed to reflect the effects of the 2018 and 2019 test period adjustments in its corresponding MFR schedules. ..... paragraph 88

4. The Commission directs the ATCO Transmission Utilities to recalculate the balances using its WACC as the interest rate applied to its carrying costs, and to file the resulting refund and regulatory schedules for AET and AP in the compliance filing to this decision. ..... paragraph 94

5. On this basis, the Commission rejects Calgary's NPV proposal. The Commission directs the ATCO Transmission Utilities to remove all IT directed adjustments to direct and indirect capital from rate base in compliance with the IT Common Matters decision in the compliance filing to this decision and in future IT common matters, GRA, GTA or other relevant transmission proceedings and compliance proceedings. ..... paragraph 103

6. The Commission is of the view that the placeholder and line-by-line adjustments that were provided in this proceeding offer greater transparency into the ATCO Transmission Utilities' compliance with directions from the IT Common Matters decision than any of the other alternatives the Commission was asked to consider. Although the total cost approach delivers the same result as the line-by-line analysis, the Commission agrees with the principles articulated by Calgary regarding (i) the need for transparency; (ii) the need to ensure reductions to the MSA prices are readily identifiable; and (iii) the need to allow interested parties to review test year forecasts and PP&E reconciliations. As the ATCO Transmission Utilities have already provided both placeholder and detailed line-by-line adjustments in the current proceedings, the Commission considers that populating Excel worksheets with forecast and actual volumes, new services and approved IT rates in future proceedings, as recommended by Calgary, should not be overly burdensome. For future rate applications, the Commission directs the ATCO Transmission Utilities to provide the following information, to comply with directions from the IT Common Matters decision and this decision:
• Each of AP and AET is required to file with its GRA/GTA a workbook, in a manner similar to the attachments filed in Proceeding 24817, showing the adjusted MSA prices for each test year, that would be applied against the corresponding forecast volumes. The resultant forecasted IT costs in each application must be reconciled to these prices.
• For direct and other capital, a calculation of the NPV of future rate adjustments must be performed against the forecast projects with the NPV period beginning after the last test year. Reconciliations to actual PP&E balances are to be included in the next GRA and GTA, or in a related compliance filing. ..... paragraph 113

7. It is hereby ordered that:
(1) ATCO Electric Ltd. is directed to file a second compliance filing in accordance with the findings and directions in this decision. The Commission will provide the filing deadline for the paragraph 114

IT Common Matters second compliance filing in its decision addressing non-IT common matters, which will be issued on or before August 12, 2020. .....

Footnotes

1 Decision 20514-D02-2019: *The ATCO Utilities, Re* [2019 CarswellAlta 1171 (Alta. U.C.)] Proceeding 20514, June 5, 2019.

2 Proceeding 24817, ATCO Pipelines, 2019-2020 GRA Compliance Filing, leading to Decision 24817-D01-2020: *ATCO Pipelines, Re* [2020 CarswellAlta 1270 (Alta. U.C.)], Proceeding 24817, July 6, 2020.

3 Decision 22742-D01-2019: *ATCO Electric Ltd., Re* [2019 CarswellAlta 1404 (Alta. U.C.)], Proceeding 22742, July 4, 2019.

4 Decision 22742-D02-2019: *ATCO Electric Ltd., Re* [2019 CarswellAlta 2099 (Alta. U.C.)], Proceeding 22742, October 2, 2019.

5 Decision 23793-D01-2019: *ATCO Pipelines, Re* [2019 CarswellAlta 1297 (Alta. U.C.)], Proceeding 23793, June 25, 2019.

6 Exhibit 24805-X0015.01, Other matters response 04 Attachment 1.

7 Exhibit 24805-X0001.01, AET 2018-2019 GTA Compliance Filing.

8 Exhibit 24805-X0015.01, Other matters response 04 Attachment 1.

9 Proceeding 24817, Exhibit 24817-X0008.01, Attachment C.

10 Exhibit 24805-X0015.01, Other matters response 04 Attachment 1.

11 Exhibit 24805-X0150, AET argument - IT matters, paragraph 14.

12 Exhibit 24805-X0150, AET argument - IT matters, Table 1, paragraph 14.

13 Decision 20514-D02-2019, paragraph 19.

14 Exhibit 24805-X0151, Calgary argument - redacted, paragraph 18.

15 Proceeding 3378, ATCO Utilities Evergreen Compliance Filing.

16 Exhibit 24805-X0113, Calgary evidence - redacted, A.40, PDF page 39.

17 Exhibit 24805-X0113, Calgary evidence - redacted, A.25, PDF page 28.

18 Exhibit 24805-X0156, UCA reply argument on IT Matters, paragraph 17.

19 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraph 20.

20 Exhibit 24805-X0135-CONF, ATCO rebuttal evidence, paragraph 20.

21 Exhibit 24805-X0058, AET Responses to CAL, AET-CAL-2019OCT07-002(f)(i), PDF pages 10-11.

22 Decision 20514-D02-2019, paragraph 19.

23 Exhibit 24805-X0151, Calgary argument - redacted, PDF page 16, paragraph 51.

24 Exhibit 24805-X0113, Calgary evidence - redacted, PDF pages 9-10. There are numerous examples of units for Custom Service Rates for each of the following Service IDs: Service ID 348 has a billing metric of "Per IDS Device"; Service ID 548 has a billing metric of "Per Device/Month"; Service ID 583 has a billing metric of "Per Site/Month"; Service IDs 706, 707, 815, 816, 817, 818, 820 and 830

all have billing metrics of "Per Application/Month"; Service ID 732 has a billing metric of "Per PC/Month"; Service IDs 744 and 764 have billing metrics of "Per Firewall/Month"; Service ID 763 has a billing metric of "Per User/Month"; and Service IDs 814, 821, 822, 823, 824, 825, 826 and 827 (all of which are "Fixed Overhead Charges," for each tower) have billing metrics of "Fixed Fee/Month."

25 Exhibit 24805-X0113, Calgary conf evidence, PDF pages 10-11.

26 Proceeding 20514, Exhibit 20514-X0222.05, CONF ATCO-CAL CONF-2017MAR31-007(b) Attachment-AET 3378 July 10, and Exhibit 20514-X0222.01 CONF, ATCO-CAL CONF-2017MAR31-004(d) Attachment-AP 3378 July 10.

27 Exhibit 24805-X0097 CONF, PDF pages 12-13.

28 Exhibit 24805-X0113, Calgary evidence - redacted, PDF pages 29-31.

29 Exhibit 24805-X0156, UCA reply argument on IT matters, paragraphs 19-20.

30 Exhibit 24805-X0135, and Proceeding 24817, Exhibit 24817-X0094.

31 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraphs 62-63.

32 Exhibit 24805-X0113, Calgary evidence - redacted, A. 22, PDF pages 24-25.

33 Exhibit 24805-X0156, UCA reply argument on IT matters, paragraph 23.

34 Exhibit 24805-X0151, Calgary argument - redacted, paragraphs 104-111.

35 Exhibit 24805-X0149, UCA argument (IT Matters), paragraph 23.

36 Exhibit 24805-X0149, paragraphs 8-10.

37 Exhibit 24805-X0135, and Proceeding 24817, Exhibit 24817-X0094.

38 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraph 44.

39 Exhibit 24805-X0120, AET-AUC-2019DEC06-004(b)-(d).

40 Exhibit 24805-X0120, Response to AET-AUC-2019DEC06-004(b)-(d), PDF pages 200-201.

41 Exhibit 24805-X0113, Calgary evidence - redacted, PDF page 8.

42 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraph 13.

43 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, PDF pages 21-22.

44 Exhibit 24805-X0120, response to AET-AUC-2019DEC06-004(a), PDF page 200.

45 Exhibit 24805-X0120, AET responses to AUC requests — Round 2, AET-AUC-2019DEC06-004.

46 Exhibit 24805-X0120, AET responses to AUC requests — Round 2, AET-AUC-2019DEC06-004.

47 Exhibit 24805-X0151, Calgary argument - redacted, paragraph 133.

48 Decision 3378-D01-2016, paragraphs 162-163.

49 Exhibit 24805-X0156, UCA reply argument on IT matters, paragraphs 24-26.

50 Rule 023: *Rules Respecting Payment of Interest*.

51 Proceeding 32, ATCO Utilities, 2003-2007 Benchmarking and I-Tek Placeholders True Up.

52 Decision 2012-237: *Rate Regulation Initiative, Re* [2012 CarswellAlta 2557 (Alta. U.C.)], Proceeding 566, September 12, 2012.

53 Decision 20385-D01-2015: *ATCO Gas, Re* [[2015] A.W.L.D. 3681 (Alta. U.C.)], Proceeding 20385, August 24, 2015; Decision 20369-D01-2015 (Errata): ATCO Electric Ltd., 2013-2015 Capital Trackers Compliance Filing, Proceeding 20369, August 31, 2015; and Decision 20351-D01-2015: FortisAlberta Inc., 2013-2015 Capital Tracker Compliance Filing, Proceeding 20351, September 23, 2015.

54 Decision 2010-496: ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Proceeding 87, Application 1579086-1, October 19, 2010.

55 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraph 75.

56 Proceeding 3378, ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric Ltd.), Evergreen II Application Compliance Filing to Decision 2014-169 (Errata) Confidential.

57 Decision 2010-496, paragraph 242.

58 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraph 38.

59 Exhibit 24805-X0135, ATCO rebuttal evidence - redacted, paragraphs 40-41.

60 Proceeding 24817, Exhibit 24817-X0034, AP-CAL-2019OCT07-006(d)-(e).

61 For example, Decision 2010-102: *ATCO Utilities, Re* [2010 CarswellAlta 448 (Alta. U.C.)], Proceeding 32, Application 1562012-1, March 8, 2010; and Decision 3378-D01-2016 [2016 CarswellAlta 421 (Alta. U.C.)].

62 Decision 20514-D02-2019, paragraph 399.

63 Decision 20514-D02-2019, paragraph 395.

64 Exhibit 24805-X0151, Calgary argument - redacted, paragraph 139.

65 Exhibit 24805-X0151, Calgary argument - redacted, paragraph 145.

66 Exhibit 24805-X0151, Calgary argument - redacted, paragraph 145.

67 Exhibit 24805-X0156, UCA reply argument on IT matters, paragraph 4.

68 Exhibit 24805-X0153, ATCO reply argument (IT Matters), paragraph 46.

69 Proceeding 24964, AET 2020-2022 General Tariff Application.

70 Exhibit 24805-X0153, ATCO reply argument (IT Matters), paragraph 46.

71 Proceeding 24817, Exhibit 24817-X0095 CONF for AP, Exhibit 24817-X0096 CONF for AET.

72 Decision 3378-D01-2016: ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric Ltd.), Evergreen II Application Compliance Filing to Decision 2014-169 (Errata), Proceeding 3378, March 4, 2016.

73 Proceeding 24817, Exhibit 24817-X0037, Calgary Response to ATCO per Compliance Proceedings and IR Responses.

74 Exhibit 24805-X0043, Calgary Response to ATCO per Compliance Proceedings and IR Responses.

75 Proceeding 24817: ATCO Pipelines, 2019-2020 General Rate Application Compliance Filing; Proceeding 24805: ATCO Electric Transmission, 2018-2019 General Tariff Application Compliance Filing; Proceeding 24880: ATCO Gas, 2020 Annual Performance-Based Regulation Rate Adjustment; Proceeding 24881: ATCO Electric Distribution, 2020 Annual Performance-Based Regulation Rate Adjustment.

End of Document

TAB 10

Français

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From March 1, 2021 to the e-Laws currency date.

Last amendment: 2020, c. 25, Sched. 2, s. 1-3.

Legislative History: 1991, c. 46; 1993, c. 27, Sched.; O. Reg. 922/93; 1994, c. 12, s. 1-48 (But see O. Reg. 441/97, 1998, c. 20, Sched. A, s. 20 and 1999, c. 12, Sched. B, s. 5); 1994, c. 27, s. 43; 1996, c. 25, s. 1, 9; 1996, c. 31, s. 65, 66; 1997, c. 19, s. 32; 1997, c. 23, s. 5; 1997, c. 26, Sched.; 1998, c. 4, s. 2; 1998, c. 18, Sched. B, s. 5; 1998, c. 18, Sched. G, s. 48; 1998, c. 20, s. 2; 1998, c. 20, Sched. A; 1999, c. 6, s. 18; 1999, c. 12, Sched. B, s. 4; 2000, c. 26, Sched. A, s. 5; 2000, c. 33, s. 20; 2001, c. 9, Sched. B, s. 6 (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*; 2002, c. 13, s. 56; 2002, c. 14, Sched., s. 9; 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. A, s. 4; 2004, c. 17, s. 32; 2005, c. 5, s. 17; 2006, c. 1, s. 4; 2006, c. 19, Sched. D, s. 5; 2006, c. 21, Sched. A; 2006, c. 21, Sched. C, s. 105; 2006, c. 21, Sched. F, s. 106, 136 (1); 2006, c. 35, Sched. C, s. 2; 2009, c. 11, s. 19, 20; 2009, c. 33, Sched. 2, s. 20; 2009, c. 33, Sched. 6, s. 50; 2015, c. 23, s. 1-3; 2015, c. 27, Sched. 1, s. 1; 2016, c. 5, Sched. 7; 2017, c. 2, Sched. 2, s. 1-19; 2017, c. 14, Sched. 4, s. 10; 2017, c. 20, Sched. 2, s. 3-6; 2017, c. 20, Sched. 11, s. 7; 2017, c. 24, s. 75; 2017, c. 34, Sched. 46, s. 10; 2018, c. 8, Sched. 15, s. 8; 2018, c. 17, Sched. 10; 2019, c. 7, Sched. 15; 2020, c. 11, Sched. 5, s. 1-11; 2020, c. 25, Sched. 1, s. 27; 2020, c. 25, Sched. 2, s. 1-3.

CONTENTS

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

1994, c. 12, s. 43 (3); 1997, c. 26, Sched.; O. Reg. 441/97, s. 2; 2002, c. 17, Sched. F, Table.

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

1994, c. 12, s. 43 (3) - 28/02/1995; 1997, c. 26, Sched. - 01/01/1998; O. Reg. 441/97 - 05/12/1997

2002, c. 17, Sched. F, Table - 01/01/2003

INTEREST AND COSTS

Prejudgment and postjudgment interest rates

Definitions

127 (1) In this section and in sections 128 and 129,

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the *Bank Act* (Canada); ("taux d'escompte")

"date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed; ("date de l'ordonnance")

"postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent; ("taux d'intérêt postérieur au jugement")

"prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point; ("taux d'intérêt antérieur au jugement")

"quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December. ("trimestre") R.S.O. 1990, c. C.43, s. 127 (1).

Calculation and publication of interest rates

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest rate for the next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years. 2006, c. 21, Sched. A, s. 18.

Regulations

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published. 2006, c. 21, Sched. A, s. 18.

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

2006, c. 21, Sched. A, s. 18 - 01/10/2007

Prejudgment interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. R.S.O. 1990, c. C.43, s. 128 (1).

Exception for non-pecuniary loss on personal injury

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w). R.S.O. 1990, c. C.43, s. 128 (2); 1994, c. 12, s. 44.

Special damages

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

Exclusion

(4) Interest shall not be awarded under subsection (1),

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;

(f) where the order is made on consent, except by consent of the debtor; or

(g) where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 128 (3, 4).

