EB-2022-0140

ONTARIO BOARD OF ENERGY

BETWEEN:

HYRDO ONE NETWORKS INC.

Applicant

and

THE ROSS FIRM GROUP

Intervenor

INTERVENOR'S MOTION TO REVIEW AND VARY PROCEDURAL ORDER #1 AND DETERMINATIONS ON THE FILING OF EVIDENCE AND FORM OF HEARING

MOTION RECORD

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ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. ("**HONI**") pursuant to s. 92 of the Act for an Order or Orders granting leave to construct transmission line facilities (the "**Project**") in the West of Chatham area.

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 97 of the Act for an Order granting approval of the forms of land use agreements offered or to be offered to affected landowners. (the "**Application**").

EB-2022-0140

NOTICE OF MOTION TO REVIEW AND VARY PROCEDURAL ORDER #1 and DETERMINATIONS ON THE FILING OF EVIDENCE AND FORM OF THE HEARING

The Ross Firm Group (RFG) will make a motion to the Ontario Energy Board (The Board) at its offices at 2300 Yonge Street, Toronto, on a date and time to be fixed by the Board.

<u>PROPOSED METHOD OF HEARING:</u>

In the event other intervenors wish to join in the instant Motion, RFG submits the Motion should be held orally in order to allow the most efficient process for submissions and reply submissions. In the event no other intervenors wish to the instant Motion, RFG has no strong preference as to whether the Board hears the Motion orally or in writing.

<u>THIS MOTION IS FOR:</u>

1. An Order pursuant to s. 42 of the OEB Rules of Practice and Procedure, reviewing and varying the Procedural Order No. 1, schedules and attachments dated July 13, 2022 (PO1) to require HONI to lead evidence with respect to the preferred route AND route alternatives with respect the interests of consumers with respect to prices and the reliability and quality of electricity service.
    a. In the alternative, amend, pursuant to s. 4.03, the PO1 to require HONI to lead evidence with respect to the preferred route AND route alternatives with respect to the interests of consumers with respect to prices and the reliability and quality of electricity service.
2. An Order pursuant to s. 42 of the OEB Rules of Practice and Procedure, reviewing and varying the PO1 to allow intervenors to lead and test the evidence with respect to the

preferred route AND alternatives with respect to the interests of consumers with respect to prices and the reliability and quality of electricity service.

   a. In the alternative, amend pursuant to s. 4.03, the PO1 to allow intervenors to lead and test the evidence with respect to the preferred route AND alternatives with respect to the interests of consumers with respect to prices and the reliability and quality of electricity service.

3. An Order reviewing and varying the PO1 to submit further interrogatories with respect to the expanded evidence and issues list.

   a. In the alternative, amend pursuant to s. 4.03, PO1 to submit further interrogatories with respect to the expanded evidence and issues list.

4. An Order pursuant to s. 42 of the OEB Rules of Practice and Procedure, reviewing and varying the PO1 requiring HONI to file in whole or in part the Draft Environmental Study Report as it relates to the interests of consumers with respect to prices and the reliability and quality of electricity service.

   a. In the alternative, amend pursuant to s. 4.03, PO1 requiring HONI to file in whole or in part the Draft Environmental Study Report as it relates to the interests of consumers with respect to prices and the reliability and quality of electricity service.

5. An Order reviewing and varying the ‘Determinations on the Filing of Evidence and Form of Hearing’, dated August 5, 2022, as set out in paragraphs 1-4 hereof, where appropriate.

   a. In the alternative, amend pursuant to s. 4.03, the ‘Determinations on the Filing of Evidence and Form of Hearing’, dated August 5, 2022, as set out in paragraphs 1-3 hereof, where appropriate.

6. An Order reviewing and varying the ‘Determinations on the Filing of Evidence and Form of Hearing’, to provide for an oral hearing of the s. 92 Application.

   a. In the alternative, amend pursuant to s. 4.03, the ‘Determinations on the Filing of Evidence and Form of Hearing’, dated August 5, 2022, to provide for an oral hearing of the s. 92 Application.

7. In the further alternative, an Order reviewing and varying PO1 and the ‘Determinations on the Filing of Evidence and Form of Hearing’, allowing for additional time and scope for interrogatories which query alternate routes as relates to prices and the reliability and quality of electricity service.

8. An Order, pursuant to s. 40.01 and 42.01(b) staying the implementation of PO1 and the ‘‘Determinations on the Filing of Evidence and Form of Hearing’ until the determination of this Motion.

9. An Order that this Motion and the issues to be determined herein satisfy the "threshold test" pursuant to Rule 43 of the Board's Rules of Practice and Procedure.

10. An Order that this Motion does not need to meet the "Threshold Test" pursuant to Rule 43.02 of the Board's Rules of Practice and Procedure.

11. An Order that RFG be eligible for an award of costs on this Motion in accordance with the Board's Practice Direction on Cost Awards.

12. Such further and other Orders as counsel may advise and the Board may permit.

THE GROUNDS FOR THE MOTION ARE:

RELEVANT EVIDENCE NOT BEING CONSIDERED

13. The OEB made a material and clearly identifiable error of law and/or jurisdiction.

14. Specifically, the OEB has unduly scoped the issues and evidence in the Application in reliance on Order in Council 876/2022 dated March 31, 2022 (OIC), which OIC the OEB has interpreted in a manner that is overbroad and not consistent with the legislative authority afforded under s. 96.1(1) of the OEB Act, or the plain and ordinary language contained in the OIC itself.

    a. Section 96.1(1) provides that the Lieutenant Governor in Council may make an order declaring that a project is a 'priority project', in this case, the OIC.

    b. Section 96.1(2) provides that once the OIC is made, HONI does not need to prove need in the Section 92 application.

    c. The language is scoped as top the issue of necessity only. It does not obviate the need for any other tests to be met by HONI.

    > "Under section 96.1 of the *Ontario Energy Board Act, 1998*, the Lieutenant Governor in Council (Cabinet) can make an order declaring that a new, expanded or reinforced transmission line is needed as a priority project. Even if a transmission line is declared by Cabinet to be a priority project, OEB approval to build the line is still required. However, in these cases the OEB must accept that the project is needed. "[1]

15. The designation of this project as a 'priority project' does not preclude interested parties, and the ratepayers of Ontario from the legislated and remaining regulatory process before the OEB. The priority designation is designed to do three things:

    a. Prioritize certain projects.
    b. Designate HONI as the transmitter of Priority Projects

[1] https://www.oeb.ca/consultations-and-projects/priority-transmission-projects

c. Require HONI to undertake early development work on future projects.[23]

16. PO1 and the related scoped issues list as well as the Determinations on the Filing of Evidence and Form of Hearing letter makes it clear that the OEB will not require HONI to lead evidence on nor will it hear questions about route alternatives, or any other thing addressed in the Draft Environmental Study Report (Draft ESR) indicating that those items contained in the Draft ESR fall outside OEB jurisdiction. The OEB further relies on the 'conditions of approval' requirements related to route etc. in order to suggest that the issues contained in the Draft ESR are not without a process of review.

17. This is an overbroad perspective based on the OIC and the duty put on the OEB pursuant to s.92 and 96 of the OEB Act.

18. In scoping the evidence in such a manner, the OEB precludes itself from hearing valid and relevant evidence with respect to alternative route cost and reliability.

19. Further in refusing to hear any evidence with respect to the Draft ESR the OEB is precluding itself from hearing evidence on the manner used in weighting the selection of route alternatives, which includes a process for weighting cost of the project. Cost is clearly germane and explicitly an issue to be addressed in the OEB s. 92 application process.

20. The OEB has previously found evidence to be admissible by reason of its relevance to the issues before it. This was despite the potential that such evidence may have carried little probative value.[4] In the present case, the Draft ESR is necessarily relevant to the issues of cost. The draft ESR identifies "feasible alternatives that can be compared and evaluated on the basis of … cost factors … to determine a preferred alternative".[5]

> "a *tribunal must be cautious... as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision.*"[6]

21. Section 5 of the Draft ESR directly pertains to route selection and the weighing of factors that relate to and have an impact on, amongst other relevant variables, the cost of the project. It is submitted that by refusing consideration of such evidence, which is directly and inextricably connected to the interests of consumers with respect to the price of the electricity service, the OEB is committing a palpable and identifiable error of law and/or jurisdiction.

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[2] https://www.ontariocanada.com/registry//view.do?postingId=40548

[3] It is also of note that the requirement to do development work on the future projects forms a part of the prioritization of this project, they are related and contingent. No evidence exists about the planning work being undertaken, nor whether an aggregation of the projects could provide significant cost savings while still delivering the transmission projects in a reasonable period of time.

[4] Direct Energy Marketing Ltd., Re, 2010 CarswellOnt 19431 at paras 3 and 5.

[5] The Chatham to Lakeshore 230 KV Transmission Line Class Environmental Assessment Draft Environmental Study Report, June 11, 2021 ("*Draft ESR*"), section 5 (page 193).

[6] Université du Québec à Trois-Rivières v. Larocque, 1993 CanLII 162 (SCC), [1993] 1 SCR 471

22. It is critical to note that the preferred route is **NOT** the most cost-effective route investigated by HONI in the instant case.

23. It is further critical to note that real estate acquisition costs is the single largest cost in the project[7]. Real Estate costs are determined by route choice.

24. The determination of the preferred route, contained entirely within the Draft ESR, is based on highly subjective, qualitative, and largely unscientific matrices which may or may not be consistent with the OEB standard of economic evaluation when determining a s. 92 application.

25. Route choice is and always has been within the purview of the OEB during a s.92 application. The issuance of an OIC under 96.1(1) doesn't direct the route. It does not approve a route. It does not grant HONI the right to determine a route, untested in the OEB regulatory framework. The OIC simply gets HONI over the necessity hurdle and mandates that that a route is developed.