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

1994, c. 12, s. 44 - 28/02/1995

Postjudgment interest

129 (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

Interest on periodic payments

(2) Where an order provides for periodic payments, each payment in default shall bear interest only from the date of default.

Interest on orders originating outside Ontario

(3) Where an order is based on an order given outside Ontario or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given.

Costs assessed without order

(4) Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.

Other provision for interest

(5) Interest shall not be awarded under this section where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 129.

Discretion of court

130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

Same

(2) For the purpose of subsection (1), the court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

TAB 11

Most Negative Treatment: Check subsequent history and related treatments.

2004 CarswellOnt 4915
Ontario Court of Appeal

Hislop v. Canada (Attorney General)

2004 CarswellOnt 4915, 2004 C.E.B. & P.G.R. 8129 (headnote only), [1985] W.D.F.L. 823, [1985] W.D.F.L. 825, [2004] O.J. No. 4815, 124 C.R.R. (2d) 1, 12 R.F.L. (6th) 71, 135 A.C.W.S. (3d) 610, 192 O.A.C. 331, 234 D.L.R. (4th) 465, 246 D.L.R. (4th) 644, 73 O.R. (3d) 641, 73 O.R. (3d) 685 (Fr.)

GEORGE HISLOP, BRENT E. DAUM, ALBERT McNUTT, ERIC BROGAARD and GAIL MEREDITH (Plaintiffs / Respondents) and THE ATTORNEY GENERAL OF CANADA (Defendant / Appellant) and THE ATTORNEY GENERAL OF ONTARIO (Intervener)

Charron, Feldman, Lang JJ.A.

Heard: June 10, 11, 2004
Judgment: November 26, 2004 *
Docket: CA C41224

Proceedings: reversing in part *Hislop v. Canada (Attorney General)* (2003), 2003 CarswellOnt 5183, 114 C.R.R. (2d) 303, 50 R.F.L. (5th) 26, C.E.B. & P.G.R. 8078, 234 D.L.R. (4th) 465 (Ont. S.C.J.)

Counsel: R. Douglas Elliott, David F. O'Connor, R. Trent Morris, Victoria A. Paris, Kenneth W. Smith, Sharon Matthews, for Plaintiffs / Respondents
Paul B. Vickery, Debra M. McAllister, Monika Lozinska, for Defendant / Appellant
Daniel Guttman, Mark Crow, for Intervener, Attorney General of Ontario

Subject: Labour; Employment; Public; Constitutional; Civil Practice and Procedure; Family; Human Rights
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.iii Date from which interest runs
Constitutional law
XI Charter of Rights and Freedoms
XI.2 Scope of application
XI.2.c Retroactive and retrospective application
XI.2.c.ii Equality rights
Constitutional law
XI Charter of Rights and Freedoms
XI.4 Nature of remedies under Charter
XI.4.a General principles
Pensions
II Federal and provincial pension plans
II.1 Federal pension plans
II.1.a Constitutional issues
II.1.a.i Charter of Rights and Freedoms

2004 CarswellOnt 4915, 2004 C.E.B. & P.G.R. 8129 (headnote only)...

Headnote

Social assistance --- Federal pension plans — Constitutional issues — Charter of Rights and Freedoms

Provisions added to Canada Pension Plan, R.S.C. 1985, c. C-8 violated s. 15(1) of Canadian Charter of Rights and Freedoms — Sections 44(1.1) and 72(2) of Plan were to be struck in their entirety.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

Provisions were added to Canada Pension Plan, R.S.C. 1985, c. C-8 — Existing general sections limited survivors's pensions — At trial, class members were granted constitutional exemption from general sections — General sections did not violate s. 15(1) of Canadian Charter of Rights and Freedoms — Constitutional exemption was set aside.

Civil practice and procedure --- Judgments and orders — Interest on judgments — Prejudgment interest — Date from which interest runs

Provisions were added to Canada Pension Plan, R.S.C. 1985, c. C-8 — Existing general sections limited survivors's pensions — At trial, class members were granted pre-judgment interest back to 1985 — There was no basis to interfere with award of pre-judgment interest.

Constitutional law --- Charter of Rights and Freedoms — Scope of application — Retroactive and retrospective application — Equality rights

Provisions added to Canada Pension Plan, R.S.C. 1985, c. C-8 violated s. 15(1) of Canadian Charter of Rights and Freedoms — Sections 44(1.1) and 72(2) of Plan were to be struck in their entirety.

In 1999, the Supreme Court of Canada struck down the opposite-sex definition of "spouse" in the Family Law Act, R.S.O. 1990, c. F.3 as contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms. The federal government responded by enacting omnibus legislation entitled the Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (MOBA) which amended 68 pieces of federal legislation. Sections 44(1.1) and 72(2) (the specific sections) were added to the Canada Pension Plan (CPP) by the MOBA. These sections extended survivors' pensions to same-sex partners but also limited the pension entitlement. Limits to survivors' pensions already existed in the CPP as ss. 60(2) and 72(1) (the general sections).

A class action was brought by five representative plaintiffs. The trial judge found that the class members had not sat on their rights. The trial judge found that the plaintiffs' choice of married heterosexual couples as a comparator group was appropriate. The trial judge found differential treatment between opposite-sex and same-sex couples was based on the analogous ground of sexual orientation and was discriminatory and offensive to s. 15 of the Charter. The trial judge found that the Crown had failed to demonstrate that the exclusion of same-sex survivors' pensions was a reasonable limit on the class members' Charter rights. The trial judge struck ss. 44(1.1) and 72(2) of the CPP in their entirety under s. 52(1) of the Constitution Act, 1982 and refused to grant a suspension of the declaration of invalidity. The class members were granted a constitutional exemption from ss. 60(2) and 72(1) of the CPP. Interest was awarded from February 1, 1992 or one month after the date of death of the class member's contributing partner, whichever was later, up to the date of judgment. As a result, each class member became eligible to receive prospective survivors' pensions and survivors' pensions in arrears calculated from one month following the death of their partner, plus interest. The Crown appealed.

Held: The appeal was allowed in part and the constitutional exemptions set aside.

The appropriate comparator group was the one chosen by the plaintiffs. Both ss. 44(1.1) and 72(2) of the CPP treat same-sex partners differently from their comparator group. Same-sex surviving partners, by reason of their sexual orientation, were already a vulnerable group and subject to stereotyping as a result of that orientation. They had the same need for survivors' pensions as opposite-sex survivors and the denial of those survivors' pensions without any corresponding ameliorative benefit to a more disadvantaged group perpetuated the view that same-sex survivors were less worthy of recognition than opposite-sex survivors. As a matter of fact, and as a matter of law, the history of the evolution of same-sex relationship rights could not justify the temporal restrictions in ss. 44(1.1) and 72(2) of the CPP. The built-in limitation contained in s. 72(1) of the CPP undermined the cogency of Parliament's decision to further limit the retroactive remedial aspect of the CPP amendments. The specific sections themselves violated the equality provisions of the Charter. The impairment of the rights of same-sex survivors was significant and arbitrary. The Crown did not meet its burden on the proportionality assessment. Sections 44(1.1) and 72(2) of the CPP must be struck down in their entirety. There was no suspension necessary as striking down these sections did not leave any void that needed to be filled by Parliament and did not have any adverse effect on the CPP fund or the public purse. There can be no constitutional remedy for a statutory provision unless that provision breaches the Charter. The survivors' estates did not enjoy s. 15(1) Charter rights and there was no basis to assess whether such rights were breached by s. 60(2) of the

CPP. Section 72(1) of the CPP did not limit same-sex survivors' rights. It was only once ss. 44(1.1) and 72(2) of the CPP were declared unconstitutional that s. 72(1) of the CPP might have an adverse effect on the members of the plaintiff class. Section 72(1) of the CPP did not violate s. 15(1) of the Charter because, in the context of the MOBA, it had no adverse effect on the claimants and it was not clear that it would have an adverse effect on the class. There was no need to consider s. 1 of the Charter. There was no remedy to be granted in respect of ss. 60(2) and 72(1) of the CPP. The constitutional exemption was set aside. Nothing precluded the successful class members from their presumptive entitlement to pre-judgment interest in accordance with the laws of the applicable province. The trial judge properly exercised her discretion on appropriate principles. There was no basis to interfere with the award of pre-judgment interest.

Table of Authorities

Cases considered:

Ardoch Algonquin First Nation & Allies v. Ontario (2000), 2000 SCC 37, 2000 CarswellOnt 2460, 2000 CarswellOnt 2461, (sub nom. *Lovelace v. Ontario)* 48 O.R. (3d) 735 (headnote only), (sub nom. *Lovelace v. Ontario)* 188 D.L.R. (4th) 193, 255 N.R. 1, (sub nom. *Lovelace v. Ontario)* 75 C.R.R. (2d) 189, (sub nom. *Lovelace v. Ontario)* [2000] 1 S.C.R. 950, 134 O.A.C. 201, (sub nom. *Lovelace v. Ontario)* [2000] 4 C.N.L.R. 145 (S.C.C.) — referred to

Benner v. Canada (Secretary of State) (1997), 143 D.L.R. (4th) 577, 208 N.R. 81, 37 Imm. L.R. (2d) 195, [1997] 1 S.C.R. 358, 42 C.R.R. (2d) 1, 125 F.T.R. 240 (note), 1997 CarswellNat 190, 1997 CarswellNat 191 (S.C.C.) — considered

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (1999), 1999 CarswellBC 1907, 1999 CarswellBC 1908, (sub nom. *British Columbia Government & Service Employees' Union v. Public Service Employee Relations Commission)* 99 C.L.L.C. 230-028, [1999] 10 W.W.R. 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 176 D.L.R. (4th) 1, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 244 N.R. 145, 66 B.C.L.R. (3d) 253, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 127 B.C.A.C. 161, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 207 W.A.C. 161, 46 C.C.E.L. (2d) 206, 35 C.H.R.R. D/257, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3, 7 B.H.R.C. 437 (S.C.C.) — referred to

Corbiere v. Canada (Minister of Indian & Northern Affairs) (1999), 239 N.R. 1, 1999 CarswellNat 663, 1999 CarswellNat 664, (sub nom. *Corbière v. Canada (Minister of Indian & Northern Affairs))* 173 D.L.R. (4th) 1, (sub nom. *Canada (Minister of Indian & Northern Affairs) v. Corbiere)* 61 C.R.R. (2d) 189, [1999] 3 C.N.L.R. 19, [1999] 2 S.C.R. 203, 163 F.T.R. 284 (note) (S.C.C.) — considered

Doucet-Boudreau v. Nova Scotia (Department of Education) (2003), 2003 SCC 62, 2003 CarswellNS 375, 2003 CarswellNS 376, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* 232 D.L.R. (4th) 577, (sub nom. *Doucet-Boudreau)* [2003] 3 S.C.R. 3, 112 C.R.R. (2d) 202, 45 C.P.C. (5th) 1, 312 N.R. 1, 218 N.S.R. (2d) 311, 687 A.P.R. 311 (S.C.C.) — considered

Egan v. Canada (1995), 95 C.L.L.C. 210-025, 12 R.F.L. (4th) 201, C.E.B. & P.G.R. 8216, 124 D.L.R. (4th) 609, 182 N.R. 161, 29 C.R.R. (2d) 79, [1995] 2 S.C.R. 513, 96 F.T.R. 80 (note), 1995 CarswellNat 6, 1995 CarswellNat 703 (S.C.C.) — considered

Eurig Estate, Re (1998), 1998 CarswellOnt 3950, 1998 CarswellOnt 3951, 40 O.R. (3d) 160 (headnote only), (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 231 N.R. 55, 23 E.T.R. (2d) 1, 165 D.L.R. (4th) 1, (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 114 O.A.C. 55, [1998] 2 S.C.R. 565, [2000] 1 C.T.C. 284 (S.C.C.) — distinguished

Giguère c. Chambre des notaires du Québec (2004), 2004 SCC 1, 2004 CarswellQue 19, 2004 CarswellQue 20, [2004] 1 S.C.R. 3, [2004] R.R.A. 5, (sub nom. *Giguère v. Chambre des notaires du Québec)* 315 N.R. 346, 235 D.L.R. (4th) 422 (S.C.C.) — referred to

Graham v. Rourke (1990), 40 O.A.C. 301, 75 O.R. (2d) 622, 74 D.L.R. (4th) 1, 1990 CarswellOnt 2676 (Ont. C.A.) — referred to

Granovsky v. Canada (Minister of Employment & Immigration) (2000), 2000 SCC 28, 2000 CarswellNat 760, 2000 CarswellNat 761, 50 C.C.E.L. (2d) 177, 186 D.L.R. (4th) 1, 253 N.R. 329, [2000] 1 S.C.R. 703, 74 C.R.R. (2d) 1 (S.C.C.) — referred to

Guimond c. Québec (Procureur général) (1996), 3 C.P.C. (4th) 1, 201 N.R. 380, 138 D.L.R. (4th) 647, 110 C.C.C. (3d) 223, 22 M.V.R. (3d) 251, [1996] 3 S.C.R. 347, 43 Admin. L.R. (2d) 44, 1996 CarswellQue 918, 1996 CarswellQue 919, 38 C.R.R. (2d) 212 (S.C.C.) — referred to

Halpern v. Toronto (City) (2003), 65 O.R. (3d) 161, 65 O.R. (3d) 201, (sub nom. *Halpern v. Canada (Attorney General))* 106 C.R.R. (2d) 329, 2003 CarswellOnt 2159, (sub nom. *Halpern v. Canada (Attorney General))* 172 O.A.C. 276, 36 R.F.L. (5th) 127, 225 D.L.R. (4th) 529 (Ont. C.A.) — followed

Hodge v. Canada (Minister of Human Resources Development) (2004), 2004 SCC 65, 2004 CarswellNat 3695, 2004 CarswellNat 3696, C.E.B. & P.G.R. 8121, 244 D.L.R. (4th) 257 (S.C.C.) — considered

Irvington Holdings Ltd. v. Black (1987), 58 O.R. (2d) 449, 35 D.L.R. (4th) 641, 20 O.A.C. 390, 14 C.P.C. (2d) 229, 1987 CarswellOnt 356 (Ont. C.A.) — referred to

Law v. Canada (Minister of Employment & Immigration) (1999), 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development))* 60 C.R.R. (2d) 1, 170 D.L.R. (4th) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development)* C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — followed

M v. H (1999), (sub nom. *M. v. H.)* 171 D.L.R. (4th) 577, (sub nom. *M. v. H.)* 238 N.R. 179, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, (sub nom. *M. v. H.)* 43 O.R. (3d) 254 (headnote only), (sub nom. *M. v. H.)* 62 C.R.R. (2d) 1, (sub nom. *M. v. H.)* 121 O.A.C. 1, 46 R.F.L. (4th) 32, (sub nom. *Attorney General for Ontario v. M. & H.)* C.E.B. & P.G.R. 8354 (headnote only), (sub nom. *M. v. H.)* [1999] 2 S.C.R. 3, 7 B.H.R.C. 489 (S.C.C.) — considered

Mason v. Peters (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21, 1982 CarswellOnt 705 (Ont. C.A.) — referred to

Mason v. Peters (1982), 46 N.R. 538, 1982 CarswellOnt 1340 (S.C.C.) — referred to

Newfoundland (Treasury Board) v. N.A.P.E. (2004), (sub nom. *Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen (Treasury Board))* 2004 C.L.L.C. 230-035, 2004 SCC 66, 2004 CarswellNfld 322, 2004 CarswellNfld 323, 244 D.L.R. (4th) 294 (S.C.C.) — considered

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — referred to

R. c. Demers (2004), (sub nom. *R. v. Demers)* 323 N.R. 201, (sub nom. *R. v. Demers)* 185 C.C.C. (3d) 257, (sub nom. *R. v. Demers)* 240 D.L.R. (4th) 629, 20 C.R. (6th) 241, 2004 SCC 46, 2004 CarswellQue 1547, 2004 CarswellQue 1548 (S.C.C.) — considered

R. v. Hall (2002), [2002] 3 S.C.R. 309, 2002 SCC 64, 2002 CarswellOnt 3259, 2002 CarswellOnt 3260, 4 C.R. (6th) 197, 217 D.L.R. (4th) 536, 167 C.C.C. (3d) 449, 293 N.R. 239, 165 O.A.C. 319, 97 C.R.R. (2d) 189 (S.C.C.) — referred to

R. v. Mills (1999), [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1, 1995 CarswellBC 1098, 1995 CarswellBC 1151 (S.C.C.) — referred to

R. v. Parker (2000), 2000 CarswellOnt 2627, 188 D.L.R. (4th) 385, 146 C.C.C. (3d) 193, 49 O.R. (3d) 481, 75 C.R.R. (2d) 233, 37 C.R. (5th) 97, 135 O.A.C. 1 (Ont. C.A.) — considered

Sauvé v. Canada (Chief Electoral Officer) (2002), [2002] 3 S.C.R. 519, 2002 SCC 68, 2002 CarswellNat 2883, 2002 CarswellNat 2884, 5 C.R. (6th) 203, 168 C.C.C. (3d) 449, 98 C.R.R. (2d) 1, 218 D.L.R. (4th) 577, 294 N.R. 1 (S.C.C.) — referred to

Schachter v. Canada (1992), 92 C.L.L.C. 14,036, 10 C.R.R. (2d) 1, 139 N.R. 1, 93 D.L.R. (4th) 1, 1992 CarswellNat 658, 1992 CarswellNat 1006, 53 F.T.R. 240 (note), [1992] 2 S.C.R. 679 (S.C.C.) — followed

Somers v. Fournier (2002), 2002 CarswellOnt 2119, 214 D.L.R. (4th) 611, 60 O.R. (3d) 225, 12 C.C.L.T. (3d) 68, 22 C.P.C. (5th) 264, 27 M.V.R. (4th) 165, 162 O.A.C. 1 (Ont. C.A.) — referred to

application of every class member, it was apparent that throughout the relevant period persons would be told over the phone that they did not qualify, and it was expected that most people would accept that information at face value and would not apply. They submitted further that, "those who did apply may or may not have been told about their *Charter* rights at the reconsideration stage. Those who had the temerity to pursue the matter faced a long battle.... This is not requiring claimants to apply promptly." The class members argued that the federal government's conduct was discriminatory and, as a result, they claimed to be entitled "to an award of damages equal to the value of the pensions that they are barred from receiving."

139 Much the same conduct was alleged in support of the claim for damages for breach of fiduciary duty. As noted earlier, the trial judge dismissed that claim. She found that the class members failed to establish the existence of a fiduciary relationship. She also dismissed the class members' claim to symbolic damages under s. 24(1), concluding that while "there was lethargy on the part of the Crown in responding to its obligations as a result of s. 15 of the *Charter*, I cannot find bad faith" (at para 122).

140 In our view, the same result must follow in respect of the s. 24(1) *Charter* claim to the full pension arrears. The difficulty lies with the fact that the government action upon which this claim is based relates solely to its administration of a law that was valid throughout the relevant period of time. There can be no civil liability at common law for this conduct: see *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347 (S.C.C.). The result can be no different because the claim is made under s. 24(1) of the *Charter*. Hence, the comments referred to earlier that a remedy under s. 24(1) is available "where there is some government action, *beyond the enactment of an unconstitutional statute or provision*" (*Doucet-Boudreau*, *supra* at para. 43); where "the violative action *... falls outside the jurisdiction conferred by the provision*" (*Schachter*); or "in the event of conduct that is clearly wrong, in bad faith or an abuse of power" (*Demer*, *supra* at para 62).

141 We therefore conclude that there is no basis to grant a s. 24(1) remedy in this case.

6. — Conclusion on Remedy

142 In the result, the constitutional exemption is set aside. The declaration of invalidity in respect of s. 44(1.1) and s. 72(2) is upheld. We agree with the trial judge's conclusion that no suspension is necessary in this case. Striking down the specific sections does not leave any void that needs to be filled by Parliament and on the particular facts of this case, it does not have any adverse effect on the *CPP* fund or the public purse.

IX. — Pre-Judgment Interest

143 The appellant also appeals the trial judge's award of pre-judgment interest on any pension arrears, which award, they argue, is not available under either s. 24(1) of the *Charter* or s. 52(1) of the *Constitution Act, 1982*.

144 The trial judge, however, did not award interest under the *Charter* but rather under s. 31 of the *Crown Liability and Proceedings Act*, *supra*, which provides, in part, as follows:

> 31.(1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.
>
> . . . . .
>
> (5) A court may, where it considers it just to do so, having regard to changes in market interest rates, the conduct of the proceedings or any other relevant consideration, disallow interest or allow interest for a period other than that provided for in subsection (2) in respect of the whole or any part of the amount on which interest is payable under this section.

By this enactment, the legislature determined that a successful litigant is presumptively entitled to pre-judgment interest from the Crown in the same manner as a litigant would be entitled to interest from any other defendant.

145 As the trial judge recognized, an award of pre-judgment interest is a natural extension of the underlying damages award. Such an award recognizes that the successful litigant has not had the use of the money to which it was entitled. Pre-

judgment interest puts that litigant in the position it would have been in had it received the monies when it was entitled to do so. It neither benefits a successful party unfairly by providing that party with a windfall, nor punishes an unsuccessful party. It merely deprives the unsuccessful party of the financial benefit it received from holding funds to which it was, in the result, never entitled. Accordingly, pre-judgment interest is compensatory, not punitive. See *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.); *Irvington Holdings Ltd. v. Black* (1987), 58 O.R. (2d) 449 (Ont. C.A.); *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (Ont. C.A.); *Giguère c. Chambre des notaires du Québec*, [2004] 1 S.C.R. 3 (S.C.C.).

146 At the same time, Parliament recognized there might be circumstances in which the legislature had reason to preclude the granting of pre-judgment interest. Accordingly, it reserved to the legislature the right to prohibit an interest award in specific legislation. The *CPP* is not such legislation. While the *CPP* addresses other types of interest, it is silent on the issue of pre-judgment interest. The *CPP* does contain a general prohibition against the use of *CPP* revenues for extraneous purposes, but that prohibition does not preclude an award of pre-judgment interest. This is because such an award would not be payable from *CPP* funds but rather from the funds of the appellant, the Attorney General of Canada.

147 Accordingly, apart from an exercise of the trial judge's discretion not to award interest for reasons related to the litigation, nothing precludes the successful class members from their presumptive entitlement to pre-judgment interest in accordance with the laws of the applicable province.

148 With respect to the discretion of the trial judge to grant pre-judgment interest, her award will only be overturned if the Crown demonstrates error or injustice in the exercise of that discretion. The Crown has not done so. The trial judge did not, as was suggested by the Crown, confuse this award with either the indexing of pensions available under the *CPP* or with symbolic damages. Further, the mere fact that this is *Charter* litigation, or that it raises a novel issue, is not a reason that justifies depriving the respondents of an award of interest to which they are otherwise entitled: *Mason v. Peters* (1982), 39 O.R. (2d) 27 (Ont. C.A.), leave to appeal to S.C.C. refused (1982), 46 N.R. 538 (S.C.C.).

149 Section 31(6) of the *Crown Liability and Proceedings Act*, however, disallows any award of interest against the Crown before February 1, 1992, the day the section came into force. It was for this reason that the trial judge held that she could award interest on any arrears from no earlier than February 1, 1992.

150 The trial judge properly exercised her discretion on appropriate principles. She was entitled to award the class members pre-judgment interest and there is no basis to interfere with that disposition.

X. — Disposition

151 The appeal is therefore allowed and the trial judgment is amended to conform to these reasons. The parties may make written submissions with respect to costs. The submissions shall be no longer than ten pages in total. The appellant's submissions shall be made by January 5, 2005 and the respondents' submissions by January 19, 2005.

Appeal allowed in part.

Footnotes

* Corrigenda issued by the court on November 29, 2004 and December 14, 2004 have been incorporated herein. Additional reasons at *Hislop v. Canada (Attorney General)* (2005), 2005 CarswellOnt 2151 (Ont. C.A.) and at *Hislop v. Canada (Attorney General)* (2005), 2005 CarswellOnt 2152 (Ont. C.A. [In Chambers]).

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11,

2 The class was defined this way on the theory that because equality rights only became effective on April 17, 1985, that is the cut-off for any entitlement argument. Arguably, however, if a same-sex survivor's partner died before April 17, 1985, the survivor's status would have crystallized on the date of death, and it is only the date of an application for pension that is limited by the coming into force of s. 15(1).

3 As stated by Judy LaMarsh, then Minister of Health and Welfare: *House of Commons Debates*, Vol. III (July 18, 1963) at 2340-41.

4 In fairness to the Crown's position, the incidental effect of s. 72(2) as it operates in conjunction with s. 44(1.1) is that same-sex survivors of partners who die after July 2000 are treated like every other person in terms of eligibility to collect the pension, depending on the date the application is made, while those same-sex survivors whose partners die between January 1998 and July 2000 are potentially deprived of two year's worth of pension if they apply for it before July 2000. Having said that, it is difficult indeed to contemplate how such a distinction between same-sex survivors can be said to have a legitimate legislative purpose, nor does the material before the court suggest that it was the legislative purpose of s. 72(2). It therefore cannot be the basis for the comparator group in the s. 15(1) analysis.

End of Document

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: White v. Chaumont | 2008 CarswellOnt 1430, [2008] O.J. No. 1051, 166 A.C.W.S. (3d) 23 | (Ont. S.C.J., Mar 19, 2008)

2006 CarswellOnt 1211
Ontario Court of Appeal

Pilon v. Janveaux

2006 CarswellOnt 1211, [2006] O.J. No. 887, 211 O.A.C. 19, 29 M.V.R. (5th) 172

IN THE MATTER OF THE CONSOLIDATED ACTIONS

GILLES PILON (Plaintiff / Appellant / Respondent by way of cross-appeal) and GLEN JANVEAUX, CONRAD JANVEAUX, JANVEAUX LOGGING and JANVEAUX AND SONS LOGGING LIMITED (Defendants / Respondents / Appellants by way of cross-appeal)

GILLES PILON (Plaintiff / Appellant / Respondent by way of cross-appeal) and MATTAWA INNS INC. (Defendant / Respondent / Appellant by way of cross-appeal)

Feldman, Cronk, Juriansz JJ.A.

Heard: April 12, 2005
Judgment: March 2, 2006
Docket: CA C38378

Proceedings: additional reasons at *Pilon v. Janveaux* (2005), 203 O.A.C. 345, 22 M.V.R. (5th) 223, 2005 CarswellOnt 5660 (Ont. C.A.); reversing in part *Pilon v. Janveaux* (2002), 27 M.V.R. (4th) 24, 2002 CarswellOnt 1696 (Ont. S.C.J.)

Counsel: John B. Gorman, Q.C. for Appellant / Respondent by way of cross-appeal
Chris T. Blom for Respondents / Appellants by way of cross-appeal

Subject: Torts; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.b Postjudgment interest
XXII.22.b.iii Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.4 Offers to settle or payment into court
XXIV.4.a Offers to settle
XXIV.4.a.iii Failure to accept offer
XXIV.4.a.iii.G Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.i General principles

2006 CarswellOnt 1211, [2006] O.J. No. 887, 211 O.A.C. 19, 29 M.V.R. (5th) 172

Torts
XV Negligence
XV.6 Apportionment of liability
XV.6.d Miscellaneous
Torts
XIX Spoliation
XIX.2 Occupiers' liability
XIX.2.c Particular situations
XIX.2.c.iv Hotels and taverns
Torts
XXIII Practice and procedure
XXIII.10 Trial
XXIII.10.b Charge to jury

Headnote

Negligence --- Contributory negligence — Apportionment of liability — General principles

Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Defendants admitted 100 percent liability for accident but alleged contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Jury reduced damage award by 35.5 percent for contributory negligence and trial judge endorsed jury's verdict — Appeal by plaintiff was allowed on basis that jury should have been asked to apportion degree of fault for each aspect of liability of tavern separately, along with liability of each of other defendants and of plaintiff — Parties made further submissions on proper apportionment as between plaintiff and tavern of responsibility that jury assigned to plaintiff — Plaintiff responsible for 21.3 percent of damages awarded — In this case, tavern was liable for its breach of duty for over-serving both driver and passenger — Tavern personnel had expertise in recognizing signs of impairment and knew how much they had served both men, even though driver did not appear to be impaired — While plaintiff must bear significant responsibility for his own actions, tavern should bear similar level of responsibility for allowing passenger to become impaired as for driver, subject to additional factor that driver did not appear to be impaired but tavern knew that he was — In these unique circumstances, appropriate apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — This took into account reality that plaintiff's ability to look out for himself was compromised in part by tavern over-serving him.

Negligence --- Practice and procedure — Trials — Charge to jury — Questions for jury to answer — General

Apportionment of fault — Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Defendants admitted 100 percent liability for accident but alleged contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Jury reduced damage award by 35.5 percent for contributory negligence and trial judge endorsed jury's verdict — Appeal by plaintiff was allowed on basis that jury should have been asked to apportion degree of fault for each aspect of liability of tavern separately, along with liability of each of other defendants and of plaintiff — Parties made further submissions on proper apportionment as between plaintiff and tavern of responsibility that jury assigned to plaintiff — Plaintiff responsible for 21.3 percent of damages awarded — In this case, tavern was liable for its breach of duty for over-serving both driver and passenger — Tavern personnel had expertise in recognizing signs of impairment and knew how much they had served both men, even though driver did not appear to be impaired — While plaintiff must bear significant responsibility for his own actions, tavern should bear similar level of responsibility for allowing passenger to become impaired as for driver, subject to additional factor that driver did not appear to be impaired but tavern knew that he was — In these unique circumstances, appropriate apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — This took into account reality that plaintiff's ability to look out for himself was compromised in part by tavern over-serving him.

Negligence --- Occupiers' liability — Particular situations — Hotels and taverns

Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Defendants admitted 100 percent liability for accident but alleged contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Jury reduced damage award by 35.5 percent for

contributory negligence and trial judge endorsed jury's verdict — Appeal by plaintiff was allowed on basis that jury should have been asked to apportion degree of fault for each aspect of liability of tavern separately, along with liability of each of other defendants and of plaintiff — Parties made further submissions on proper apportionment as between plaintiff and tavern of responsibility that jury assigned to plaintiff — Plaintiff responsible for 21.3 percent of damages awarded — Commercial host owes duty of care not only to its patrons, but also to third parties who might reasonably be injured by intoxicated patron — Tavern personnel had expertise in recognizing signs of impairment and knew how much they had served both men, even though driver did not appear to be impaired — While plaintiff must bear significant responsibility for his own actions, tavern should bear similar level of responsibility for allowing passenger to become impaired as for driver, subject to additional factor that driver did not appear to be impaired but tavern knew that he was — In these unique circumstances, appropriate apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — This took into account reality that plaintiff's ability to look out for himself was compromised in part by tavern over-serving him.