26. The OEB still retains the duty to ratepayers to determine the best route as it relates to the interests of consumers with respect to prices and the reliability and quality of electricity service. By virtue of PO1 and the Determinations on the Filing of Evidence and Form of Hearing letter, available relevant evidence will not be allowed to come before the OEB in order for it to discharge its regulatory duty.

27. While it is conceded that the OEB does not have jurisdiction to determine the process or indeed decision-making matrix used in the Draft ESR, they patently do have jurisdiction to satisfy themselves if that process and/or matrix is sufficient from the perspective of project cost, impact on rates and reliability/stability. The OEB cannot replace the Draft ESR matrix, but they may reject it as an appropriate mechanism to determine the economic and reliability/quality factors the OEB must decide in the s. 92 process.

28. None of the foregoing removes the standard review of route and route alternatives from a cost and reliability perspective. As it stands, no evidence exists with respect to route selection or costs of the route vs. route alternatives as is normally required in the s. 92 process.

THE NEED FOR AN ORAL HEARING IN ADDITION TO ROUTE EVIDENCE

29. Given the technical and scientifically complex nature of the evidence advanced by HONI, to which the RFG and other intervenor parties have indicated their intention to examine and submit expert evidence in response, the OEB is breaching the principles of natural justice, including a legitimate expectation of those affected by the application, by refusing to conduct an oral hearing. It is submitted that proceeding by way of a written hearing would not result in a meaningful opportunity for affected parties to conduct an examination of HONI's evidence or allow them to effectively advance their own evidence and arguments. In addition it is not the most efficient process as it will result in periods of filing, review, response and reply if the principals of natural justice are applied to a written format.

[7] EB-2022-0140 – Hydro One Networks Inc. Leave to Construct Application – Chatham by Lakeshore – Update to Exhibit B-3-1, June 8, 2022, EXHIBIT B, TAB 7 , SCHEDULE 1, Table 1.

30. The purpose of the participatory rights contained in the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.

31. The nature of the issues and stake significantly determine the content of the duty of fairness and the failure to accord an oral hearing. In this instance the circumstances require a full and fair consideration of the issues in an oral hearing, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.[8]

32. The five considerations when determining the level of procedure required in a particular decision are:

    a. the nature of the decision,
    b. the statutory scheme,
    c. t**the importance of the interest to the affected party,**
    d. **the legitimate expectations, and**
    e. the procedural choices.

Accordingly, to this test, the more important the decision, the more procedure is required.

33. A written hearing, as opposed to an oral hearing, would preclude reasonable participation to the landowners, who are the most affected by the OEB decision, and do not have the technical abilities to fully understand and participate in the examination of HONI's evidence.

DUTY OF FAIRNESS NOT BEING DISCHARGED:

34. While the Board has discretion to determine their own procedure, these discretionary powers are not unlimited and are subject to the rules of natural justice and procedural fairness[9] including, among other elements, the right for all parties impacted by an administrative decision to meaningfully participate in the process (also known as the "right to be heard") and the right to an unbiased, impartial decision maker.[10]

35. By granting intervenor status to the Ross Firm Group, the Board acknowledges and confirms that the RFG and all other intervenors have a substantial interest and intend to participate actively and responsibly in the proceeding.[11] As intervenors, the Board is required to protect the RFG's rights to natural justice and procedural fairness with respect to this proceeding, including the RFG's right to meaningful participation.[12]

36. Procedural rights lie on a spectrum; what constitutes natural justice and procedural fairness in a given proceeding will depend on the nature of the power being exercised and

[8] Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817
[9] Framework for Review of Intervenor Processes and Cost Awards EB-2022-0011, March 2022, p. 8
[10] Framework for Review of Intervenor Processes and Cost Awards EB-2022-0011, March 2022, p. 8
[11] Rules of Practice and Procedure, OEB, Section 22.02
[12] Framework for Review of Intervenor Processes and Cost Awards EB-2022-0011, March 2022, p. 8

the nature of the right(s) affected by that exercise. While the full array of procedural rights may not be necessary or applicable in every proceeding, certain procedural rights are required and applicable in all proceedings: (a) the right to know the case to meet and the right to meaningfully participate in the proceedings; and (b) the right to make submissions to an unbiased, impartial decision maker.

37. In this case, the government is seeking to exercise its power to take away one of the most historic and fundamental rights held by individuals in Ontario: the right to use, own, and enjoy real property. Given the significant consequences of the Board's decision in this proceeding, the Board must make sure all parties directly impacted thereby have an opportunity to meaningfully participate in the proceeding.

38. The right to be heard is not a merely a right to make submissions. At a minimum, the right to be heard is a right to make submissions and a right to have those submissions seriously considered by the Board. The right to be heard cannot be illusory. It must be realized.

PUBLIC/OEB POLICY CONSIDERATIONS IN FAVOUR OF AN ORAL HEARING

39. The Board's mandate is to protect consumers and serve the public interest in a manner that is transparent and accountable and includes the following guarantee: "We will never lose sight of the individual rate payers, the consumers, the people of Ontario."[13]

40. Through its mandate (including its vision statement[14] and purpose statement,[15] among others), the Board guarantees each individual and consumer in Ontario will have agency at all times in all matters within the Board's jurisdiction. The Board guarantees it will be transparent with and accountable to each individual and consumer in carrying out its mandate.[16] The Board explicitly acknowledges the power of the monopolized energy systems in Ontario and promises to protect the individuals and consumers from the unilateral powers associated with monopolistic markets.[17]

41. By limiting permissible evidence and allowing only written submissions from the parties, the Board has failed to fulfill its mandate to be transparent and accountable. In doing so, the Board has rendered the agency it guarantees to each individual and consumer in Ontario as nothing more than perceived agency.

42. Even if the Board's procedural orders in this proceeding to date are justified, the public perception remains that the Board acted unfairly and unjustly against those directly impacted by its decision. As a result, in the public eye it would appear that the Board unfairly favoured the applicant and, as a result, would give rise to a reasonable apprehension of bias.

43. As part of its pursuit of modernization, the Board developed a Framework for Review of Intervenor Processes and Cost Awards (Framework), which explicitly recognizes the significant benefit that intervenors bring to proceedings and policy discussions at the

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[13] "Mandate". https://www.oeb.ca/about-oeb/mission-and-mandate
[14] "Vision". https://www.oeb.ca/about-oeb/mission-and-mandate
[15] "Purpose". https://www.oeb.ca/about-oeb/mission-and-mandate
[16] "Values". https://www.oeb.ca/about-oeb/mission-and-mandate
[17] "Natural monopolies and regulation". https://www.oeb.ca/about-oeb/what-we-do

Board and the importance of protecting intervenors' procedural rights, including the right to be heard.[18]

44. Ultimately, the RFG agrees that the Board has discretion to determine the processes and procedures in this proceeding. However, that discretionary power ends where procedural unfairness begins.[19] In the given circumstances and having consideration of the totality of the foregoing, the RFG respectfully submits that continuing under the Board's procedural orders would result in a breach of its duties of natural justice and procedural fairness.

THE THRESHOLD TEST:

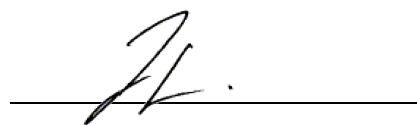
45. The errors referenced in this Motion are errors of law. The OEB has scoped the proceedings with respect to alternate route and the evidence regarding same contained in the ESR despite their obligation to review the project cost etc. Further, the OEB has made an error in law with respect to the manner of hearing, in not discharging their duty of fairness, in denying the RFG their right to procedural fairness, all in the face of a legitimate expectation.

46. The evidence relevant to the s.92 analysis to be undertaken by the OEB and specifically the evidence contained in the ESR could have reasonably been placed on the record in the proceeding.

47. Given the fact the proposed route is not the most cost effective among the routes investigated for the project and that the evidence of those costs and weighing of the costs exists and is available, that data could reasonably be expected to result in a material change to the outcome of the matter, if not the instant decision of PO1 and letter.

48. The Moving party's interests are patently and materially harmed by the scope of PO1 and the direction to proceed with a written hearing for the reasons herein stated.

All of which is respectfully submitted.



August 26, 2022 .

Quinn M. Ross
Counsel for The Ross Firm Group

Date:

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[18] OEB Letter re: Framework for Review of Intervenor Processes and Cost Awards (March 31, 2022), p. 1
[19] *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (CanLII).

EB-2022-0140

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. ("**HONI**") pursuant to s. 92 of the Act for an Order or Orders granting leave to construct transmission line facilities (the "**Project**") in the West of Chatham area.

AND IN THE MATTER OF a Motion by The Ross Firm Group to review and vary Procedural Order #1 and determinations on the filing of evidence and form of the hearing (the "**Motion**").

BOOK OF AUTHORITIES & CITED DOCUMENTS OF THE INTERVENORS – THE ROSS FIRM GROUP

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5. *Direct Energy Marketing Ltd., Re,* 2010 CarswellOnt 19431

6. The Chatham to Lakeshore 230 KV Transmission Line Class Environmental Assessment Draft Environmental Study Report, June 11, 2021 ("*Draft ESR*") at page 193.

7. *Université du Québec à Trois-Rivières v. Larocque,* 1993 CanLII 162 (SCC), [1993] 1 SCR 471

8. EB-2022-0140 – Hydro One Networks Inc. Leave to Construct Application – Chatham by Lakeshore – Update to Exhibit B-3-1, June 8, 2022, EXHIBIT B, TAB 7 , SCHEDULE 1, Table 1.

9. *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817

10. Framework for Review of Intervenor Processes and Cost Awards EB-2022-0011, March 2022 at page 8.

11. *Re: Sound v. Fitness Industry Council of Canada,* 2014 FCA 48 (CanLII)

TAB 1

OEB Rules of Practice and Procedure, Revised December 17, 2021

4. Procedural Orders and Practice Directions
4.03 The OEB may at any time amend any procedural order.

22. Intervenor Status
22.02 The person applying for intervenor status must satisfy the OEB that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

42. Motion to Review
42.01 Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion, which grounds must be one or more of the following:
   i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law;
   ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
   iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order;

(b) if sought, and subject to Rule 40, request a stay of the implementation of the order or decision or any part pending the determination of the motion;

(c) describe how the moving party's interests are materially harmed by the decision or order;

(d) where the grounds include new facts and the new facts relate to a change in circumstances, explain whether the change in circumstances was within the control of the moving party;

(e) provide a clear explanation of why the motion should pass the threshold described in Rule 43.01; and

(f) set out the specific relief requested.