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Failure to accept offer — General principles

Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Defendants admitted liability for accident but alleged contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Before trial, defendants delivered offer to settle under R. 49.10(2) of Rules of Civil Procedure in amount of $375,000 plus costs — Jury reduced damage award by 35.5 percent for contributory negligence and trial judge endorsed jury's verdict — Appeal by plaintiff was allowed — Appropriate apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — Parties made submissions on costs — Plaintiff ordered to pay defendants' costs from date of offer — Trial judge properly concluded that amount of final judgment of $291,901.30, including prejudgment interest, was less favourable than offer — Judgment was not $375,000 awarded by jury, but amount finally awarded by trial judge plus prejudgment interest — Amount of judgment, recalculated based on adjusted apportionment of responsibility between plaintiff and tavern with prejudgment interest added, was $356,096.24, which was still less favourable than offer to settle — Trial judge declined to exercise his discretion to order otherwise and there was no basis to interfere with that exercise of discretion.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — General principles

Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Driver pleaded guilty to impaired driving causing bodily harm — Defendants admitted liability for accident but alleged contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Jury reduced damage award by 35.5 percent for contributory negligence and trial judge endorsed jury's verdict — Appeal by plaintiff was allowed — Appropriate apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — Plaintiff raised issue of application of Victims' Bill of Rights, 1995 — Bill did not apply in this case — Section 4(6) of Bill provides that costs in favour of victim should be awarded on solicitor and client basis unless judge considers that to do so would not be in interests of justice — Bill came into force after accident and commencement of action, and is silent on whether it was intended to apply retroactively — Trial judge declined to order solicitor and client costs in case where victim was contributorily negligent and therefore not wholly innocent victim of crime — Trial judge was entitled to consider fact that plaintiff bore some responsibility for his damages — It was not reversible error for trial judge to conclude that in this case, it would not be in interests of justice to award higher scale of costs.

Civil practice and procedure --- Judgments and orders — Interest on judgments — Postjudgment interest — General principles

Plaintiff suffered serious brain injury in motor vehicle accident and brought action against driver, owner of vehicle, and tavern where both he and driver became intoxicated — Jury reduced damage award by 35.5 percent for contributory negligence by plaintiff, willing passenger who failed to wear seatbelt — Trial judge endorsed jury's verdict — On appeal by plaintiff, apportionment between plaintiff and tavern of 35.5 percent responsibility for his own injuries that jury attributed to plaintiff was 60 percent to plaintiff and 40 percent to tavern — Trial judge accepted that plaintiff should be denied 14 months of postjudgment interest because of his counsel's delay in delivering his bill of costs — Order denying postjudgment interest set aside — Under s. 129(1) of Courts of Justice Act, postjudgment interest normally runs from date of order — Court has discretion under s. 130(1), "where it considers it just to do so," to adjust postjudgment interest — Trial judge erred by misapplying conduct factor in s.

130(2)(f) and by failing to consider all factors in s. 130(2) in deciding what was just in circumstances — Although counsel's conduct in failing to deliver his client's bill of costs in timely manner caused extra postjudgment interest on judgment and on plaintiff's costs to accrue to plaintiff, postjudgment interest on defendants' costs was also accruing — To extent that defendants' costs exceeded plaintiff's costs, interest accruing in favour of defendants on difference would be deducted by them from amount owing to plaintiff for damages and interest accruing on that amount — Defendants knew that significant amount was owing on judgment and could be paid with impunity to stop postjudgment interest from accruing — Complete denial of postjudgment interest on entire amount of judgment and costs for 14 months while allowing postjudgment interest to continue to accrue on defendants' costs imposed unwarranted penalty on plaintiff and conferred corresponding benefit on defendants.

Table of Authorities

Cases considered by *Feldman J.A.*:

Crocker v. Sundance Northwest Resorts Ltd. (1988), 44 C.C.L.T. 225, [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321, 86 N.R. 241, 29 O.A.C. 1, 64 O.R. (2d) 64n, [1988] R.R.A. 444, 1988 CarswellOnt 962, 1988 CarswellOnt 744 (S.C.C.) — referred to

Despres v. Nobleton Lakes Golf Course Ltd. (1994), 5 M.V.R. (3d) 25, 1994 CarswellOnt 29, [1994] O.J. No. 1166 (Ont. Gen. Div.) — referred to

Hague v. Billings (1993), 15 C.C.L.T. (2d) 264, 64 O.A.C. 219, 46 M.V.R. (2d) 254, 102 D.L.R. (4th) 44, 13 O.R. (3d) 298, 1993 CarswellOnt 32 (Ont. C.A.) — referred to

Holton v. MacKinnon (2005), 2005 BCSC 41, 2005 CarswellBC 63 (B.C. S.C.) — referred to

Kidd Creek Mines Ltd. v. Northern & Central Gas Corp. (1988), 29 C.P.C. (2d) 257, 30 O.A.C. 146, 66 O.R. (2d) 11, 1988 CarswellOnt 461, 53 D.L.R. (4th) 123 (Ont. C.A.) — referred to

Laface v. McWilliams (2005), 2005 BCSC 291, 2005 CarswellBC 519, 14 M.V.R. (5th) 162, 29 C.C.L.T. (3d) 219 (B.C. S.C.) — referred to

Lum (Guardian ad litem of) v. McLintock (1997), 1997 CarswellBC 2370, 45 B.C.L.R. (3d) 303 (B.C. S.C.) — referred to

Menow v. Honsberger (1973), *(*sub nom. *Jordan House Ltd. v. Menow (Can.))* 38 D.L.R. (3d) 105, [1974] S.C.R. 239, 1973 CarswellOnt 230, 1973 CarswellOnt 230F (S.C.C.) — considered

Sambell v. Hudago Enterprises Ltd. (1990), 1990 CarswellOnt 2877 (Ont. Gen. Div.) — referred to

Schmidt v. Sharpe (1983), 27 C.C.L.T. 1, 1983 CarswellOnt 714 (Ont. H.C.) — referred to

Somers v. Fournier (2002), 2002 CarswellOnt 2119, 214 D.L.R. (4th) 611, 60 O.R. (3d) 225, 12 C.C.L.T. (3d) 68, 22 C.P.C. (5th) 264, 27 M.V.R. (4th) 165, 162 O.A.C. 1 (Ont. C.A.) — referred to

Stewart v. Pettie (1995), 23 C.C.L.T. (2d) 89, 25 Alta. L.R. (3d) 297, [1995] 3 W.W.R. 1, [1995] 1 S.C.R. 131, 177 N.R. 297, 8 M.V.R. (3d) 1, 121 D.L.R. (4th) 222, 162 A.R. 241, 83 W.A.C. 241, 1995 CarswellAlta 1, 1995 CarswellAlta 406 (S.C.C.) — considered

ter Neuzen v. Korn (1995), [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, [1995] 3 S.C.R. 674, 11 B.C.L.R. (3d) 201, 127 D.L.R. (4th) 577, 1995 CarswellBC 593, 1995 CarswellBC 1146 (S.C.C.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 129(1) — considered

s. 130(1) — considered

s. 130(2) — considered

s. 130(2)(f) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Victims' Bill of Rights, 1995, S.O. 1995, c. 6

Generally — referred to

s. 4 — considered

s. 4(6) — considered

Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.03(1) "judgment" — considered

R. 49 — referred to

R. 49.10(2) — referred to

ADDITIONAL REASONS to judgment reported at *Pilon v. Janveaux* (2005), 203 O.A.C. 345, 22 M.V.R. (5th) 223, 2005 CarswellOnt 5660 (Ont. C.A.), allowing appeal by plaintiff from endorsement of jury's verdict regarding apportionment of liability in action for damages for personal injury arising from motor vehicle accident.

***Feldman J.A.*:**

1 Following the release of its reasons for judgment in this matter, the court received further submissions on the issue of the proper apportionment as between the appellant and the respondent, Mattawa Inns Inc., of the responsibility the jury assigned to the appellant for his contributory negligence.

2 The court is now able to make that apportionment and deal with the outstanding issues of trial costs and postjudgment interest.

Apportionment Between the Appellant and Mattawa Inns Inc.

3 The trial judge accepted the respondents' submission that, because the respondents collectively admitted 100% responsibility for the accident, the jury's only task was to quantify the appellant's contributory negligence that caused or contributed to his damages. The jury was asked to separately quantify two aspects of the appellant's negligence: (1) his failure to take reasonable precautions for his own safety by becoming intoxicated and accepting a ride with an intoxicated driver, the respondent Glen Janveaux; and (2) his failure to wear his seatbelt. The jury apportioned 17.5% responsibility to the appellant for failing to take reasonable precautions for his own safety and 18% for failing to wear his seatbelt. In the result, the jury attributed a total of 35.5% of the damages to the contributory negligence of the appellant.

4 What the jury was not asked was to determine to what extent, if any, the respondent tavern that served the two men, was responsible, not for the accident (for which it admitted liability), but for contributing to the appellant's damages and effectively to his contributory negligence by over-serving him to the point of intoxication and thereby impairing his judgment with respect to accepting a ride with an intoxicated driver and failing to put on a seatbelt.

5 This brings into focus the distinction between the duty of care that a commercial host owes to its patrons who become intoxicated and unable to properly look after themselves, and the duty of care that a commercial host owes to third parties (including willing passengers) injured by a patron who becomes inebriated in its establishment. The Supreme Court of Canada first recognized the duty commercial hosts owe to their patrons in its 1974 decision in *Menow v. Honsberger* (1973), [1974] S.C.R. 239 (S.C.C.) where the inebriated patron left the bar and while walking home, was hit by a car. It was not until 1995 in *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.) that the Supreme Court extended the duty owed originally only to patrons, to certain third parties who might reasonably be expected to come into contact with an intoxicated patron and to whom that patron may pose some risk.

6 In these supplementary reasons, the court is only concerned with apportioning responsibility to the respondent tavern for the first kind of breach, that is, the duty of care it owed to the appellant *qua* patron — *i.e.* for over-serving him and diminishing his ability to look out for himself, which effectively contributed to his own negligent behaviour and to the damages he suffered.

7 In his written submissions, the appellant argues that his contributory negligence should be assessed at a minimal percentage, in part because the respondents did not satisfy their onus of proving that the appellant's failure to wear a seatbelt contributed to the extent of his injuries, and in part because of the evidence against the tavern. The court cannot give any effect to the first

part of this submission. The jury determined by its finding that the appellant's failure to wear a seatbelt did contribute to the extent of his injuries.

8 In their written submissions, the respondents provided case law suggesting that the range of degrees of responsibility that have been attributed to taverns that over-served drivers who caused accidents is between 10% and 50%: see *Hague v. Billings* (1993), 13 O.R. (3d) 298 (Ont. C.A.) (15%); *Despres v. Nobleton Lakes Golf Course Ltd.*, [1994] O.J. No. 1166 (Ont. Gen. Div.) (10%); *Sambell v. Hudago Enterprises Ltd.*, [1990] O.J. No. 2494 (Ont. Gen. Div.) (20%); *Schmidt v. Sharpe*, [1983] O.J. No. 418 (Ont. H.C.) (15%); *Holton v. MacKinnon*, [2005] B.C.J. No. 57 (B.C. S.C.) (15% to each of two taverns); *Lum (Guardian ad litem of) v. McLintock*, [1997] B.C.J. No. 2607 (B.C. S.C.) (30%); *Laface v. McWilliams*, [2005] B.C.J. No. 470 (B.C. S.C.) (50%). Based on these cases the respondents submitted that the appropriate level of the tavern's responsibility in this case is 15%.

9 However, the respondents suggest that the court now apply that percentage by apportioning responsibility among the respondents, attributing 49.5% to the Janveaux respondents and 15% to the respondent Mattawa, leaving the appellant with his 35.5% apportionment untouched. Again, the court cannot give effect to this submission. The issue is not apportionment among the respondents, who chose to determine that issue privately and to present a united approach for the purpose of the trial.

10 The issue that is raised on this appeal is that the jury was not asked to determine the amount, if any, of the appellant's percentage responsibility for contributory negligence that ought to have been attributed to the respondent tavern for its role in over-serving the appellant and thereby causing or contributing to his lack of judgment in accepting a ride with Glen Janveaux and not wearing a seatbelt. Unlike the cases cited by the respondents, in which the tavern was held liable for over-serving the driver only, in this case, the tavern is liable for its breach of duty for over-serving both the driver and the passenger. [1] Therefore, the jury should have been asked to apportion responsibility for the appellant's damages in four parts: (1) to the driver (and owner) of the vehicle; (2) to the injured passenger for his contributory negligence; (3) to the tavern for over-serving the driver; and (4) to the tavern for over-serving the passenger.

11 The respondent Mattawa over-served two people that evening, the driver, Glen Janveaux, and his passenger, Gilles Pilon. The tavern owners and the waitress who served both men were certified with the Server Intervention Program set up by the Addiction Research Foundation of Ontario to assist tavern personnel to evaluate and monitor patrons' drinking and to prevent intoxicated people from driving. Although Glen Janveaux was intoxicated, the evidence of the waitress was that he was not showing signs of impairment. Still, she said she offered to call a taxi for both men, but they refused. As between the tavern and the appellant, the tavern personnel had expertise in recognizing signs of impairment and knew how much they had served the men even though the driver did not appear to be impaired, while the appellant was himself intoxicated.

12 The issue of apportionment turns on the relative appreciation of risk: see *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 (S.C.C.); *Lum (Guardian ad litem of) v. McLintock*, *supra*; *Schmidt v. Sharpe*, *supra*. Of course, the appellant must bear significant responsibility for his own actions. However, the tavern ought also to bear some significant responsibility, and logically, it should bear a similar level of responsibility for allowing the passenger to become impaired as for the driver, subject to the additional factor that although the driver did not appear to be impaired, the tavern knew that he was. In this case, however, no one knows how the jury would have apportioned responsibility among the respondents; consequently, the court is not in a position to apply a similar percentage to the tavern for each of its breaches of the duty of care.

13 In the unique circumstances of this appeal, I am of the view that an appropriate apportionment between the appellant and the respondent tavern of the 35.5% responsibility for his own injuries that the jury attributed to the appellant is 60% to the appellant and 40% to the respondent tavern. This apportionment takes into account the fact that the appellant must ultimately be held accountable for his own actions but it is also attentive to the reality that the appellant's ability to look out for himself was compromised in part by the tavern over-serving him. Accordingly, while the appellant must bear the majority of the responsibility (*i.e.* 60%), the tavern is nonetheless assigned a significant percentage (*i.e.* 40%).

14 In the end result, this leaves the appellant responsible for 21.3% of the damages awarded and the respondents, collectively, responsible for 78.7%. This percentage includes the 14.2% responsibility (*i.e.* 40% of 35.5%) now attributed to the tavern for

its breach of duty in over-serving the appellant. It also includes an uncertain percentage for the tavern's breach of duty in over-serving Glen Janveaux, the driver. [2]

Costs of the Trial

15 Before the trial, the respondents delivered an offer to settle under Rule 49.10(2) of the *Rules of Civil Procedure* in the amount of $375,000 plus costs. Because the jury's verdict for general damages of $375,000 had to be reduced in order to accord with the upper limit (adjusted for inflation) set by the Supreme Court of Canada in *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 (S.C.C.), the trial judge concluded that the amount of the final judgment of $291,901.30, including prejudgment interest, was less favourable than the offer.

16 The trial judge did not err in this conclusion. The definition of the term "judgment" in Rule 1.03(1) provides that a judgment is "a decision that finally disposes of an application or action on its merits". In this case, the judgment was not the amount awarded by the jury, but the amount finally awarded by the trial judge plus the prejudgment interest. That was the amount contained in the formal judgment that finally disposed of the action (subject to appeal).

17 The amount of the judgment, recalculated on the basis of the adjusted apportionment of responsibility between the appellant and the respondent tavern with prejudgment interest added, is $356,096.24. That amount is still less favourable than the offer to settle. The result is that unless the court orders otherwise, the appellant must pay the respondents' costs from the date of the offer. The trial judge declined to exercise his discretion to order otherwise. There is no basis for this court to interfere with that exercise of discretion.

The Victims' Bill of Rights

18 The trial judge determined the costs entitlement issue on January 20, 2003, and ordered counsel for the parties to deliver their bills of costs within 30 days. The appellant's bill was not delivered until after July 21, 2004. On August 30, 2004, the trial judge heard submissions to fix the costs, but also to deal with a new issue raised by the appellant regarding the application of the *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6, and the issue of postjudgment interest, which was raised by the respondents because of the appellant's delay in delivering his bill of costs.

19 The *Victims' Bill of Rights* was enacted by the legislature in 1995, and applies to a victim ("a person who, as a result of the commission of a crime by another, suffers...physical harm... or economic harm...") of crime ("an offence under the *Criminal Code*"). Section 4 deals with civil proceedings where a victim of crime seeks redress from the person convicted of the crime. Section 4 provides guidelines that favour the victim for the ordering of security for costs and for the award of damages, costs and pre- and postjudgment interest. On the issue of costs, s. 4(6) provides that costs in favour of the victim should be awarded on a solicitor and client basis "unless the judge considers that to do so would not be in the interests of justice."

20 On the basis of this subsection, the appellant asked the trial judge to reconsider the award of costs and to award the appellant his portion of the costs on the higher scale. Although the respondent driver, Glen Janveaux, pled guilty to the *Criminal Code* offence of impaired driving causing bodily harm, the trial judge was concerned that it was not the intent of the legislature that the *Bill* apply to willing passengers who are injured when they accept a ride with a drunk driver. Accordingly, he declined to order solicitor and client costs in this case.

21 Although the issue was not raised by the parties, I question whether the *Bill* can apply in this case. The *Bill* did not come into force until 1996, while the accident, the conviction and the commencement of this action all occurred before 1996. The *Bill* is silent on whether it was intended to apply, in effect, retroactively in such circumstances. Although some aspects of s. 4 can be characterized as procedural, such as those dealing with costs and security for costs (see *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (Ont. C.A.)), others are substantive, such as those dealing with entitlement to damages, punitive damages and pre- and postjudgment interest (see *Somers*, *supra*; *Kidd Creek Mines Ltd. v. Northern & Central Gas Corp.* (1988), 66 O.R. (2d) 11 (Ont. C.A.)). It may be that the procedural aspects would apply retroactively, while the substantive ones would not.

22 However, because of the conclusion I have reached regarding the trial judge's costs ruling, it is not necessary for me to decide the retroactivity issue. The trial judge did not consider it appropriate to award the higher level of costs in a case where the victim was contributorily negligent and therefore not a wholly innocent victim of a crime. Because the appellant bears some responsibility for his damages, the trial judge was entitled to consider that factor in determining whether it was in the interests of justice to award the appellant the higher level of costs in this case. While I would not endorse the trial judge's language, *i.e.* that the higher scale of costs "would shock the conscience of the community and would bring the administration of justice into disrepute," applying the language of discretion used in s. 4(6) of the *Bill*, it was not reversible error for the trial judge to conclude that in this case it would not be in the interests of justice to award the higher scale of costs.

Postjudgment Interest

23 The trial judge accepted the position of the respondents that the appellant should be denied 14 months of postjudgment interest due to his counsel's delay in delivering his bill of costs. The argument that was accepted was that because the costs awarded to the respondents as a result of the Rule 49 offer to settle were likely to amount to more than the costs owing to the appellant, without knowing the amount fixed for costs the respondents could not calculate the amount ultimately owing to the appellant on the judgment and therefore could not make a meaningful advance payment. Because the delay was entirely the fault of the appellant, the trial judge found that "[i]t would be unjust for the plaintiff to recover postjudgment interest during that period of delay." Consequently, the appellant was denied postjudgment interest from May 10, 2002, the date of the judgment, until July 10, 2003, 14 months later, on the whole of the judgment and the costs awarded to him, while the respondents were awarded postjudgment interest on their portion of the costs throughout that period.

24 Section 129(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 is the normal rule and provides that postjudgment interest on "[m]oney owing under an order, including costs to be assessed or costs fixed by the court" runs from the date of the order. Section 130(1) gives the court discretion, "where it considers it just to do so," to adjust postjudgment interest on all or part of the money ordered (including costs) by disallowing postjudgment interest, changing the rate or changing the length of the postjudgment interest period.

25 Section 130(2), in turn, sets out the factors a court is obliged to consider in deciding to adjust postjudgment interest. Those factors are:

> (a) changes in market interest rates;
>
> (b) the circumstances of the case;
>
> (c) the fact that an advance payment was made;
>
> (d) the circumstances of medical disclosure by the plaintiff;
>
> (e) the amount claimed and the amount recovered in the proceeding;
>
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
>
> (g) any other relevant consideration.

26 The trial judge's reason for disallowing postjudgment interest on the judgment and on the appellant's costs for 14 months is contained in his statement:

> In this case, the right of entitlement of the plaintiff to be paid postjudgment interest on the basis that the defendants have had the use of the money is trumped by the fact that the period of delay in question is attributable solely to the plaintiff. I therefore find that this is a proper case in which to exercise my discretion under s. 130(1)(a) of the *Courts of Justice Act* to disallow postjudgment interest on the judgment for a period of 14 months.

27 As I have said, the normal rule is that postjudgment interest will run in accordance with s. 129(1) from the date of the order. The legislature gave trial judges the discretion to depart from the normal rule where it would be just to do so or, looked at the other way, where it would be unjust to allow the normal rule to operate. The normal rule reflects the fact that interest is compensatory and that from the time money is owed by one party to another, interest accruing on the money belongs to the creditor party.

28 The trial judge in this case concluded that it would be unjust for the appellant to receive postjudgment interest during the 14-month period of delay on any of the money owed to him, because it was his counsel's conduct that prevented the respondents from ascertaining the amount of money properly payable to him. This, in turn, prevented them from making an advance payment on that amount. The trial judge concluded that the compensatory nature of postjudgment interest was "trumped" by the delay.

29 In my view, with respect, the trial judge erred by misapplying the conduct factor in s. 130(2)(f) and by failing to consider all the factors in s. 130(2) in deciding what was just in the circumstances. Although counsel's conduct in failing to deliver his client's bill of costs in a timely manner did cause extra postjudgment interest on the judgment and on the appellant's costs to accrue and be payable to the appellant, at the same time postjudgment interest on the respondents' costs was also accruing. Therefore, accruing interest on both sets of costs would be set off. To the extent that the respondents' costs exceeded the appellant's costs, the interest accruing in favour of the respondents on the difference would be deducted by the respondents from the amount owing to the appellant for damages and the interest accruing on that amount.

30 Although the appellant's counsel's failure to deliver his client's bill of costs meant that the respondents did not know the exact amount they owed the appellant, they knew that a significant amount was owing on the judgment and could be paid with impunity in order to stop postjudgment interest from accruing.

31 Consequently, although counsel's failure to deliver the bill of costs in a timely way was conduct that could attract some sanction, such as a denial of a portion of costs, the complete denial of postjudgment interest to the appellant on the entire amount of the judgment and costs for 14 months while allowing postjudgment interest to continue to accrue on the respondents' costs imposed an unwarranted penalty on the appellant and conferred a corresponding benefit on the respondents that were not in accordance with a full and balanced application of the factors set out in s. 130(2), and amounted to an error in law.

32 Accordingly, I would set aside the trial judge's ruling on postjudgment interest. In these circumstances, it is again unnecessary to consider the applicability of the *Victims' Bill of Rights* on this issue.

Conclusion

33 I would allow the appeal as follows:

(i) The apportionment as between the appellant and the respondent tavern, Mattawa, of the amount attributed by the jury to the appellant for contributory negligence will be 60% to the appellant and 40% to the respondent tavern; and

(ii) The order denying postjudgment interest to the appellant for 14 months will be set aside.

34 I would dismiss the appeal on the issue of the level of costs to be awarded to the appellant.

35 The costs of the appeal have previously been awarded to the appellant, fixed at $50,000.

***Cronk J.A.*:**

I agree.

***Juriansz J.A.*:**

I agree.

Order accordingly.

Footnotes

1 It should be noted that in three of the cases cited by the respondents, namely *Sambell v. Hudago Enterprises Ltd., supra, Schmidt v. Sharpe*, *supra*, and *Holton v. MacKinnon*, *supra*, the defendant tavern also served alcohol to the plaintiff passenger who was ultimately injured in the accident, and was held to be contributorily negligent; however, in those cases, no amount of responsibility was apportioned to the tavern for any breach of duty to the passenger in this regard.

2 As noted above, the percentage responsibility assigned to the tavern for its role in over-serving Glen Janveaux is uncertain because at trial the jury was not asked to apportion responsibility among the respondents.

End of Document

TAB 13

In the Court of Appeal of Alberta

Citation: Capital Power Corporation v Alberta Utilities Commission, 2018 ABCA 437

Date: 20181220
Docket: 1501-0036-AC;
1501-0039-AC;
1501-0040-AC
Registry: Calgary

Docket: 1501-0036-AC

Between:

Capital Power Corporation

Applicant

- and -

**Alberta Utilities Commission, Milner Power Inc.
and ATCO Power Ltd.**

Respondents

Docket: 1501-0039-AC

Between:

Enmax Energy Corporation

Applicant

- and -

**Alberta Utilities Commission, Milner Power Inc.
and ATCO Power Ltd.**

Respondents

Docket: 1501-0040-AC

Between:

TransAlta Corporation

Applicant

- and -

**Alberta Utilities Commission, Milner Power Inc.
and ATCO Power Ltd.**

Respondents

Corrected judgment: A corrigendum was issued on November 9, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall**

Permission to Appeal

Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall

Introduction

[1] Pursuant to section 29 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2, Capital Power, EnMax, and TransAlta Utilities applied for permission to appeal a 2015 decision of the Alberta Utilities Commission (*Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology* (20 January 2015), 790-D02-2015, online: www.auc.ab.ca [Decision 790-D02-2015]). In that decision the Commission decided that it had the jurisdiction to grant relief to correct for the payment of unlawful transmission line loss charges which the Commission found in a prior decision were unjustly discriminatory and in contravention of the *Electric Utilities Act*, SA 2003, c E-5.1 and the *Transmission Regulation* governing the recovery of the cost of transmission line losses on the Alberta interconnected electric system (*Complaint by Milner Power Inc. Regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology* (16 April 2012), 2012-104, online: <www.auc.ab.ca> [Decision 2012-104]).

[2] Section 29(1) of the *Alberta Utilities Commission Act* provides that an appeal lies from a decision of the Commission on a question of jurisdiction or on a question of law if permission to appeal is granted by a judge of this Court.

[3] On an application for permission to appeal, the applicant must show that the Commission decision raises significant unanswered questions of law or of the Commission's jurisdiction which requires the Court of Appeal to settle. Alternatively, the applicant must show that the Commission erred in its application of settled legal principles or that it exceeded its jurisdiction.

[4] The applicants argue that the Commission erred in law and jurisdiction because it engaged in impermissible retroactive ratemaking when it found that it had jurisdiction to adjust the transmission line loss charges levied under the Alberta Electric System Operator's tariff retroactive to January 1, 2006, the date the line loss rule came into effect.

Background

[5] In Alberta, electricity is generated at various locations throughout the province. West of Edmonton near Lake Wabamun there are a number of coal-fired plants. Other coal-fired generating facilities are located on the Battle River near Forestburg and at Sheerness south of Hanna. In Calgary and Edmonton, there are gas-fired plants. The respondent, Milner Power Inc. (Milner Power) has a dual power (coal and natural gas) generating plan north of Grande Cache. Transmission lines and distribution lines convey the electricity from these plants to those who use the electricity. When electricity is transmitted along lengthy transmission lines, some of the energy is lost because of the electrical resistance in the lines and transformer wiring. Line losses vary with

the length of the line. The closer the generation facility is to load, the less the line losses. Losses also vary according to the magnitude of the flow of electricity on the lines. The more electricity which is put onto a transmission line at any given time, the greater the line losses.

[6] By statute, the cost of transmission lines losses is required to be borne by the generators of electricity collectively. But individual generators bear their share of that cost based on certain prescribed factors which are intended to reflect their contribution to the line losses. The *Electric Utilities Act* prescribes the bases upon which the line loss costs are borne. In general terms, the *Act* requires that line losses are allocated on the basis of the location of the generating facility and on that generating facility's contribution to the overall line losses. All generators who transmit electricity over the Alberta interconnected system cause line losses and are charged for those losses, but some generators pay more than others because of the location of their generating facilities relative to load or because the timing of their dispatch of electricity contributes to greater line losses. Other generators receive credits against their line loss charges because of the location of their generating facilities and the way they operate them.

[7] To fairly allocate line losses and line loss reductions, methodologies had to be developed to fairly distribute the costs. The Independent System Operator (ISO) is responsible for managing, allocating and recovering the costs of transmission line losses. It is mandated to make rules incorporating methodologies which reasonably and fairly recover the cost of transmission line losses on Alberta's interconnected electric system. The ISO does this by establishing loss factors for each generating unit. The actual recovery of the cost of line losses is achieved through the imposition of an ISO tariff. That is, the cost of the line losses is recovered through an ISO tariff which is paid by the electricity generators and which is subject to Commission approval. The tariff incorporates the ISO's line loss rule and the rule establishes loss factors for each generating unit.

[8] After a complaint by Milner Power and a major hearing involving most of the province's electricity generators, the Commission found that the ISO's methodology for calculating line loss factors, and hence the charges or the credits that each generator must pay or receive, was unlawful in that it was unjustly discriminatory and did not comply with legislated guidelines for determining such line loss factors (Decision 2012-104).

[9] Pursuant to its power to manage and recover the cost of transmission line losses, the ISO is authorized to make rules respecting the operation and use of the interconnected electric system. When it makes such rules, it must obtain Commission approval. A generator may object to an ISO rule to the ISO itself; but if that generator is not satisfied with ISO's response to its objection, it may complain to the Commission about the ISO rule. A generator who has made a timely objection to an ISO rule may also have the option of challenging the ISO tariff it is charged for transporting its electricity on the basis that the line loss component of the tariff, calculated in accordance with the ISO's line loss rule, is unfair.

[10] In this case, Milner Power complained in August of 2005 to the Commission about ISO's rule respecting the calculation and determination of transmission line loss factors which was to come into effect January 1, 2006. It also sought to object to the ISO tariff which included a charge for line losses based on the ISO rule which Milner Power had objected to.