43. The Threshold Question and Determinations

43.01 In addition to its powers under Rule 18.01, prior to proceeding to hear a motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits. Considerations may include:

(a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);

(b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;

(c) whether any new facts relating to a change in circumstances were within the control of the moving party;

(d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;

(e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits; and

(f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.

43.02 Where the OEB determines that the threshold in Rule 43.01 has been passed, or where it has chosen not to consider the threshold, or where it is conducting a review on its own motion, it will hear the motion on its merits and decide whether to confirm, cancel, suspend or vary the decision or order.

43.03 The OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a).

EB-2022-0140

TAB 2

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Leave to construct, etc., electricity transmission or distribution line

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection. 1998, c. 15, Sched. B, s. 92 (1).

Order allowing work to be carried out

96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92

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

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. REPEALED: 2021, c. 25, Sched. 19, s. 2.

2009, c. 12, Sched. D, s. 16; 2021, c. 25, Sched. 19, s. 2.

Section Amendments with date in force (d/m/y)

Lieutenant Governor in Council, order re electricity transmission line

96.1 (1) The Lieutenant Governor in Council may make an order declaring that the construction, expansion or reinforcement of an electricity transmission line specified in the order is needed as a priority project. 2015, c. 29, s. 16.

Effect of order

(2) When it considers an application under section 92 in respect of the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1), the Board shall accept that the construction, expansion or reinforcement is needed when forming its opinion under section 96. 2015, c. 29, s. 16.

Obligations must be followed

(3) Nothing in this section relieves a person from the obligation to obtain leave of the Board for the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1). 2015, c. 29, s. 16.

Condition, land-owner's agreements

97 In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board. 1998, c. 15, Sched. B, s. 97.

TAB 3

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

EB-2022-0140

Hydro One Network Inc.

Application for leave to construct an electricity transmission line between Chatham Switching Station and Lakeshore Transmission Station.

DETERMINATIONS ON THE FILING OF EVIDENCE AND FORM OF THE HEARING

August 5, 2022

Hydro One Networks Inc. (Hydro One) filed an application with the Ontario Energy Board (OEB) under section 92 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (OEB Act), seeking approval to construct approximately 49 kilometres of 230 kilovolt double-circuit transmission line between Chatham Switching Station and Lakeshore Transformer Station and associated station facilities to connect the new transmission line at the terminal stations (Project). The proposed transmission line and station facilities will be located in the municipalities of Chatham-Kent and Lakeshore and the County of Essex. Hydro One has also applied under section 97 of the OEB Act for approval of the form of land use agreements it has offered, or will offer, to landowners affected by the route or location of the Project.

A Notice of Hearing was issued on June 3, 2022. The Chippewas of Kettle and Stony Point First Nation together with Southwind Corporate Development Inc. (CKSPFN), Environmental Defence, the Haudenosaunee Development Institute (HDI), the Independent Electricity System Operator (IESO), the Municipality of Chatham-Kent, Pollution Probe, and the Ross Firm Group applied for intervenor status. CKSPFN, Environmental Defence, HDI, Pollution Probe and the Ross Firm Group applied for cost eligibility.

All parties that requested interevenor status were granted intervenor status, and Environmental Defence, Pollution Probe, the Ross Firm Group, HDI and CKSPFN were each granted eligibility to apply for an award of costs, all in respect of matters that are within the scope of this proceeding. In a letter dated July 26, 2022, the OEB approved a request by CKSPFN to add Caldwell First Nation to its intervention, and to continue the intervention under the name Three Fires Group Inc. (Three Fires Group).

As part of its intervention request, HDI indicated that it wished to file evidence and requested an oral hearing. CKSPFN (now Three Fires Group) also indicated that it may wish to submit evidence, depending on the development of the record. The Ross Firm Group also requested an oral hearing, and the Municipality of Chatham-Kent requested the right to file evidence (though it is not clear at this point if they actually wish to file evidence).

Determination on the filing of evidence and the form of the hearing

In Procedural Order No. 1, issued on July 13, 2022, the OEB identified the issues that it will consider in this proceeding. That issues list, based on the OEB's Standard Issues List for electricity leave to construct applications, as well as the Notice of Hearing issued for this proceeding, were informed by OEB jurisprudence on the scope of the OEB's mandate under section 92 of the OEB Act.[1] That section expressly limits the OEB's jurisdiction by prescribing in exhaustive terms the matters that the OEB may consider in deciding whether a proposed project is in the public interest:

> **96** (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.
>
> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

[1] See EB-2009-0120 (Decision on Questions of Jurisdiction and Procedural Order No. 4, November 18, 2009) and EB-2017-0182 (Decision and Order, December 20, 2018).

The OEB’s authority to consider environmental issues and the Constitutional duty to consult is therefore limited to the issues set out in section 96(2) of the OEB Act; in other words, where these matters are relevant to the issues of price, reliability and quality of electricity service such as impacts relating to the cost or schedule for a project. As noted in Procedural Order No. 1, the Project is subject to an Environmental Assessment conducted by the Ministry of the Environment, Conservation and Parks, and the duty to consult for the Project is led by the Ontario government as part of the Environmental Assessment process. It is a standard condition of approval in any approval granted under section 92 of the OEB Act that the applicant obtain all necessary approvals, permits, licences, certificates, agreements and rights required to construct, operate and maintain the project.

The issues list for this proceeding also reflects the fact that the Project has been declared to be a priority transmission project under section 96.1 of the OEB Act, such that the standard issues relating to need and the consideration of alternatives to the construction of a transmission line are not applicable in this proceeding.

Based on their letters of intervention and their interrogatories, it appears that the focus of HDI and Three Fires Group is on matters that are outside the OEB’s statutory authority in a proceeding under section 92 of the OEB Act. The OEB will not make provision for the filing of evidence relating to matters that are outside the scope of this proceeding. If any intervenor wishes to file evidence that is directly and materially relevant to an issue on the issues list, it shall file a letter with the OEB by **August 11, 2022** with a description of the proposed evidence (including an explanation of how the evidence relates to the issues in this proceeding), an estimate of the cost of the evidence (if the intervenor is eligible for an award of costs), and the proposed timing of the filing of the evidence.

The OEB will also not require Hydro One to respond to interrogatories from any intervenor on matters that are outside the scope of this proceeding as reflected in the issues list and clarified in this letter.

Given the relatively narrow focus of the interrogatories that appear to be in scope for this proceeding, the OEB has also determined that it intends to proceed by way of a written hearing.

Filing Instructions

Parties are responsible for ensuring that any documents they file with the OEB **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's Rules of Practice and Procedure.

Please quote file number, **EB-2022-0140,** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at the File documents online page on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the File documents online page of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the Practice Direction on Cost Awards.

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Andrew Bishop at Andrew.Bishop@oeb.ca.

Email: registrar@oeb.ca
Tel: 1-877-632-2727 (Toll free)

DATED at Toronto, **August 5, 2022**

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar

TAB 4

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

EB-2022-0140

Hydro One Networks Inc.

Application for leave to construct an electricity transmission line between Chatham Switching Station and Lakeshore Transmission Station.

PROCEDURAL ORDER NO. 1

July 13, 2022

Hydro One Networks Inc. (Hydro One) filed an application with the Ontario Energy Board (OEB) under sections 92 and 97 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (OEB Act), seeking approval to construct approximately 49 kilometres of 230 kilovolt double-circuit transmission line between Chatham Switching Station and Lakeshore Transformer Station and associated station facilities to connect the new transmission line at the terminal stations (Project). The proposed transmission line and station facilities will be located in the municipalities of Chatham-Kent and Lakeshore and the County of Essex. Hydro One has also applied to the OEB for approval of the form of land use agreements it offers to landowners for the routing or construction of the Project.

A Notice of Hearing was issued on June 3, 2022. The Chippewas of Kettle and Stony Point First Nation together with Southwind Corporate Development Inc. (CKSPFN), Environmental Defence, the Haudenosaunee Development Institute (HDI), the Independent Electricity System Operator (IESO), the Municipality of Chatham-Kent, Pollution Probe, and the Ross Firm Group applied for intervenor status. CKSPFN, Environmental Defence, HDI, Pollution Probe and the Ross Firm Group applied for cost eligibility. The Municipality of Chatham-Kent stated that it is aware that it is not eligible for an award of costs under the OEB's *Practice Direction on Cost Awards* (Practice Direction) but reserved the right to seek costs depending upon the extent of its involvement and contribution throughout the proceeding and if exceptions to section 3.05 of the Practice Direction apply.

By letter dated June 29, 2022, Hydro One acknowledged and accepted the seven intervenors. Hydro One did not note any objections to the requests for cost eligibility.

Environmental Defence, the Municipality of Chatham-Kent, Pollution Probe and the IESO

Environmental Defence, the IESO, the Municipality of Chatham-Kent and Pollution Probe are approved as intervenors, and Environmental Defence and Pollution Probe are eligible for cost awards under the OEB's Practice Direction, all in respect of matters that are within the scope of this proceeding.

The Ross Firm Group

The Ross Firm Group is a landowner group comprising 48 individual landowners that have retained The Ross Firm to represent them in this proceeding. According to the intervention request, Hydro One is proposing a taking of the land in respect of the property of the vast majority of these landowners, while the remaining are made up of directly abutting landowners. The Ross Firm Group is approved as an intervenor and is eligible for cost awards in respect of matters that are within the scope of this proceeding, subject to the exception noted below.

At this time the OEB does not grant cost eligibility to the Ross Firm Group in respect of representing the interests of the directly abutting landowners in their capacity as landowners. Except in exceptional circumstances, the OEB does not grant cost eligibility to individual landowners unless the facilities that are the subject of the application are on their property or the utility requires access to their property.[1] From the Ross Firm Group's letter of intervention, it is not clear whether or how the directly abutting landowners are affected. The OEB will allow the Ross Firm Group an opportunity to provide additional information on how the directly abutting landowners are affected by the Project, or to identify any special circumstances that they wish the OEB to consider in relation to cost award eligibility in respect of representing the interests of those landowners. Any such submissions must be filed by **July 20, 2022.**

CKSPFN and HDI

In its letter of intervention, CKSPFN stated that it is "affected by this Application with respect to potential impacts on Treaty rights, land use and cultural heritage." CKSPFN stated that its interest in this proceeding relates to:

a) issues related to economic and environmental impacts and land matters;
b) whether the duty to consult and accommodate with Indigenous communities potentially affected by the proposed project has been discharged with respect to the Application; and

[1] Procedural Order No.1 and Cost Eligibility Decision, EB-2012-0451, April 17, 2013.

c) generally, to represent the constitutionally recognized Aboriginal rights and interests of CKSPFN, its members, and its wholly-owned development corporation Southwind.

In its letter of intervention, HDI stated that it acts with delegated authority from the Haudenosaunee Confederacy Chiefs Council (HCCC), the collective rights holder on behalf of the Haudenosaunee, and acts on behalf of HCCC in respect of development issues on lands where HCCC holds an interest.

HDI stated that it has significant concerns relating to the Project, which relate to "the impact the Project may have on Haudenosaunee rights and treaty lands, including, but not limited to, the loss of the Haudenosaunee's substantive rights to the treaty lands in the [municipalities of Chatham-Kent and Lakeshore and the county of Essex], detrimental environmental effects resulting from the construction and operation of the proposed transmission line, disruption of the environment and ecology of the surrounding land, and sustainable development of historical and traditional Haudenosaunee lands". HDI also stated that its participation in this proceeding, including its review of Hydro One's application materials, may also reveal additional Haudenosaunee concerns with respect to prices and the reliability and quality of electricity service. HDI further stated that the OEB has preemptively barred intervenors from addressing issues related to the Crown's duty to consult and has thus failed to uphold the honour of the Crown and advance the goals of reconciliation.

CKSPFN and HDI are approved as intervenors and are eligible for costs in respect of matters that are within the scope of this proceeding.

Issues and Interrogatories

The OEB has developed a standard Issues List for electricity leave to construct applications. The standard issues list is intended to ensure that the OEB's review is focused and aligned with its mandate.

By Order in Council dated March 31, 2022, the Lieutenant Governor in Council declared that the Project is a priority transmission project under section 96.1 of the OEB Act. Accordingly, pursuant to section 96.1(2) of the OEB Act, the OEB is required to accept that the construction of the Project is needed. In addition, it is a condition of Hydro One's electricity transmission licence to develop and seek approvals for a new Chatham to Lakeshore transmission line, and that development of the line accord with the project scope and timing recommended by the IESO[2]. As such, the standard issues relating to

[2] These conditions were added to Hydro One's licence by Decision and Order dated December 23, 2020 (EB-2020-0309) further to a Ministerial Directive received by the OEB on December 17, 2020

need and the consideration of alternatives to the construction of a transmission line are not applicable in this proceeding. The OEB also notes that the Project is subject to an Environmental Assessment conducted by the Ministry of the Environment, Conservation and Parks, and that the duty to consult for the Project is led by the Ontario government as part of the Environmental Assessment process.

The issues that the OEB will consider in this proceeding are listed in Schedule A to this Procedural Order, subject to such amendments as the OEB considers necessary as the proceeding progresses.

At this time, provision is being made for written interrogatories. Parties should consult sections 26 and 27 of the OEB's *Rules of Practice and Procedure* regarding required naming and numbering conventions and other matters related to interrogatories.

Other Intervenor Requests

The Ross Firm Group and HDI requested that the OEB hold an oral hearing. HDI has indicated that it wishes to submit evidence, and the Municipality of Chatham-Kent has requested the right to file evidence. The OEB will make its determination on these matters at a later date.

List of Parties and Considerations in Awarding Costs

The list of parties in this proceeding is attached as Schedule B to this Procedural Order.

Parties should focus their participation on issues that are within the scope of the OEB's review and should coordinate their participation to avoid duplication. In making its decision on cost awards, the OEB will consider whether cost eligible intervenors made reasonable efforts to focus their participation on issues within the scope of the OEB's review and avoid duplication with other parties.

The OEB is making provision for the following matters. Additional procedural steps will be considered at a later date, and further procedural orders may be issued by the OEB.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OEB staff and intervenors shall request any relevant information and documentation from Hydro One that is in addition to the evidence already filed, by written interrogatories filed with the OEB and served on all parties by **July 27, 2022.**

2. Hydro One shall file with the OEB complete written responses to all interrogatories and serve them on intervenors by **August 10, 2022.**

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's *Rules of Practice and Procedure*.

Please quote file number, **EB-2022-0140** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at the Filing Systems page on the OEB's website
- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Andrew Bishop at andrew.bishop@oeb.ca and OEB Counsel, Michael Millar at michael.millar@oeb.ca.

Email: registrar@oeb.ca
Tel: 1-877-632-2727 (Toll free)

DATED at Toronto, **July 13, 2022**

ONTARIO ENERGY BOARD

By delegation, before: Rudra Mukherji

Rudra Mukherji
Manager, Adjudicative Process

SCHEDULE A

ISSUES LIST

HYDRO ONE NETWORKS INC.

EB-2022-0140

JULY 13, 2022

Schedule A:
Issues List

1. Prices: Project Cost

1.1. Has the applicant provided sufficient information to demonstrate that the estimates of the project cost are reasonable? Are comparable projects selected by the applicant (as required by the filing requirements) sufficient and appropriate proxies for the proposed project?

1.2. Has the applicant adequately identified and described any risks associated with the proposed project? Is the proposed contingency budget appropriate and consistent with these identified risks?

1.3. If the applicant has requested that deferral accounts be established, has the applicant adequately demonstrated that the eligibility criteria of Causation, Materiality, and Prudence have been met?

2. Prices: Customer Impacts

2.1. Has the applicant correctly determined the need for and the amount of any capital contributions that are required for the project?

2.2. Are the projected transmission rate impacts that will result from the project reasonable given the need(s) it satisfies and the benefit(s) it provides?

3. Reliability and Quality of Electricity Service

3.1. Has the applicant established that the project will maintain or improve reliability?

3.2. Has the applicant provided a final System Impact Assessment (SIA)? Does the final SIA conclude that the project will not have a material adverse impact on the reliability of the integrated power system?

3.3. Has the applicant provided a final Customer Impact Assessment (CIA)? Does the final CIA conclude that the project will not have an adverse impact on customers, with respect to reliability and quality of electricity service?

4. Route Map and Form of Landowner Agreements

4.1. Are any proposed forms of landowner agreements under section 97 of the OEB Act appropriate and consistent with OEB requirements?

4.2. Does the route map provided pursuant to section 94 of the OEB Act show the general location of the proposed project and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed project is to pass.

5. Conditions of Approval

5.1. The OEB's standard conditions of approval are attached as Attachment 1. If the OEB approves the proposed project, what additional or revised conditions, if any, are appropriate?

Attachment 1:

Standard Conditions of Approval for Electricity Leave to Construct Applications

1. [The Applicant] shall fulfill any requirements of the SIA and the CIA, and shall obtain all necessary approvals, permits, licences, certificates, agreements and rights required to construct, operate and maintain the project.

2. Unless otherwise ordered by the OEB, authorization for leave to construct shall terminate 12 months from the date of the Decision and Order, unless construction has commenced prior to that date.

3. [The Applicant] shall advise the OEB of any proposed material change in the project, including but not limited to changes in: the proposed route, construction schedule, necessary environmental assessment approvals, and all other approvals, permits, licences, certificates and rights required to construct the project.

4. [The Applicant] shall submit to the OEB written confirmation of the completion of the project construction. This written confirmation shall be provided within one month of the completion of construction.

5. [The Applicant] shall designate one of their employees as project manager who will be the point of contact for these conditions, and shall provide the employee's name and contact information to the OEB and to all affected landowners, and shall clearly post the project manager's contact information in a prominent place at the construction site.

SCHEDULE B

LIST OF PARTIES (APPLICANT AND INTERVENORS)

HYDRO ONE NETWORKS INC.