[11] Section 25(1) of the 2003 *Electric Utilities Act* (which was in force between June 1, 2003 and April 19, 2007) provided that any person could complain to the Energy and Utilities Board (now the Alberta Utilities Commission) about an ISO rule. Upon receipt of such a complaint the Board could decline to investigate if it considered the complaint did not warrant investigation or it could hold a hearing of the complaint. The Board initially declined to investigate or hold a hearing of Milner Power's complaint. It also declined to consider Milner Power's objection to the ISO tariff which incorporated the impugned rule. The Commission summarily dismissed Milner Power's complaint in December of 2005 on the grounds that it was not warranted because, in the Commission's view, the complaint had been addressed through the ISO's rule making process which involved consultation with market participants. After a failed judicial review application of that summary dismissal, Milner Power sought and obtained the permission of this Court to appeal the Board's decision. Milner Power's appeal was successful and the Board's decision was vacated (*Milner Power Inc v Alberta (Energy and Utilities Board)*, 2010 ABCA 236, 482 AR 327). This Court directed the Board to investigate or hold a hearing to determine whether the ISO rule contravened section 19 of the *Transmission Regulation*, Alta Reg 174/2004, as alleged. As a result of that ruling, a hearing was held by the Commission in October of 2011.

[12] Section 25(6) of the 2003 *Electric Utilities Act* stated that upon the Board hearing such a complaint, it might determine the justness and the reasonableness of the ISO rule and, depending on what it determined, the Board could confirm or disallow the rule and, if it disallowed it, the Board could direct the ISO to change the rule. What section 25(6) did not state expressly was that the Board could direct the ISO to reimburse a market participant for any line loss charges paid; although the section did state that the Board could direct the ISO to reimburse a market participant any "fee" paid to it. To be clear, an ISO fee is something separate and apart from costs and expenses recovered under the ISO tariff (Section 21(1)(c)). But it does indicate a legislative intent that there be no blanket prohibition on the reimbursement of certain charges.

[13] The grounds for Milner Power's complaint were that the line loss rule contravened the *Transmission Regulation* made pursuant to the *Electric Utilities Act* and that the rule was otherwise unjust, unreasonable, unduly preferential and arbitrarily or unjustly discriminatory. Specifically, Milner Power's complaint was that the line loss factors for each generating unit in ISO's line loss rule were not based on their locations or their contributions to the electric system's line losses, as required by section 19(1)(a) of the *Transmission Regulation*. Section 19(1)(a) of the *Transmission Regulation* under the *Electric Utilities Act* which compels the ISO to make rules to "reasonably recover the cost of transmission line losses … by establishing and maintaining loss factors for each generating unit based on their location and their contribution, if at all, to transmission line losses."

[14] In having its rules and line loss charges and credits subject to Commission scrutiny, the ISO is in a position somewhat analogous to that of a regulated utility, although its only "customers" or "ratepayers" are the province's power generators who are not so much paying for a service that the ISO provides as they are paying the cost of losses they "cause". The ISO submits its line loss recovery rule to the Commission for approval. And if there is a complaint, the Commission then evaluates the rule to determine whether it complies with the *Transmission Regulation* or is otherwise unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of the *Electric Utilities Act* or the regulations thereunder (so long as the complaint warrants such an evaluation).

[15] Following the Commission's hearing of Milner Power's complaint about the ISO line loss rule, which had industry-wide participation, the Commission concluded that the ISO line loss factors, which were the product of the rule, did not comply with the requirements of section 19 of the 2004 *Transmission Regulation* because they not only failed to measure the contribution of each generating facility to the transmission system's line losses, but they also had little regard for the location of the individual generating facilities. Indeed, the Commission found that the line loss factors actually penalized generators who located their generation facilities next to their load. In the words of the Commission, "It [the line loss rule] neither captures the generator's contributions, nor rewards it for its locational choice." Additionally, the Commission concluded that the ISO's line loss factors did not reflect each generator's impact on average system losses as required by section 19(2)(d) of the *Transmission Regulation*.

[16] The Commission found that ISO's methodology for determining line loss factors unjustly discriminated against generators who were lowering line losses by over-charging them and unduly crediting those causing the greater losses. The Commission found the ISO's line loss rule "unjust, unreasonable, unduly preferential, arbitrarily and unjustly discriminatory" pursuant to section 25(6)(b). The Commission expressly found the ISO line loss rule to be unlawful.

[17] The Commission's decision was essentially declaratory. The Commission deliberately refrained from ordering a remedy. It did not order the ISO to revoke or change the ISO rule pursuant to s. 25(6)(b). The Commission stated that it had not made any determination related to the options available to it under section 25(6) of the 2003 *Electric Utilities Act*, including "any potential claim to compensation".

[18] Prior to the complaint hearing, the Commission decided to bifurcate the proceedings into two phases. The first phase was to consider whether the line loss rule contravened s. 19 of the 2004 *Transmission Regulation* or was otherwise unlawful. The second phase was to determine the appropriate relief, if any, should Milner Power's complaint be upheld.

[19] No appeal was taken from the Commission's decision declaring the line loss rule unlawful; but no sooner had the ink dried on the decision that the ISO, TransAlta, Capital Power and TransCanada Energy sought a review and variance of it.

[20] Also, following the Commission's decision in April of 2012, Milner Power submitted a second complaint to the Commission with respect to a new line loss rule the ISO submitted for Commission approval and which took effect on January 1, 2009. ATCO Power Ltd. (ATCO Power) filed a similar complaint. The new line loss rule continued to utilize the same methodology as that which took effect in January of 2006 and which the Commission subsequently declared unlawful in 2012.

[21] The Commission decided to entertain the review and variance applications referred to above. A review panel was made up of Commission members other than those who had initially decided that the line loss rule was unlawful. Notably, the Commission's Chair joined the review panel. Following the review and variance hearing in October of 2013, the Commission issued a decision in April of 2014 in which the review panel concurred with the hearing panel's finding that the ISO's line loss methodology did not comply with sections 19(1)(a) and 19(2)(d) of the 2004 *Transmission Regulation* because it failed to assign to each generating unit a line loss charge or credit based on each generating units' contribution to transmission line losses based on each generating unit's impact on average system losses relative to load. The review panel also concurred with the hearing panel's finding that the ISO's line loss rule's methodology was unjust because it disadvantaged loss savers and did not properly charge loss creators for their losses. The review panel found the methodology to be unjustly discriminatory in that it violated basic principles of rate design that would normally be observed in a regular rate or tariff proceeding.

[22] The review panel then indicated that the Commission would proceed with the second phase of its consideration of Milner Power's complaint to determine what, if any, remedy might be given for the unlawful line loss rule and charges. Recall that the Commission bifurcated the hearing of Milner Power's complaint into two phases: the first to determine whether the ISO's line loss rule contravened section 19 of the *Transmission Regulation*; the second to determine what remedy, if any, could be awarded to Milner in the event the Commission found the line loss rule to contravene the Regulation.

[23] Significantly, no appeal was taken of the Commission's decisions declaring the line loss rule and the line loss component of the ISO tariff unlawful. That is, as of April 2014, following the release of the Commission's review and variance decision, all market participants were aware that the line loss rule was unlawful in that it did not comply with the *Transmission Regulation* and was unjust, unreasonable, unduly preferential, arbitrarily and unjustly discriminatory in contravention of the 2003 *Electric Utilities Act* and had been since January of 2006. Even though the test to be met by complainants challenging an ISO rule was changed in 2008 (s. 25(4.1) of the 2003/2007 *Electric Utilities Act*), none of the applicants for permission to appeal the Commission's remedy decision argued that the line loss rule would survive a complaint under the new test. The Commission's determination that the line loss rule was unlawful was accepted by all market participants.

[24] In August of 2014, following the review panel's decision confirming the hearing panel's declaration and after canvassing the parties, the Commission decided that the second phase (to determine what remedy, if any, would be granted) would be further subdivided into three modules. The first, Module "A", was to deal with whether any remedy can or should be granted to retroactively or retrospectively adjust the unlawful credits and charges. The second, Module "B", was to develop a new line loss rule should the Commission decide that it had the jurisdiction to order a remedy. The third, Module "C", was to determine the actual line loss charges and credits for each of the province's electricity generators during the time the unlawful line loss rule or rules were in place.

[25] So, the issue to be determined in the first of the second-phase hearings was whether the Commission had the jurisdiction to order a remedy or relief to correct for the payment of unlawful line loss charges or the receipt of unlawful line loss credits during the time that the line loss rule was unlawful or non-compliant with the legislation. Put another way, the issue was whether the 2003 *Electric Utilities Act* or the 2007 amendments to that Act permitted the Commission to order a remedy or relief to correct for the payment or receipt of unlawful line loss charges or credits over any period of time in respect of which the Commission found the line loss rule to have been non-compliant. After receiving submissions from most of the major market participants, the Commission decided that it could order a remedy to correct for the payment of unlawful line loss charges by some generators and for the receipt of unlawful line loss credits by other generators of electricity. It is from this decision which Enmax, Capital Power, and TransAlta Utilities seek permission to appeal.

[26] The decision sought to be appealed is comprehensive and exhaustive, comprising 81 pages of text and another 60 pages of attachments. It was issued January 20, 2015 following receipt of written submissions from a number of parties, including the ISO, Milner Power (the original complainant), ATCO Power (a subsequent complainant) and the three companies currently seeking permission to appeal, Enmax, Capital Power and TransAlta Utilities.

[27] In its decision, the Commission decided that it had the authority or jurisdiction "to order a remedy or relief to correct for the payment or receipt of unlawful line loss charges and credits included in the ISO tariff from January 1, 2006 (the date the unlawful line loss rule and associated line loss charges in the ISO tariff first came into effect) to the date the new rule takes effect. The Commission's findings were as follows:

1. The non-compliant provisions of the 2005 line loss rule were found to have been non-compliant with the *Electric Utilities Act* and the *Transmission Regulation* since January 1, 2006 and continued to be non-compliant.
2. Milner Power's complaint was found to have continued from the date of filing its initial complaint in August of 2005 to the present.

3. Milner Power's complaint satisfied the statutory requirements in section 25(6)(b) of the 2003 *Electric Utilities Act* for the Commission to grant relief [i.e., order the ISO to revoke or change its line loss rule] for the period from January 1, 2006 through 2008.
4. Milner Power's complaint against the line loss rule under the 2003 *Electric Utilities Act* would also satisfy the statutory requirements for the Commission to grant relief from January 1, 2009 to the present under either the 2003 *Electric Utilities Act* or the 2007 *Electric Utilities Act*. Section 25(6) of the 2003 *Electric Utilities Act* provided that the Board, now the Commission, could order the ISO to revoke or change a provision of an ISO rule that, in the Board's opinion, was unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of the 2003 Act or its regulations. Section 25(6) of the 2007 *Electric Utilities Act* also provided that the Commission could, after hearing a complaint, disallow an ISO rule; or it could direct the ISO to change the rule.
5. The 2003 *Electric Utilities Act* and the remedies available under it were found to apply to the Milner Power's complaint from the date it was filed to the present.
6. The Milner Power complaint about the line loss rule was found to be tantamount to a complaint or objection to the line loss charges in the ISO tariff. The line loss charges in the ISO tariff were found to have been unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with Alberta legislation since January 1, 2006 because they were the product of a line loss rule that was unjust, unreasonable, unduly preferential, and arbitrarily or unjustly discriminatory and inconsistent with or in contravention of the *Electric Utilities Act* and the *Transmission Regulation* since January 1, 2006.
7. The ISO line loss rule and the line loss components of the ISO tariff were characterized by the Commission as a "negative disallowance scheme". A negative disallowance scheme is one where the utility has the right to set its own tolls but grants the ratepayer the right to later challenge those tolls at which point the regulator has the power to retroactively vary those tolls and is therefore an exception to the general rule against retroactive ratemaking (*Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1758, 60 DLR (4th) 682). The applicants for permission to appeal take issue with the Commission's characterization of the ISO tariff as being a negative disallowance scheme.
8. Because the line loss rule and the line loss charge component of the ISO tariff derived from that rule are subject to a negative disallowance scheme, the Commission found that the ISO tariff was effectively interim and remained interim from the time it went into effect on January 1, 2006. It was conceded by all parties that when a utilities commission approves rates on an interim basis, such rates may be revised by final order retroactive to the date of the interim order. What was not

conceded by the applicants for permission to appeal was that the ISO tariff was effectively interim.

9. Critically, the Commission found that it was not impermissible retroactive ratemaking for it to grant a tariff-based remedy to correct for the payment or receipt of unlawful line loss charges and credits included in the ISO tariff from the date that the unlawful line loss rule went into effect on January 1, 2006.
10. The Commission found that it could grant a tariff-based remedy or relief under either the 2003 *Electric Utilities Act* or, if it were to apply, it could also do so under the 2007 *Electric Utilities Act*.

Summary of the Arguments of the Applicants for Permission to Appeal

[28] In its decision, the Commission summarized the positions of the parties objecting to the granting of relief and then dealt with each and every argument advanced against the Commission's jurisdiction to order a remedy or relief to correct for the payment or receipt of unlawful line loss charges and credits provided for in the ISO tariff during the period for which the Commission found the line loss rule to be non-compliant.

[29] A summary of the arguments of the applicants for permission to appeal the Commission's decision (Enmax, Capital Power and TransAlta) discloses that the applicants intend to advance the same arguments on appeal, if permission is granted, as they advanced before the Commission. The applicants seek to re-argue what they argued before the Commission, taking the position that their arguments raise questions of law or jurisdiction which only this Court can resolve. The applicants' arguments before me could be fairly summarized as follows:

1. They argued that prejudice would befall market participants if the Commission ordered retroactive remedies. Hundreds of millions of dollars in charges and credits were said to be at stake.
2. They argued that ordering a remedy a decade or so after the imposition of the charges would amount to impermissible retroactive ratemaking.
3. They argued that none of the exceptions to the prohibition on retroactive ratemaking apply. That is, they argued that
    a. there was no actual or constructive knowledge that rates might be subject to change,
    b. the *Electric Utilities Act* did not establish a negative disallowance scheme for the ISO tariff which might have permitted retroactive relief,
    c. the line loss rule prescribing line loss charges and credits was not an interim rate subject to change; and
    d. the line loss rule was not analogous to a utility deferral account.
4. They argued that the 2003 *Electric Utilities Act* could not apply to Milner Power's complaint after the 2003 Act was amended in 2007 (effective January 1, 2008).

> They argued that as of January 1, 2008, the 2007 *Electric Utilities Act* applied to a determination of available remedies and that section 25(9) of the 2007 Act, which provided that an ISO rule changed pursuant to a Commission direction to change the rule following the upholding of a complaint came into effect either when it is filed or some other date in the future, indicated a legislative intent to prohibit retroactive or retrospective remedies being granted for an unlawful line loss rule.

Test for Permission to Appeal

[30] Section 29(1) of the *Alberta Utilities Commission Act* states that an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of jurisdiction or a question of law. Section 29(2) requires that permission to appeal be obtained from a judge of the Court of Appeal.

[31] So there must be a question of jurisdiction or a question of law raised by the decision or order of the Commission.

[32] A "question" connotes the raising of doubt. So a question of law or jurisdiction would be the raising of doubt about a proposition of law or the taking of jurisdiction. A "question" connotes a problem of some practical importance requiring a solution. So unless there is a question or problem of practical importance requiring an answer, permission to appeal ought not to be granted because there is no basis for an appeal. Unless there exists a question of law or jurisdiction which has not already been authoritatively answered, no appeal lies.

[33] Various "tests" for granting permission to appeal have been posited by judges of this Court and they have been repeated by the parties seeking leave.

[34] These multi-pronged tests may not be tests at all. They simply posit factors which may be considered depending on the nature of the Commission's decision or order and the question of law or jurisdiction sought to be raised.

[35] The test for permission to appeal suggested by the statute itself is an unanswered question of law or jurisdiction. And that test logically leads to a consideration of the merits of the intended appeal. Have the applicants demonstrated that there is an unanswered question of law and/or jurisdiction which requires an answer from the Court of Appeal?

[36] The test of whether the intended appeal is *prima facie* meritorious may also trigger a consideration of what standard of appellate review would likely be applied should permission be granted. The more deferential the standard the less meritorious the intended appeal might be.

[37] The parties argue that another consideration is the significance of the question or questions to be raised to the Commission's function and perhaps even to the practice before the Commission.

Clearly, as stated above, the question, the problem requiring a solution, must be of some practical importance. Given the uniqueness of the facts of this case, I question whether this consideration would necessarily favour permission to appeal being granted.

[38] The applicants also argue that one of the tests is whether the appeal would unduly hinder the progress of the action. That is a consideration which may not help the applicants in this case because the challenge to the ISO's line loss rule, charges and tariff commenced in 2005 and has yet to be resolved. Granting permission to appeal would represent further delay and mounting prejudice to all market participants who are operating in an environment of regulatory uncertainty and uncertain liability.

Standard of Review

[39] A standard of review analysis in a decision by a judge hearing an application for permission to appeal is considered necessary because it is relevant to the issue of whether or not the applicants have raised a question of law or jurisdiction which requires an answer from the Court of Appeal. If, because of the deference required to be accorded to the decisions of the Commission, this Court must defer to the Commission's decision, then granting permission to appeal may not be appropriate.

[40] Clearly, the Commission in this case was deciding a jurisdictional question. Having found the 2006 ISO line loss rule to be unlawful, it was called upon to decide what, if any, remedy or relief it could grant. However, the fact that the Commission was engaged in deciding a jurisdictional question does not automatically mean that its decision raises a question or doubt about the Commission's jurisdiction.

[41] If, as some have argued, the decision of this Court in *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28, 566 AR 323 [*Salt Caverns II*] has already determined the standard of review for Commission ratemaking decisions, then the standard is one of the reasonableness. See also *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 at paras 26-28, [2015] 3 SCR 219 where the Supreme Court of Canada confirmed that a standard of reasonableness presumptively applies to the Commission's interpretation of its home statutes on questions of jurisdiction. But if, as all parties seem to agree, the facts of this case and therefore the decision the Commission was called upon to make were novel and complex, perhaps further analysis is in order.

[42] Enmax argues that the issues raised by the Commission's decision should be reviewed on a standard of correctness as they involve the Commission's interpretation and application of general law concerning temporal application of statutes, retroactive ratemaking and whether judicial precedents regarding retroactive ratemaking can be applied to retroactive rule making.

[43] TransAlta goes so far as to suggest that the Commission has no special expertise with respect to the questions of law or jurisdiction raised and therefore a correctness standard applies.

[44] Capital Power echoes Enmax's argument that the questions of law or jurisdiction raised by the Commission's decision are largely reviewable on a correctness standard. It argues that questions relating to the "common law prohibition" against retroactive ratemaking raise issues of "general law" outside of the Commission's rate-regulating mandate. Capital Power argues, by way of example, that the fact that the Commission had to apply the *Interpretation Act*, RSA 2000, c I-8 in order to make its decision shows that the Commission was dealing in matters on which it had no special expertise.

[45] Implicit in the applicants' arguments is the suggestion that the judiciary and the courts are the only articulators of authoritative and binding utility law. In particular, the suggestion is implicit in the argument that interpreting the "common law prohibition" against retroactive ratemaking is outside of the Commission's expertise. Where do the applicants think the common law prohibition against retroactive ratemaking came from? It came from roughly 100 years of public utility regulation and public utility board jurisprudence in this province and elsewhere in North America. Admittedly the courts have contributed to the development of the prohibition, invoking concepts such as the presumption against retroactive application of legislation. But it is important to understand that the underlying rationales for the prohibition were not derived solely from the common law, or statute law for that matter. The prohibition against retroactive ratemaking was derived from general principles of fairness, reliance, certainty and finality, which the common law recognized, but which existed independent of the common law. These are values which gained currency, not because of the law, but because they made sense in a fair and orderly society. Courts have no monopoly or special expertise when it comes to the application of principles of fairness. And that is what the Commission did in this case: it applied principles of fairness to a function (i.e., ratemaking) in respect of which it has special expertise.

[46] Commissions are not inferior tribunals governed by the courts. Statutory appeal provisions are not indicative of a supervisory role residing in the judiciary. The appeal provisions, and by extension this Court, are there to assist the Commission and those affected by its decisions by answering questions of law or jurisdiction which the Commission or those it regulates need answered by the Courts. This Court's function is to correct obvious errors of law and to serve as a check on the Commission's exercise of the powers conferred upon it by its enabling legislation. But it is the Commission which regulates the utilities, not the courts. Even if this Court were to vacate or vary the Commission's decision, sections 29(11)(c) and 29(14) of the *Alberta Utilities Commission Act* requires that the matter be referred back to the Commission for further consideration and redetermination.

[47] To argue that the fact that the Commission had to interpret and apply the *Interpretation Act* shows that it was dealing with matters on which it had no special expertise is to suggest that

accessibility to the law is limited to the courts. Administrative tribunals develop expertise not only in interpreting their home statute but also in interpreting statutes which regularly impact their functioning. Regulatory tribunals are often in a better position than a court to know how a piece of general legislation or how a common law principle ought to be interpreted in the context of their regulatory responsibilities.

[48] A deferential standard must be applied to even the "true jurisdictional issues" which the applicants say the Commission's decision raises, namely its jurisdiction to provide a remedy for an unjustly discriminatory tariff. The Commission's interpretation of its legislation and how the common law impacts on its function is certainly subject to review by this Court; but the question is whether the Commission's interpretation in this case ought to be reviewed. In deciding this question, one must accord the Commission deference. As this Court stated in *Milner Power Inc v Alberta (Energy and Utilities Board)*, 2010 ABCA 236 at paragraph 27:

> There is no doubt that the Board can decide questions of law. We also recognize that where a question of interpretation of law falls within the Board's expertise, deference may be owed to that interpretation.

Analysis

[49] In a typical rate case, the Commission must address two broad sets of questions: 1) the revenue requirement, and 2) rate-design issues. The revenue requirement of the ISO tariff is what it is. It is the cost of the losses of electricity caused by the transmission of the electricity. And that cost must be recovered on an annual basis. It is the rate-design phase which is engaged in these applications for permission to appeal the Commission's remedy decision. In the rate-design phase, if there is a complaint or an objection, the Commission must decide whether the ISO's proposed allocation of the cost of the line losses among the various electricity generators violates the statutory prohibition against being "unduly preferential, arbitrarily or unjustly discriminatory" or otherwise unlawful. That determination has been made and is no longer subject to review. The question now is can the Commission relieve those who paid more than their fair share of these unjustly discriminatory rates and surcharge those who did not pay their fair share?

[50] The remedy the Commission decided it would order was one which involved an adjustment of rates previously paid or avoided (not paid). In other words, the remedy the Commission chose was one which would effectively see a new rate, a new ISO tariff, imposed for the period of January 1, 2006 to the present. That is, the province's electricity generators would be charged and credited in accordance with a different methodology, a different rate design, from January 1, 2006 to the present.

[51] Ratemaking is a core function of the Commission and is at the heart of its expertise (*ATCO Gas and Pipeline Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 at para 27. And in performing that core function, the Commission's interpretation of legislation which governs it is also a part of

the Commission's expertise. Justice Paperny of this Court may have said it best in *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 at para 94, 389 DLR (4th) 1:

> [T]the interpretation of the Commission's home statutes and the policy choices necessary to ensure just and reasonable rates in light of these pronouncements are not general questions of law, nor are they outside the expertise of the Commission. To the contrary, they are specific to the Commission's mandate and, indeed, central to that mandate.

[52] In deciding whether permission to appeal ought to be granted, one must begin with an understanding that there is much more to the impugned Commission decision than questions of law or jurisdiction. The Commission's first and foremost mandate is to make decisions which are in the public interest. It must make policy choices it considers necessary to achieve the objectives of utility regulation. The Commission has a much better understanding of what those objectives are, but they would presumably include objectives such as setting just, reasonable and lawful utility rates for utility services, balancing the interests of rate payers and the owners of the utilities, encouraging efficiencies in the provision of utility services, encouraging a competitive market to the extent possible and ensuring that transmission line loss costs are shared appropriately by energy generators in accordance with legislated directives as to how those costs should be shared. Questions of law or jurisdiction, while important, are incidental to the achievement of the Commission's public interest objectives.

[53] And so when the Commission makes a decision on remedies which it says will achieve what it considers to be public interest objectives, courts should be hesitant to interfere. In this case, we not only have a decision which is based on a thorough canvassing of public interest considerations, but also a decision which contains a defensible legal analysis of the issue of whether the Commission's adjustment of charges previously paid or avoided constitutes impermissible retroactive ratemaking. Whether determinations regarding impermissible retroactive ratemaking are questions of fact as Justice Conrad of this Court suggested in *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28 at para 51 or questions of mixed fact and law, this Court should be loathe to interfere. There is no inextricable question of law here. The law governing impermissible retroactive ratemaking is clear. The Commission's decision does not turn on questions of law. It turns on the Commission's application of the law to the facts. Only if its application of the law to the facts is unreasonable ought permission to appeal be granted.

[54] The correctness of the legal analysis contained in any court or tribunal decision can always be debated. Even Supreme Court of Canada decisions are regularly the subjects of moots and academic criticism. Likewise, the Commission's legal analysis in this case can be debated. But the Commission's legal analysis is not of a type where a judge hearing an application for permission to appeal can say there is a serious question as to whether the analysis is correct. I might argue that

the Commission's legal analysis is absolutely correct. Others might argue that there is contrary authority. But what constitutes impermissible retroactive ratemaking in any particular regulatory context is a matter for the Commission to decide. The Commission is in a much better position that this Court to apply the law to the facts to determine whether the remedy or relief it is contemplating offends the proscription against retroactive ratemaking.

[55] The thrust of the applicants' argument is that the Board found it had jurisdiction to engage in impermissible retroactive ratemaking. But who better to determine whether the relief or remedy the Commission had in mind constituted impermissible ratemaking than the Board? That is not to say that the Board's determination can never give rise to a question or law or jurisdiction and thereby never be subjected to judicial review. The question is whether in this case the Commission's decision in this case gives rise to such questions.

[56] The issue before the Commission was whether it ought to order a remedy or relief to correct for the payment of unlawful line loss charges and for the receipt of unlawful line loss credits. The Commission's decision was that it was not impermissible retroactive ratemaking for the Commission to grant a tariff-based remedy to correct for the payment or receipt of the unlawful line loss charges or credits from the date the rule went into effect, January 1, 2006.

[57] In making its decision, the Commission carefully canvassed the jurisprudence governing retroactive ratemaking. In particular, the Commission dealt with some (but not all) the recognized exceptions to the prohibition against retroactive ratemaking:

1) adjustments to rates which may be properly characterized as interim;
2) the use of deferred accounts to deal with differences between forecast and actual costs and revenues;
3) changes to rates as a result of the operations of what is known as a negative disallowance scheme (where rates are set and charged by utilities subject to being later changed by the Commission because they were not "just and reasonable" in the first place);
4) changes to rates when affected parties knew or ought to have known that the rates were subject to change (the so-called "knowledge exception"); and
5) replacing rates in a tariff that have been determined to be a nullity.

[58] At the risk of over-simplifying the Commission's decision, while it dealt with all five exceptions for the purpose of determining the boundaries of its jurisdiction, the Commission relied primarily on its jurisdiction to change rates as a result of the operation of a negative disallowance scheme.

[59] That is, the Commission found that the legislative regime for disposing of complaints about ISO rules and for approving the ISO tariff was a negative disallowance regime and therefore an

exception to the rule against retroactive ratemaking. This is a finding which the applicants argue raises a question or law or jurisdiction.

[60] All parties agreed that the rule-making provisions of the *Electric Utilities Act* constituted a negative disallowance scheme, in that the ISO rule takes effect without prior Commission review or approval. A negative disallowance scheme implies a power to act retrospectively because the Commission is empowered to disallow a rule which has already been in place and acted upon for a period of time. However, the applicants for permission to appeal were of the view that the ratemaking provisions of the *Electric Utilities Act* constituted a positive approval scheme because the ISO tariff required Commission approval (i.e., a Commission determination that the tariff was just and reasonable) before it took effect. Having then been approved, they argue that it would be impermissible retroactive ratemaking to retrospectively disapprove a tariff found to be reasonable. The Commission, on the other hand, was of the view that although the ratemaking provisions of the *Electric Utilities Act* constituted a positive approval scheme, an ISO tariff was not like other tariffs in that it provided for a rate be charged to the holder of supply transportation services calculated in accordance with the ISO's line loss rule. Absent a complaint to the Commission, the Commission found that ISO rules are presumed to be compliant with the statutory requirements. The Commission found that it was unable to examine the justness or the reasonableness of a line loss rule and the line loss charge component of the ISO tariff unless there was an ISO rule complaint. The Commission concluded that the line loss charge component of the ISO tariff is therefore subject to a negative disallowance scheme, and not a positive approval scheme. There is certainly defensible logic in that reasoning.

[61] The Commission also invoked the knowledge exception to find it had jurisdiction to grant a retroactive tariff-based remedy. Relying on this Court's decision in *Salt Caverns II*, the Commission found that the province's electrical generators knew or ought to have known that the line loss charges in the ISO tariff might be subject to change once Milner Power filed its 2005 complaint against the ISO line loss rule and its objection to the line loss charges in the ISO tariff proceedings. The Commission summarily dismissed Milner Power's complaint about the rule and approved the ISO tariff which incorporated the rule in proceedings in which there was widespread utility industry participation. The dismissal of the complaint was later overturned by this Court, again with widespread utility industry participation. The Commission's finding that the province's electricity generators had knowledge very early in the piece that the rates were subject to retroactive or retrospective change simply cannot be credibly challenged. To quote the Commission's decision, 790-D02-2015, at paragraphs 206 and 207:

> [T]he Commission further finds as follows. First, the very nature of a negative disallowance scheme is such that once a complaint is made pursuant to that scheme, all affected parties must be taken to know two things: (1) that the object of the complaint (be it a tariff, a rule, or any part thereof) may change, and (2) if the complaint is upheld, not only may the object of the complaint change, it may change

> with retrospective effect to the date the complaint was first made. …under Canadian common law, two of the distinguishing attributes of a negative disallowance scheme are that once a complaint is made, the impugned rate may be subject to change and, if the complaint is upheld, the impugned rate may change effective the date the complaint was first made (unless the governing statute expressly provides otherwise). If this were not the case, the statutory design of, and legislative intention underlying such approval schemes would be frustrated, if not wholly undermined.
>
> Second, in the Commission's view, once affected parties become aware that rates (or rules) may change (by virtue of a complaint having been made pursuant to a negative disallowance scheme), such knowledge cannot be disavowed by virtue of (1) the complexity of the issues raised by the complaint; (2) uncertainty as to whether relief is available with retrospective effect, or only prospectively; (3) uncertainty as to the actual date upon which relief or compensation may be available; (4) uncertainty as to how compensation (if available) may be calculated; (5) uncertainty as to the magnitude of compensation, if available; (6) uncertainty as to which parties may receive and which parties may be required to pay compensation, if available; (7) the number of judicial and/or regulatory proceedings required to arrive at a final determination on the complaint; or (8) the total length of time it takes to reach a final determination on the complaint. Indeed, the Commission is of the view that much of the opposition to Milner's complaint since it was first filed has reflected a concern as to the possibility that tariff-based relief may be granted retroactively or retrospectively should Milner's complaint be made out.