EB-2022-0140

July 13, 2022

Hydro One Networks Inc.
EB-2022-0140

APPLICANT & LIST OF INTERVENORS

July 13, 2022

APPLICANT	**Rep. and Address for Service**
Hydro One Networks Inc.	**Carla Molina** Sr. Regulatory Coordinator Hydro One Networks Inc. 483 Bay Street 7th Floor - South Tower Toronto, ON M5G 2P5 Tel: 416-345-5317 Fax: 416-345-5866 regulatory@hydroone.com
APPLICANT COUNSEL	
	Gordon Nettleton Partner McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary ON T2P 4K9 Tel: 403-260-3622 Fax: 403-260-3501 gnettleton@mccarthy.ca
	Monica Caceres Assistant General Counsel Hydro One Networks Inc. 483 Bay Street 8th Floor - South Tower Toronto ON M5G 2P5 Tel: 647-505-3341 Fax: 416-345-6972 monica.caceres@hydroone.com

Hydro One Networks Inc.
EB-2022-0140

APPLICANT & LIST OF INTERVENORS

July 13, 2022

INTERVENORS	Rep. and Address for Service
Chippewas of Kettle and Stony Point First Nation	**Philip Lee** Chief Executive Officer Chippewas of Kettle and Stony Point First Nation Southwind Development Corporation 9119 West Ipperwash Road, Unit A Kettle and Stony Point First Nation ON N0N 1J1 Tel: 519-786-6753 Fax: 519-786-6752 philip.lee@southwindcorp.ca
	Don Richardson Consultant Three Fires Group 9119 W. Ipperwash Rd. Unit A Lambton Shores ON N0N 1J3 Tel: 226-820-5086 don.richardson@threefiresgroup.com
	Lisa (Elisabeth) DeMarco Senior Partner and Chief Executive Officer Resilient LLP Bay Adelaide Centre 333 Bay Street, Suite 625 Toronto ON M5H 2R2 Tel: 647-991-1190 Fax: 888-734-9459 lisa@resilientllp.com

Hydro One Networks Inc.
EB-2022-0140

APPLICANT & LIST OF INTERVENORS

July 13, 2022

Chippewas of Kettle and Stony Point First Nation	**Jonathan McGillivray** Senior Associate Resilient LLP Bay Adelaide Centre 333 Bay Street, Suite 625 Toronto ON M5H 2R2 Tel: 647-208-2677 Fax: 888-734-9459 jonathan@resilientllp.com
Environmental Defence Canada Inc.	**Jack Gibbons** Ontario Clean Air Alliance 160 John Street, Suite 300 Toronto ON M5V 2E5 Tel: 416-260-2080 Ext: 2 jack@cleanairalliance.org
	Kent Elson Elson Advocacy 1062 College Street Lower Suite Toronto ON M6H 1A9 Tel: 416-906-7305 Fax: 416-763-5435 kent@elsonadvocacy.ca
	Amanda Montgomery Elson Advocacy 1062 College Street Lower Suite Toronto ON M6H 1A9 Tel: 416-906-7305 Fax: 416-763-5435 amanda@elsonadvocacy.ca

Hydro One Networks Inc.
EB-2022-0140

APPLICANT & LIST OF INTERVENORS

July 13, 2022

Haudenosaunee Development Institute	**Tim Gilbert** Gilbert's LLP 181 University Ave, Suite 2200 Toronto ON M5H 3M7 Tel: 416-703-1100 tim@gilbertslaw.ca
	Aaron Detlor Council Haudenosaunee Development Institute 16 Sunrise Court Suite 417 Ohsweken ON N0A1M0 Tel: 519-445-4222 aaron@detlorlaw.ca
Independent Electricity System Operator	**Devon Huber** Senior Manager Independent Electricity System Operator 1600-120 Adelaide Street West Toronto ON M5H 1T1 Tel: 416-967-7474 Devon.Huber@ieso.ca
Municipality of Chatham-Kent	**David Taylor** Director of Legal Services Municipality of Chatham-Kent 315 King Street West Chatham ON N7M 5K8 Tel: 519-360-1998 davet@chatham-kent.ca

Hydro One Networks Inc.
EB-2022-0140

APPLICANT & LIST OF INTERVENORS

July 13, 2022

Pollution Probe	**Michael Brophy** Consultant for Pollution Probe Michael Brophy Consulting Inc. 28 Macnaughton Road Toronto ON M4G 3H4 Tel: 647-330-1217 michael.brophy@rogers.com
The Ross Professional Corporation Firm	**Quinn Ross** The Ross Professional Corporation Firm Barristers & Solicitors 138 Courthouse Square Goderich ON N7A 1M9 Tel: 519-524-5532 Fax: 519-524-8438 qmross@rossfirm.com

EB-2022-0140

TAB 5

Case Name:
Direct Energy Marketing Ltd., Re

2010 CarswellOnt 19431
Ontario Energy Board

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B

IN THE MATTER OF an application by Direct Energy Marketing Limited for an Electricity Retailer licence

Jennifer Lea Member

Judgment: July 16, 2010
Docket: EB-2010-0045

Counsel: Counsel — not provided

Subject: Natural Resources; Public

Headnote

Natural resources

Public law

***Jennifer Lea Member*:**

Background

1 Direct Energy Marketing Limited (”Direct Energy”) filed an application for renewal of its electricity retailer licence on March 1, 2010. The procedural order in the application provided for an interrogatory and submission process.

2 Board staff filed interrogatories on May 7, 2010. Direct Energy filed responses to Board staff interrogatories on May 26, 2010. On June 4, 2010, Board staff requested an extension of time for the filing of Board's staff's submission. On June 24, Board staff informed the Board and Direct Energy that it had become aware of additional evidence related to the issues before the Board in this proceeding and requested the approval of the Board to have the evidence admitted. Board staff provided a copy of the evidence to Direct Energy and to the Board. Board staff requested that the Board not review the evidence until such time as Direct Energy had an opportunity to make representations as to its admissibility. Direct Energy made representations objecting to the admissibility of the additional evidence on July 8, 2010.

Board Findings

3 The Board will accept the evidence proposed to be filed by Board staff. However, Board staff is directed to review the proposed evidence carefully to ensure that only such evidence as is relevant to the licence of Direct Energy, or to conditions on that licence, is filed. As Direct Energy pointed out in its submission, the licence renewal process is not a suitable forum for the consideration of individual customer complaints, or the resolution of individual complaints. However, a consideration of the business practices of the applicant, as may be revealed by trends in the existence and resolution of customer complaints, is relevant to a licence renewal.

4 Direct Energy opposed the admissibility of the evidence on several grounds. First, it was pointed out that only about 15% of the complaints proposed to be submitted as evidence relate to electricity contracts. This application is for an electricity retailer licence. However, I find that the fact that many of the complaints may relate to gas supply contracts does not make the complaints irrelevant. As I understand the evidence, Direct Energy does not divide its customer service and customer complaint resolution practices into two separate gas and electricity businesses. The success Direct Energy demonstrates in preventing and resolving complaints regarding gas supply contracts may provide some evidence as to Direct Energy's business practices related to electricity supply contracts.

5 Secondly, Direct Energy questioned the relevance of introducing certain customer complaints and letters to the Board from Direct Energy, on the basis that the Board is not privy to the circumstances surrounding the complaints, and presumably therefore the Board would not be able to draw any conclusions from the evidence. Trends in customer complaints and correspondence regarding possible systemic problems are relevant to a consideration of the business practices of an applicant for a licence. The evidence proposed here is relevant and therefore admissible, but may be of little probative value if it does not actually demonstrate the existence of a problem in the business practices of Direct Energy. The Board will remain mindful to assess the value of this evidence in considering the application.

6 Lastly, Direct Energy points out that the complaints proposed to be filed have been resolved, and as Direct Energy received no further correspondence from the Board, presumed that the Board had no further concerns with respect to the complaints. If further concerns existed, Direct Energy would have expected them to be addressed through the Board's compliance process. I find that this submission does not address the relevance of the evidence, and is therefore not persuasive as to admissibility. The fact that the complaints have been resolved does not mean that they are irrelevant to a consideration of the business practices of the applicant, and possible licence conditions that may be necessary to address any problems that may exist with those business practices.

7 Board staff submitted, and Direct Energy did not disagree, that the evidence be held confidential. Board staff's letter indicates that the evidence contains the personal information of consumers. I find that the evidence will be held in confidence. In addition, if either Board staff or Direct Energy includes confidential information in their submissions on this application, the party must provide a complete copy of the submission to be held in confidence and considered by the Board, and a copy from which the confidential information is redacted, to be placed on the public record of the application.

8 *IT IS THEREFORE ORDERED THAT:*

1. The Board will accept the filing of evidence from Board staff, and that evidence will be held in confidence in its entirety.

2. If Board staff wishes to make a submission, Board staff must file that submission with the Board, and deliver it to the applicant by August 4, 2010.

3. If Direct Energy wishes to file a response to a submission, the response must be filed with the Board by August 18, 2010.

TAB 6

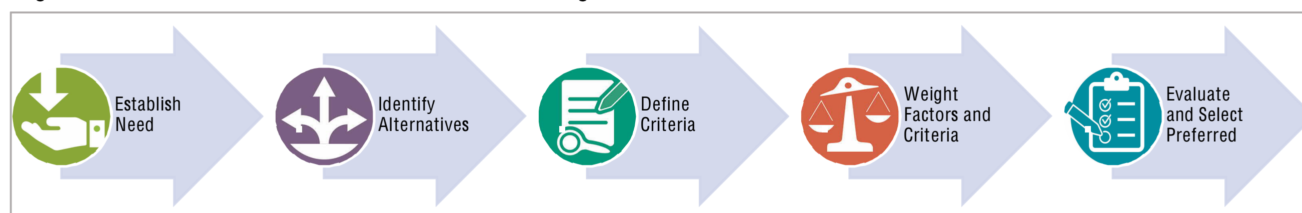
5 Identification and Evaluation of Alternative Routes

This section describes the identification and evaluation of the alternative methods for carrying out the proposed Project. "Alternative methods" refer to different means of carrying out the same task to achieve the purpose of the undertaking, which in this case; involves the construction of a double-circuit 230 kV transmission line to transmit electricity between two transmission stations. Following the identification of "alternative methods" for the undertaking, evaluation criteria are established, through which, a comparative evaluation results in the selection of a preferred alternative.

Hydro One's Class EA for Minor Transmission Facilities (Class EA) process (**Section 1.4**) requires the identification of feasible alternatives that can be compared and evaluated on the basis of natural environment, socio-economic environment, and technical and cost factors following the recommendations of the Provincial Policy Statement (PPS) to determine a preferred alternative. Potential quantitative and qualitative effects associated with each of the alternatives identified are considered. For this undertaking, a weighted Multi-Criteria Decision Making Analysis (MCDA) was used.

A weighted MCDA is a common decision-making approach involving a five-step process outlined below (**Figure 5-1**).

Figure 5-1: Multi-Criteria Decision Making Process



5.1 Step 1: Establish Need

As outlined in Section 1.1, IESO identified the need for a new double-circuit 230 kV transmission line in Southwestern Ontario. Hydro One received direction from the IESO to initiate work on development activities, including seeking relevant approvals to construct the line from the Chatham SS in the Municipality of Chatham-Kent, to the future Lakeshore TS in the Town of Lakeshore (**Appendix A**).