[62] There may have been uncertainty, but there could be no reasonable reliance here as the applicants argued. Two inescapable facts support the Commission's finding that the applicants knew the tariff was subject to change. The first was Milner Power's complaint about the line loss rule in 2005 before it was approved by the Board. The second is that that approval was found to be unlawful by this Court. This Court held that the Commission should not have summarily dismissed Milner Power's complaint. The Commission should have heard it. And when the Commission hears a complaint, there is always the prospect that the complaint will be upheld. Once a complaint is upheld, something usually has to be done about it. Otherwise the complaint process is rendered ineffective. The applicants argue that what should have been done was change the impugned rule going forward. In my view, that is tantamount to doing nothing to address the complaint. But regardless of my view, the prospect of the Commission rejecting the applicants' argument and retroactively or retrospectively providing relief to those who had been improperly charged and credited was obvious to all. Indeed, it was that prospect the applicants fought so hard for so many years to prevent.

[63] With respect to the applicants' arguments that the Commission's decision violates the rule against retroactive ratemaking, the first point to be made is that the *Electric Utilities Act*, like most public utility statutes, does not expressly prohibit retroactive ratemaking. Indeed, there have been provisions in the Alberta *Electric Utilities Act* from time to time which expressly permitted retroactive ratemaking in certain situations. Among them, the "Retrospective tariff" provision in section 123, to name but one. Also, the "Review of tariff" section of the 2003 *Electric Utilities Act*, section 26, at one time actually did contain an express prohibition against retroactive ratemaking, but then proceeded to provide for exceptions. That section was repealed in 2007. Prior to its repeal, the provision permitted tariff reviews and variances during the period in which the tariff was intended to have effect where circumstances had changed in a manner that rendered continuation of the tariff unjust and unreasonable. Following the 2007 amendments and the repeal of section 126, one would be hard-pressed to find an express prohibition in the *Electric Utilities Act* against retroactive ratemaking, the applicants' argument based on section 25(9) of the 2007 *Electric Utilities Act* notwithstanding. Section 25(9) is dealt with below.

[64] The reason that there is no blanket prohibition against retroactive ratemaking is that there are decades of public utility board and judicial decisions variously applying the rule or declining to apply the rule depending on circumstances. See, for example, Professor Stefan Krieger's article entitled "The Ghost of Regulations Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings" (1991) 1991 Illinois L Rev 983. Professor Krieger discusses a century of what he characterized as "inconsistent and contradictory application of the traditional rule against retroactive ratemaking." Whether that is a fair characterization of the jurisprudence, no court or public utilities board will ever be able to define precisely the circumstances in which retroactive ratemaking is permissible. Nor is it desirable that they should do so. And, presumably, it has been deemed even less desirable to enact a blanket prohibition.

[65] The rule against retroactive ratemaking is applied when considerations of fairness, reliance, rate stability and certainty are engaged and given more weight than countervailing considerations. By way of examples, the rule is often not applied in the context of regulatory changes to accounting methodology, when obvious mistakes have been made in rate orders, when utilities experience extraordinary losses or gains or other exceptional (novel and complex) circumstances. It is often not applied when rate orders are quashed or reversed following judicial review. And it is often not applied when retroactive relief is granted by the utility regulator following a lengthy tariff proceeding or in cases of interim rates subject to change or in cases of deferral accounts employed to deal with differences between forecast and actual costs and revenues. There are other circumstances as well in which the rule is not applied. The list is not closed.

[66] The point being made is that the Commission's application of the rule against retroactive ratemaking is not so much a question of law but a question of whether or not a strict application of the rule in the circumstances of the case achieves sound utility regulation. The latter is not a question for this Court.

[67] In making its decision on remedy, the Commission was faced with a novel and complex set of circumstances, some of which were of its own making. First, it was presented with a complaint about ISO's line loss rule which it declined to hear and summarily dismissed. It also refused to entertain an objection it received to the tariff which was calculated using the rule, notwithstanding that it was alleged that the rule was unreasonable and unjustly discriminatory. Following an appeal to this Court, the Board was ordered to hear Milner Power's line loss rule complaint. The Commission then heard the complaint and found the line loss rule was indeed unreasonable, unjustly discriminatory and inconsistent with the *Electric Utilities Act* and Regulations. Having found the line loss rule to be unlawful, the Commission was then compelled to consider what, if any, remedy or relief it might grant to those who had paid the unlawful line loss charges, including Milner Power which had complained that the rule was not compliant right at the outset. Given that the cost of line losses has to be borne by a finite number of power generators, any relief given to those who paid too much by virtue of the unlawful rule meant others who paid too little would be assessed additional charges. And it was in response to that reality that the Commission resorted to utility regulatory principles of fairness, equity, encouraging efficiencies and a competitive market, etc. And having done so, it reasonably concluded that a retroactive or retrospective remedy was in the public interest.

[68] The applicants argued that the Commission was prevented from ordering such retroactive or retrospective remedy or relief by section 25(9) of the 2007 *Electric Utilities Act*. They argue section 25(9) of the 2007 Act, which was not in the 2003 Act, precludes any retrospective tariff or tariff-related remedy or relief on account of the unlawful line charges. Section 25(9) states as follows:

> (9) A change to an ISO rule filed under subsection (7) [an ISO rule changed by the Commission after hearing a complaint] comes into effect on the latest of
>
> (a) the day on which it is filed,
>
> (b) the day specified in the ISO rule, and
>
> (c) the day otherwise ordered by the Commission.

[69] The applicants argued that a changed ISO rule can only take effect prospectively and that the line loss charges required by that rule cannot be altered retroactively once they have been approved by the Commission in an ISO tariff proceeding, a positive approval regime which ordinarily does not permit retroactive ratemaking. But section 25(9) does not speak to the circumstance where the validity of the approval of the tariff based on the unlawful ISO rule was put in question by a decision of this Court. What this Court found was that the Commission's summary dismissal of Milner Power's line loss rule complaint was itself unlawful. And what the Commission found was that the line loss rule and the ISO tariff were unlawful. Was it not a

reasonable response to look at providing some relief to those who had borne more than the cost that the *Electric Utilities Act* required them to bear, particularly given the mandate of the Board to ensure that the charges were compliant, not just going forward, but at all times?

[70] What the Commission was presented with was an extraordinary situation, made more extraordinary by the effluxion of time. Adherence to the rule against retroactive ratemaking was rejected by the Board, but only after considering the principles which precipitated its adoption The Commission engaged in an assessment of the interests involved and concluded that adherence to the rule would not yield a just balance of the competing interests of the electrical generators or achieve the objectives of electricity regulation set for in the *Electric Utilities Act*. These kinds of assessments are not ones this Court is capable of making.

[71] The Commission found that acceptance of the applicants' argument would undermine meaningful review of ISO rules to which justifiable objections had been made. It would also undermine meaningful review of ISO tariffs which had been successfully challenged. It also found that acceptance of the applicants' argument would tend to reward regulatory delay by those benefiting from the unlawful *status quo*.

[72] The fact that the earliest date a line loss rule change directed by the Commission could become effective is when it is filed does not mean that the Commission has no power to change the charges and credits for line losses in an ISO tariff between the time a complaint was filed to the time a changed line loss rule was filed.

[73] The Commission found that section 25(9) of the 2007 *Electric Utilities Act* simply provides an effective date for a revised ISO rule. It does not change the Commission's authority to retroactively or retrospectively adjust the tariffed line loss charges flowing from an unlawful line loss rule so that the tariffs are just, reasonable, not duly arbitrarily or unjustly discriminatory and otherwise in compliance with the *Electric Utilities Act* and the *Transmission Regulation* as required by section 121(2) of the *Electric Utilities Act*. Nor does section 25(9) speak to what consequences if any, a Commission decision disallowing an ISO rule pursuant to section 25(6) of the *Electric Utilities Act* might permit the Commission to order. When a rule or tariff is disallowed, there are often consequences of that disallowance. In ordinary utility rate regulation, the disallowance of a charge may mean the ratepayer does not have to pay it or if it has already been paid, credit may be given for the payment. An analogous remedy in the case of a disallowed ISO rule might reasonably be some form of charge or credit to better reflect what a compliant rule might have provided.

[74] To conclude that, notwithstanding the uncontested illegality of the rates paid for transmission losses by the province's electricity generators since January 1, 2006, section 25(9) of the *Electric Utilities Act* prevented the Commission from providing a remedy would give precedence to a technical provision governing the effective date of an ISO rule change over the Commission's primary statutory mandate to ensure that tariffs, including ISO tariffs, are just and

reasonable and not unduly preferential, arbitrarily or unjustly discriminatory, or inconsistent with or in contravention of the *Electric Utilities Act* or any other Act or law for that matter (section 121(2) of the *Electric Utilities Act*).

[75] The applicants for permission to appeal point to the extraordinary length of time between promulgation of the line loss rule which dictated the amount of the ISO tariff and the Commission's decision that the rule was unlawful (2005 to 2012), and the effluxion of time between the declaration of invalidity and the Commission's decision to provide a form of retroactive relief (2012 to 2015), and the further effluxion of time until a compliant methodology for calculating line loss factors was determined (2015 to 2017). They argue that if Milner Power had obtained a stay of the impugned ISO rule back in 2006, the problem presented by the effluxion of time would have been avoided. They point to section 26(5) of the *Electric Utilities Act* which states that a complaint about an ISO rule does not relieve compliance unless the Commission otherwise orders, the argument being that Milner Power should have applied for an order relieving it of compliance. The Commission dealt with that argument indicating that a stay would have been problematic. The transmission line losses, by statute, must be recovered annually. To stay the charges industry-wide was out of the question. And a stay for the benefit of the applicant would simply mean that other generators would have to make up the shortfall. Also, as Milner Power pointed out, the fact is that it did apply, unsuccessfully, more than once, for an order staying the January 1, 2006 ISO rule. It sought an extension of ISO's 2005 loss factors until the Board ruled on its complaint. And it also requested a review of the Board's refusal to consider its complaint about the line loss charges in ISO's 2005/2004 general tariff application. The effluxion of time was not Milner Power's doing. But more importantly, the effluxion of time in these circumstances is not something that should preclude a remedy being given, keeping in mind that a remedy might simply involve an adjustment of payments and credits for line losses between and among the province's electricity generators. The *Electric Utilities Act* provides a system for allocating transmission line losses which attempts to require each generator to pay for its own line losses or for the line losses it causes the system to incur. To require a generator to pay for its own line losses, or for the line losses it caused but did not pay for, is not an unreasonable remedy. Nor can it be argued that it was a remedy that could not have been anticipated.

[76] The applicants argue that huge prejudice will befall market participants if the Commission's decision is allowed to stand. They say they made countless commercial decisions in reliance on the ISO line loss rule and tariff. The Commission found little evidence of that reliance and, in any event, found it to be unreasonable. It is difficult to see how this Court could overturn that finding of fact when it can only deal with questions of law or jurisdiction. But whatever the magnitude of the prejudice might be to those market participants who paid less than their required share of the cost of the line losses is presumably matched by the magnitude of the prejudice suffered by those who paid more than required.

[77] In summary, the argument that there is a jurisdictional question as to whether the Commission had the power to order a retroactive tariff-based remedy does not accord with the jurisprudence or the *Electric Utilities Act*, no matter what version is relied upon. Section 25(6)(b) of the 2003 *Electric Utilities Act* provided that the Board (now the Commission) could order the ISO to revoke a rule. Section 25(6)(d) of the 2007 *Electric Utilities Act* provides that the Commission may disallow an ISO rule. The power to revoke or a power to disallow a rule which has been in effect for years is clearly a power to make a retroactive order. Both Acts prohibit the ISO from putting into effect a tariff that has not been approved by the Commission. The Commission approved the impugned ISO tariff, but it did so unlawfully. It did not consider, as it was required to do by virtue of section 121(2) of the *Electric Utilities Act*, whether the ISO tariff was just and reasonable (notwithstanding Milner Power contended that it was not just and reasonable). After being directed by this Court to do so, the Commission later found that the line loss component of the ISO tariff was unjust and unreasonable. The tariff was unlawful. The question then was whether the Commission had the power to do anything about the fact that complaining market participants had been compelled to pay an unlawful (excessive) tariff. In my view, section 8(2) of the *Alberta Utilities Commission Act* provided it with all the authority it needed to provide relief. Section 8(2) provides that the Commission, in the exercise of its powers and the performance of its duties and functions (one of which was to ensure that tariffs charged are just and reasonable) may "act on its own initiative or motion" and do all things that are necessary or incidental to the exercise of its powers and the performance of its functions. Essentially the administrative law principle conferring jurisdiction by necessary implication has been incorporated in the Commission's enabling statute.

[78] For the foregoing reasons, I conclude that the Commission's decision that it could order a remedy or relief to correct for the payment and receipt of unlawful line loss charges and credits does not raise questions of law or jurisdiction which require an appeal to the Court of Appeal. Therefore the applications for permission to appeal are dismissed.

Other Related Applications for Permission to Appeal

[79] The applicants for permission to appeal the Commission's decision to order a remedy or relief to correct for the payment or receipt of unlawful line loss charges or credits also seek permission to appeal the Commission's subsequent decision approving a methodology for the calculation of line loss factors and determining which generators will receive invoices for line loss charges and which generators will receive credits (Decision 790-D06-2017). The applicants indicated that even if their applications for permission to appeal the Commission's decision to order a tariff-based remedy for the unlawful line loss charges was denied, they still wished to pursue their application for permission to appeal the Commission's decision approving a methodology for calculating line loss factors for the period January 1, 2006 to December 31, 2016 and determining which generators should receive invoices for additional line loss charges and

which generators should receive credits for line losses paid to the ISO. A decision on these applications for permission to appeal will be issued in the New Year.

[80] The respondents to the within application for permission to appeal, Milner Power and ATCO Power, together with Powerex Corp., seek to appeal a related decision of the Commission wherein it decided that Milner Power was not entitled to recover its costs of successfully advancing its complaint and wherein it also decided that the interest to be paid or credited to those power generators who did not pay or who overpaid for their line losses would be limited to the Bank of Canada's Bank Rate plus one and a half percent (Decision 790-D04-2016). A decision on these applications is also still under reserve but should be out in due course.

Application heard on May 31, 2018

Reasons filed at Calgary, Alberta
this 20th day of December, 2018

O'Ferrall J.A.

Appearances:

G. Tarnowsky, Q.C.
S.T. Kupi
for the Applicant, Capital Power Corporation

D.W. McGrath, Q.C.
M. O'Brien
for the Applicant, Enmax Energy Corporation

G.S. Fitch, Q.C.
L. Berg
for the Applicant, TransAlta Corporation

J.P.P. Mousseau
C. Wall (no appearance)
for the Respondent, Alberta Utilities Commission

L.L. Manning
M.S. Forster
for the Respondent, Milner Power Inc.

E.B. Mellett
M.H. Buchinski
for the Respondent, ATCO Power Ltd.

Corrigendum of the
Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall

Misspelling of "statute" in second sentence of paragraph 47 was corrected.