TAB 7

Case Name:

Université du Québec à Trois-Rivières *v.* Larocque, [1993] 1 S.C.R. 471

Syndicat des employés professionnels
de l'Université du Québec à Trois-Rivières *Appellant*

v.

Université du Québec à Trois-Rivières *Respondent*

and

Alain Larocque *Mis en cause*

and

Claude-Élizabeth Perreault
and Céline Guilbert *Mis en cause*

Indexed as: Université du Québec à Trois-Rivières *v.* Larocque

File No.: 22146.

1992: November 30; 1993: February 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ.

on appeal from the court of appeal for quebec

Labour relations -- Judicial review -- Excess of jurisdiction -- Arbitration -- Dismissal due to lack of funds -- Refusal by arbitrator to hear admissible and relevant evidence -- Whether refusal to hear relevant evidence necessarily a breach of rules of natural justice -- New arbitration before another arbitrator.

Pursuant to an agreement between the respondent University and the Government of Quebec to conduct research, the University hired two research assistants for a period of 14 months. Before the end of that period, they were advised that "as the result of a lack of funds" the University was forced to terminate their contracts. The employees filed grievances challenging this decision. At the hearing, the University sought to introduce evidence that the employees had done their work badly and that it was accordingly necessary to hire from the research funds provided for in the agreement another experienced person who would be able to redo the work already done. It was this additional expenditure which, according to the University, had led to the shortage of funds to pay the employees. The appellant union objected to this evidence and argued that the University was trying to alter the grounds relied on in the notices of termination of employment. The arbitrator allowed the objection. He subsequently allowed the grievances and ordered the University to pay the employees their full salaries. The arbitrator stated that when the University referred to a lack of funds, it could only mean funds of the University, with which the employees had entered into a contract. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts. He added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since this was a cause which was not within the employee's control, but "due to an agreement made between the University and a third party". The Superior

Court allowed the motion in evocation submitted by the University, concluding that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence. The court noted that the arbitrator had confined his ruling to the contractual relationship between the University and the employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the University lacked funds was precisely the poor quality of the work done by the employees. The court ordered that a new arbitration be held before another arbitrator. The Court of Appeal, in a majority decision, affirmed this judgment. This appeal is primarily to determine whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Gonthier and Iacobucci JJ.: The grievance arbitrator has jurisdiction to define the scope of the issue presented to him, and in this regard only a patently unreasonable error or a breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review. The necessary corollary of this jurisdiction of the arbitrator is his exclusive jurisdiction then to conduct the proceedings, and he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it. The arbitrator's exclusive jurisdiction to define the scope of the case is not a jurisdictional question.

An arbitrator does not necessarily commit a breach of the rules of natural justice, and therefore an excess of jurisdiction, when he erroneously decides to exclude relevant evidence. The arbitrator is in a privileged position to assess the relevance of evidence presented to him and it is not desirable for the courts, in the guise of protecting

the right of parties to be heard, to substitute their own assessment of the evidence for that of the arbitrator. An arbitrator commits an excess of jurisdiction, however, if his erroneous decision to reject relevant evidence has such an impact on the fairness of the proceeding that it can only be concluded that there has been a breach of the rules of natural justice.

In this case, the Superior Court was justified in exercising its review power and ordering a new arbitration hearing. By refusing to admit evidence presented by the University, the arbitrator infringed the rules of natural justice. In the context of a hearing involving a dismissal due to a lack of funds, such evidence was crucial. Its purpose was to establish the cause of the lack of funds. The arbitrator added, moreover, that even if there had been a lack of funds, that lack could not be a valid reason for breaking a term contract, since that was a cause which was not within the employee's control but was due to an "agreement between the University and a third party". He thus recognized the importance of the lack of cause attributable to the employees but found himself in the position of disposing of it without having heard any evidence whatever from the University on the point, and even having expressly refused to hear the evidence which the University sought to present on the point. This quite clearly amounts to a breach of natural justice. The denial of the right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.

The union did not succeed in establishing that the Superior Court had erred in the exercise of its discretion in ordering that the new arbitration be held before another arbitrator. The court was probably of the view that there could quite reasonably be doubt

as to the ability of an arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Per L'Heureux-Dubé J.: Although a reviewing court is held to a high standard of deference toward an administrative tribunal protected by a privative clause, an error on a question of law which goes to jurisdiction will always be reviewable. In this case, the arbitrator had jurisdiction to dispose of the grievances but committed an excess of jurisdiction by refusing to consider the evidence presented by the University. That evidence was relevant to the consideration and disposition of the grievances. Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice.

Cases Cited

By Lamer C.J.

Not followed: *Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18; **distinguished**: *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888; **referred to**: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Canadian Union Public of Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

By L'Heureux-Dubé J.

Referred to: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 000; *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382.

Statutes and Regulations Cited

Labour Code, R.S.Q., c. C-27, s. 100.2 [ad. 1983, c. 22, s. 65].

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APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 2183, affirming a judgment of the Superior Court[*] allowing a motion in evocation. Appeal dismissed.

Pierre Thériault, for the appellant.

Marc St-Pierre and *Louis Masson*, for the respondent.

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[*] *Université du Québec à Trois-Rivières v. Larocque*, Sup. Ct. Trois-Rivières, No. 400-05-000148-875, August 26, 1987 (Lebrun J.).

//Lamer C.J.//

English version of the judgment of Lamer C.J. and La Forest, Gonthier and Iacobucci JJ. was delivered by

LAMER C.J. --

Facts

In October 1985 an agreement was concluded between the Government of Quebec and the respondent Université du Québec à Trois-Rivières whereby research was to be conducted by the respondent by means of questionnaires and interviews. The agreement provided for an initial payment of $25,000 on the signing of the agreement and a second payment of $33,000 after the questionnaire and the interview plan were submitted. A committee was set up under the authority of the director of research at the Ministère de l'éducation to provide follow-up on the research. Responsibility for the work was assigned to Professor Jean-Luc Gouvéia, who hired the *mis en cause* Perreault and Guilbert as grant-aided part-time professional research assistants. The date the employment commenced was to be October 15, 1985 and its termination December 15, 1986 [TRANSLATION] "or on notice from the University for cause".

An initial working document prepared by the *mis en cause* was submitted to the follow-up committee on or about April 15, 1986. This presentation was behind the schedule specified in the agreement between the Government and the respondent.

On May 1, 1986 the respondent advised the *mis en cause* by letter that [TRANSLATION] "as the result of a lack of funds" it would be forced to terminate their contract as of April 25, 1986.

A grievance was then filed for each of the *mis en cause* and at the first arbitration hearing, the respondent contended that the arbitrator lacked jurisdiction by alleging that the grievance could not be arbitrated under the collective agreement. This allegation was dismissed by the *mis en cause* arbitrator in a preliminary decision dated December 16, 1986.

In February 1987 the *mis en cause* arbitrator proceeded to hear the grievances on the merits. The respondent then sought to introduce evidence that the two *mis en cause* employees had done their work badly and that, accordingly, in order to meet the schedule agreed on in the contract between the Government and the respondent, it was necessary to hire from the research funds another experienced person who would be able to redo the work done by the *mis en cause* employees in April 1986 and found by the Government's representatives to be of poor quality. It is this additional expenditure which, on the evidence which the respondent sought to present, led to the shortage of funds to pay the two assistants.

The appellant objected to this evidence on the ground that the respondent was trying to add to or alter the grounds relied on in the notices of termination of employment of May 1, 1986. The appellant contended that the respondent wanted to present evidence on the competence of the two *mis en cause* professionals when the sole and exclusive reason given by the respondent for ordering the termination of employment was a lack of funds. The *mis en cause* arbitrator allowed the appellant's objection. On March 19,

1987, he made an award allowing the two grievances and ordering the respondent to pay the *mis en cause* employees their full salary.

The respondent then submitted a motion in evocation to the Superior Court, alleging first that the arbitrator had assumed jurisdiction which he did not have in deciding that the *mis en cause* employees benefited from the grievance procedure laid down in the collective agreement. Alternatively, it argued that the arbitrator had exceeded his jurisdiction by not admitting evidence of the lack of competence of the two *mis en cause* employees. The Superior Court allowed the motion, rejecting the respondent's arguments as to the arbitrator's jurisdiction to hear the grievances but finding that his refusal to hear the evidence offered by the respondent constituted an excess of jurisdiction. It ordered that the case be re-heard before another arbitrator.

The appellant appealed the part of the judgment vacating the arbitral award and ordering a new arbitration. The respondent then filed a cross-appeal, challenging the other part of the judgment which recognized the arbitrator's jurisdiction to hear the grievances filed by the *mis en cause* employees. On August 21, 1990, the Court of Appeal dismissed the two appeals, Rousseau-Houle J.A. dissenting on the main appeal. The present appeal is from the Court of Appeal's judgment on the main appeal.

Applicable Legislation

Section 100.2 of the *Labour Code*, R.S.Q., c. C-27, reads as follows:

100.2 The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.

For such purpose, he may, *ex officio*, call the parties to proceed with the hearing of the grievance.

Applicable Provisions of the Collective Agreement

Clauses 2-1.03(A), 5-1.01 and 5-5.01 of the collective agreement read as follows:

[TRANSLATION]

2-1.03 (A)A supernumerary, temporary, replacement or grant-aided professional is subject to the following provisions:

. . .

(5)Hiring, probation, resignation (article 5-1.00), except for clauses 5-1.03, 5-1.04 and 5-1.05.

. . .

(19)Procedure for the settlement of grievances and disputes and arbitration (chapter 11-0.00) to claim the benefits conferred herein.

5-1.01All professionals shall be hired by a contract which the personnel branch will deliver to the professional, indicating to him certain of his terms and conditions of employment (group, classification, salary, date of hiring, probation period, probable length of employment in the case of a supernumerary, temporary, replacement, grant-aided or casual professional). A

copy of this contract shall be sent to the union when the professional commences his or her employment.

5-5.01(a) When an act done by a professional leads to disciplinary action the University, depending on the seriousness of the alleged act, shall take one of the following three (3) steps:

- written warning;

- suspension;

- dismissal.

(b) The University shall inform the professional in writing that he or she is subject to disciplinary action within twenty (20) working days of the time the University becomes aware of the offence alleged against him or her: this is a strict time limit and the burden of proof of subsequent knowledge of the facts by the University is on the University.

(c) In all cases in which the University takes disciplinary action, the professional concerned or the Union may have recourse to the grievance and arbitration procedure; the

burden of proof that the cause in question is just and sufficient for disciplinary action to be taken is on the University.

(d) In the event that the University wishes to take disciplinary action against a professional, it shall summon the said professional by at least twenty-four (24) hours' written notice; at the same time, the University shall advise the Union that the professional has been summoned.

(e) The notice sent to the professional shall specify the time and place at which he shall attend and the nature of the facts alleged against him. The professional may be accompanied by a union representative.

Judgments

Arbitration Tribunal -- Preliminary Decision

In the preliminary decision of December 16, 1986 the arbitrator held that he had total, absolute and exclusive jurisdiction to hear and decide the grievances presented by the complainants. He accordingly dismissed the objection made by counsel for the University that the dismissal of the grant-aided professionals was not subject to

arbitration. The arbitrator pointed out that clause 2-1.03 (A) of the collective agreement, governing grant-aided professionals, makes them subject to the grievance procedure in claiming the benefits conferred by the collective agreement. Clause 5-1.01 provides that the hiring of any professional shall be by contract and that this contract shall specify, *inter alia*, the group, classification, salary, date of hiring, probation period and probable length of the employment in the case of a grant-aided professional. According to the arbitrator, it follows that if there is disagreement as to the interpretation or application of any of the provisions of the hiring contract, that disagreement is a grievance within the meaning of the Act and the collective agreement. The arbitrator stated that the contrary solution, namely referring complainants to proceedings in the ordinary courts of law, would be contrary to the manifest intention of the legislature that all grievances be subject to arbitration. This solution would also, the arbitrator concluded, be contrary to the spirit of the Supreme Court decision in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704. Finally, the arbitrator stated that there would have to be a very clear provision to exempt a privilege conferred under a collective labour agreement from the arbitration mechanism provided for in the event of a dispute.

Arbitration Tribunal -- Decision on the Merits

In his decision on the merits of the grievances rendered on March 19, 1987, the arbitrator first stated that when the University referred to a lack of funds, it could only mean funds of the employer, the Université du Québec à Trois-Rivières, with which the complainants had entered into a contract. He noted that the University had the burden of establishing the lack of funds, and found that the University had not succeeded in showing that it lacked funds to pay the two employees up to the date of termination provided for in the contract. He observed that there was no evidence that the Government had broken its

contract with the University and indicated that the University was under no obligation to offer 14-month contracts. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts.

The arbitrator added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since [TRANSLATION] "[i]t is a cause which is not within the employee's control, but is due to an agreement between the University and a third party". He stated that, in cases of dismissal for cause in the context of term contracts, the authors and cases require that the employer establish a breach of an essential condition of the contract of employment, a breach for which the employee is responsible. This is why he found that a [TRANSLATION] ". . . fact beyond the employee's control, such as the non-payment of money by a third party to the employer, and indeed the employer's poor economic situation, cannot be a cause for the breach of a contract of employment that relieves the employer of its obligations".

Superior Court

On the question of the arbitrator's jurisdiction Lebrun J., after recalling the principles set out by the Supreme Court in *St. Anne Nackawic Pulp & Paper*, *supra*, and listing the provisions of the collective agreement in effect between the parties and applicable to the complainants, held that:

> [TRANSLATION] In deciding to hear the grievance, the respondent arbitrator applied what I would call the presumption that a grievance is arbitrable when, as here, everything tends to show that the individual contract of the parties is clearly subject to the provisions of the collective agreement and therefore to the arbitration mechanisms provided for therein.

However, Lebrun J. accepted the respondent's alternative argument. Referring to the arbitral award, he noted that the arbitrator had confined his ruling to the contractual relationship between the respondent and the *mis en cause* employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the respondent lacked funds was precisely the poor quality of the work done by the *mis en cause* employees. Accordingly, he was of the view that:

> [TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of dismissal was something for which the *mis en cause* employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal, the [*mis en cause*] arbitrator was refusing to hear admissible and relevant evidence . . . .

Relying on the Supreme Court judgment in *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888, the judge concluded that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence.

Court of Appeal, [1990] R.J.Q. 2183

Baudouin J.A.

On the question of the arbitrator's jurisdiction, Baudouin J.A. agreed that the relevant provisions of the collective agreement were not [TRANSLATION] "crystal clear". However, he held that this document should be read as a whole and its purposes taken into account. He also referred to the general philosophy of Quebec labour law and concluded

that the arbitrator had jurisdiction to decide the two grievances and so had not arrogated to himself jurisdiction exercisable only by the ordinary courts of law.

On the second issue, Baudouin J.A., for the majority, upheld the Superior Court's decision that the arbitrator had exceeded his jurisdiction. Noting first that the Superior Court had found in the respondent's favour mainly owing to the fact that the arbitrator had not observed the *audi alteram partem* rule, the judge went on to say (at p. 2187):

> [TRANSLATION] With all due respect, it does not seems to me that that resolves the problem. It is still necessary to determine whether this evidence was relevant and admissible. There does not seem to be any doubt as to the relevance of the evidence, since it seeks to establish that the need to terminate the employment before the time specified was caused by what the two research assistants themselves did. I am of the view that its admissibility results from the very interpretation of the collective agreement between the parties. No provision is to be found in that agreement requiring the employer in cases of grant-aided professionals . . . to give the facts or reasons behind the dismissal. On the contrary, article 2-1.03 expressly excludes the application to this class of employees of clause 5-5.01 requiring the employer to do that. The university accordingly had no contractual obligation to give in writing the specific reasons for terminating the employment, subject to not being able to rely on them in the event of arbitration. The allegation of lack of funds was sufficient. Evidence of the reasons for this lack of funds was nonetheless not irrelevant or inadmissible.

Rousseau-Houle J.A. (dissenting on the main appeal)

Rousseau-Houle J.A. concurred with the reasons of Baudouin J.A. regarding the arbitrator's jurisdiction. However, she was of the view that the arbitrator had not exceeded his jurisdiction in not admitting evidence of the poor quality of the work done by the *mis en cause* employees.

Rousseau-Houle J.A. held that under s. 100.2 of the *Labour Code*, it is up to the arbitrator to decide on the relevance and admissibility of the evidence the parties intend to submit. His decisions are thus subject to judicial review only if there is a breach of natural justice or patently unreasonable error.

The judge considered that the respondent had been allowed to present argument on the lack of funds and that it had only been prevented from establishing another ground of dismissal, namely the incompetence of the research assistants, a ground which it had not mentioned in the employment termination notices.

Bearing in mind the limited purpose of the arbitrator's jurisdiction, namely to hear and decide the grievance before him, the judge was of the view that the arbitrator [TRANSLATION] "may consider the notion of relevance of the evidence more narrowly than a judge would when hearing witnesses" (p. 2188). She noted that the dispute submitted to the arbitrator here concerned the probable length of the contracts hiring the two *mis en cause* employees and the reason given by the respondent for terminating them.

The judge considered that the arbitrator's decision to refuse to admit the evidence on the ground that the respondent was actually trying to prove a cause of dismissal not mentioned in the notices was not unreasonable. She went on to say (at p. 2189):

> [TRANSLATION] That decision does not seem arbitrary or illogical to me either, since it was a necessary part of determining the point at issue and noted that there was not really an adequate connection between that point and the evidence presented.
>
> . . .

> In adopting a strict interpretation of the cause of dismissal, rather than granting an adjournment or admitting the evidence under advisement, the arbitrator did not exercise his jurisdiction unreasonably.

The judge further held that the arbitrator's refusal to allow the evidence also should not be regarded as a refusal to exercise his jurisdiction contrary to the rules of natural justice, since it is only a refusal to hear relevant and admissible evidence which constitutes an excess of jurisdiction. She felt that the respondent here had had an opportunity to put forward evidence regarding the lack of funds. She noted that the arbitrator had to reconcile the demands of the decision-making process with the rights of all parties and pointed out that the *audi alteram partem* rule was intended essentially to give the parties a reasonable opportunity to respond to the evidence presented against them.

Issues

Though the appellant formulated six questions, in my opinion this appeal really only raises two. First, it must be determined whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review, and in particular whether the Superior Court was justified in exercising its review power in the case at bar. Secondly, the Court must decide whether the Superior Court erred in ordering that the new arbitration hearing would be before another arbitrator.

Analysis

(a) *Refusal to Admit Evidence and Judicial Review*

The question therefore is whether, in deciding not to admit the evidence offered by the respondent, the arbitrator committed an error giving rise to judicial review. In their consideration of this question, Lebrun J. of the Superior Court and Baudouin J.A. speaking for the majority of the Court of Appeal both referred to the following passage from Chouinard J.'s judgment in *Roberval Express*, *supra*, at p. 904:

> Appellant alleged a refusal by the arbitrator to hear admissible and relevant evidence. A refusal to hear admissible and relevant evidence is so clear a case of excess or refusal to exercise jurisdiction that it needs no further comment.

It should be noted, however, that *Roberval Express* did not involve a simple refusal by a grievance arbitrator to hear relevant evidence. The arbitrator, who was to hear four grievances, had refused to hear the first three and heard only the grievance relating to the dismissal of the employee in question. The first three grievances concerned disciplinary action leading up to that dismissal. The employer contended that the dismissal resulted from incidents which gave rise to the disciplinary action, and it was therefore necessary to hear all the grievances at the same time. Accordingly, it attacked the arbitrator not only for not hearing certain evidence, but more importantly, for refusing to exercise his jurisdiction over three of the grievances presented to him.

When thus seen in their context it is not clear that Chouinard J.'s remarks can be used to dispose of this case. Accordingly, this Court must examine the question presented to it on the basis of the particular circumstances of this case, the arguments made by the parties and the general principles governing judicial review in the field of grievance arbitration.

(i) Determining the Scope of This Case

The appellant first argued that the present appeal actually concerns not the *mis en cause* arbitrator's failure to admit the evidence submitted by the respondent, but the *mis en cause* arbitrator's understanding of the issue presented to him, a question over which the grievance arbitrator has exclusive jurisdiction, free from judicial review except in the case of a patently unreasonable error or a breach of natural justice. In other words, the appellant argued that the exclusion of the evidence resulted here from the *mis en cause* arbitrator's decision to confine himself to the cause mentioned in the notice of dismissal and that that decision could only be reversed once it was shown to be patently unreasonable or a breach of natural justice.

As far as this argument is concerned, in my opinion, there is no doubt that the *mis en cause* arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that in this regard only a patently unreasonable error or a breach of natural justice could give rise to judicial review. The question is in no way one which could be characterized as jurisdictional in nature.

For some years, since the decision of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, this Court has made an effort to limit the scope of the theory of preliminary questions. In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. favoured instead a functional and pragmatic approach to identifying questions of jurisdiction. He said (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"

Applying this approach to the question of the grievance arbitrator's jurisdiction to define the scope of the issue presented to him, I am unable to conclude that the legislature intended such a matter to be beyond the arbitrator's exclusive jurisdiction. This is especially true in the instant case in that in order to determine the scope of the issue presented to him the arbitrator had primarily to interpret the collective agreement, the contracts concluded between the *mis en cause* Perreault and Guilbert and the respondent -- contracts covered by clause 5-1.01 of the collective agreement -- and the wording of the grievances filed by the appellant. Interpretation of such documents is clearly within the grievance arbitrator's exclusive jurisdiction.

This approach may seem to be at odds with the decision of this Court in *Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18. In that case, which also involved the exclusion of evidence, Kerwin J. suggested that, far from being non-reviewable by the courts, the error of an administrative tribunal in determining the questions which were the subject of its inquiry was on the contrary, depending on whether the tribunal was wrongly refusing to examine a question or concerning itself with a question not presented to it, a refusal by that tribunal to exercise its jurisdiction or an excess of jurisdiction justifying intervention by the courts.

This judgment, however, may be classified among the decisions of this Court which, as Wilson J. noted in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, demonstrates the reluctance Canadian courts had long shown ". . . to accept the proposition that tribunals should not be subject to the same standard of review as courts" (p. 1335). As Wilson J. explained, administrative law has developed considerably since that time, so that courts of law now allow administrative tribunals

much greater independence. *New Brunswick Liquor Corp.*, *supra*, represents the culmination of this development.

In view of the foregoing, I have no hesitation in concluding that the arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that only an unreasonable error on his part in this regard or a breach of natural justice could have constituted an excess of jurisdiction. I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

In my opinion, however, these comments do not dispose of the case at bar. The respondent is not complaining only, or even primarily, of the fact that in refusing to admit the evidence it had to offer the arbitrator erred in understanding the issue presented to him. Rather, it is arguing that even within the issue as defined by the arbitrator -- that is, an issue limited to the cause relied on in the notices of dismissal, the lack of funds -- this evidence was relevant since its very purpose was to establish the reason for this lack of funds. It maintained that the refusal to admit relevant and admissible evidence infringes the rules of natural justice and for that reason constitutes an excess of jurisdiction.

In other words, the question now before this Court is not whether, after deciding wrongly but not unreasonably that he should limit his analysis to a single ground of dismissal, an arbitrator who then decides to exclude evidence of other possible reasons for dismissal commits an error that is beyond judicial review by the courts. The answer to this question is simple: it is yes. The arbitrator is then acting within his jurisdiction.

The question before this Court is instead whether, in erroneously deciding to exclude evidence relevant to the ground of dismissal which he has himself identified as being that which he must examine, the arbitrator necessarily commits an excess of jurisdiction. In my view the answer to this question must in general be no. It will be yes, however, if by his erroneous decision the arbitrator was led to infringe the rules of natural justice. I therefore now turn to considering this question.

(ii) Refusal to Admit Relevant Evidence and Natural Justice

The only rule of natural justice with which the Court is concerned here is the right of a person affected by a decision to be heard, that is, the *audi alteram partem* rule. The question is whether there is a breach of that rule whenever relevant evidence is rejected by a grievance arbitrator. In order to answer this question, we must determine whether judicial review should be available whenever an arbitrator errs, regardless of the seriousness of his error, in declaring evidence submitted by the parties to be irrelevant or inadmissible.

The difficulty of this question arises from the tension existing between the quest for effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process, which depends on the parties' believing that they have had a complete opportunity to be heard. Professor Ouellette speaks in this regard of the [TRANSLATION] ". . . perpetual contradiction between freedom of operation and its necessary procedural aspects" (Y. Ouellette, "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 *R.D.U.S.* 819, at p. 850). Professor Evans also states:

> There is a certain tension between the proposition that an administrative tribunal, even if required to hold an adjudicative-type hearing, is not bound by the whole body of the law of evidence applied in proceedings in courts of law, and the imposition of a duty to decide in a procedurally fair manner.

(J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 452.)

For this reason, the question before the Court cannot simply be answered, as the appellant suggests, by reference to s. 100.2 of the *Labour Code*, which provides:

> **100.2** [Inquiry into grievance] The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.

The appellant argued that this provision gave a grievance arbitrator exclusive jurisdiction to decide on the relevance of the evidence presented to him and that his decisions in this regard are consequently beyond the scope of judicial review except in the event of patently unreasonable error.

This argument cannot be accepted. Section 100.2 of the *Labour Code* does give a grievance arbitrator complete autonomy in dealing with points of evidence and procedure; but the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice. This is what Professor Ouellette says in this regard, *supra*, at p. 850:

> [TRANSLATION] . . . the major decisions which formulated the principle of the independence of administrative evidence from technical rules have in the same breath made it clear that this independence must be exercised in accordance with the rules of fundamental justice. It is not sufficient for

> administrative tribunals to operate simply and effectively: they must attain this high ideal without sacrificing the fundamental rights of the parties.

It is true that the error of an administrative tribunal in determining the relevance of evidence is an error of law, and that in general the decisions of administrative tribunals which enjoy the protection of a complete privative clause are beyond judicial review for mere errors of law.

That is not true, however, in cases where, as occurred here in the submission of the respondent, the arbitrator's decision on the relevance of evidence had the effect of breaching the rules of natural justice. A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review; but that brings us back to the point at issue in this case: was there a breach of natural justice as a result of the *mis en cause* arbitrator's refusal to admit the evidence submitted by the respondent?

The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.

At the same time, it is clear that the confidence of the parties bound by the final decisions of grievance arbitrators is likely to be undermined by the reckless rejection

of relevant evidence. A certain caution is therefore unquestionably necessary in this regard. As Professor Garant observes:

> [TRANSLATION] A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision. The practice of a tribunal taking objections to evidence "under advisement" where possible, and when the party making them does not absolutely insist on having a decision right then, is usually advisable; it does not in any way contravene natural justice.

(P. Garant, *Droit administratif*, vol. 2, *Le contentieux* (3rd ed. 1991), at p. 231.)

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

Accordingly, in the case before the Court there is no doubt, in my opinion, that there was a breach of natural justice. The respondent wished to present evidence of the poor quality of the work of the *mis en cause* Perreault and Guilbert. It sought to show that as a consequence of the poor quality of their work it had been forced to obtain other resources in order to meet the requirements of the granting organization, and that accordingly not enough money remained from the grant to pay the salaries of the *mis en cause* employees. In the context of a hearing involving a dismissal due to a lack of funds, such evidence is *prima facie* crucial. Its purpose is to establish the cause of the lack of

funds. If there are still any doubts as to the significance of this evidence, they are dispelled by the following remarks by the *mis en cause* arbitrator:

> [TRANSLATION] Even if there was a lack of funds, that lack could not be a valid reason for breaking a term contract. It is a cause which is not within the employee's control, but is due to an agreement between the University and a third party.

In light of these remarks by the *mis en cause* arbitrator, one can only conclude that there was a breach of natural justice. As Lebrun J. pointed out, the *mis en cause* arbitrator adopted a paradoxical position:

> [TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of the dismissal was something for which the *mis en cause* employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal. . . .

The consequence of this paradoxical position taken by the *mis en cause* arbitrator is that he found himself in the position of disposing of an extremely important point in the case before him -- namely the lack of cause attributable to the employees -- without having heard <u>any evidence whatever</u> from the respondent on the point, and even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice.

The appellant argued that the arbitrator's comments on the lack of any cause attributable to the *mis en cause* employees were only *obiter* and that the arbitrator would quite clearly have come to the same decision even if he had heard the evidence the respondent was seeking to present. It contended that the real reason for the arbitrator's

decision was that the lack of funds itself had not been established in this case and moreover could never be a valid cause for dismissal.

This argument cannot be accepted. First, it is impossible to say with any certainty what the decision of the *mis en cause* arbitrator would have been if he had heard the evidence offered by the respondent. That evidence might have convinced him that in the particular circumstances of this case, and especially in view of the relationship existing between the respondent and the granting organization, the lack of funds could be a cause for dismissal attributable to the fault of the employees and that this ground could accordingly justify the respondent in terminating the employment contracts.

Secondly, and more fundamentally, the rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J., who stated in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:

> . . . the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

For all these reasons, I conclude that by refusing to admit the evidence which the respondent was seeking to present the *mis en cause* arbitrator infringed the rules of natural justice. The Superior Court therefore did not err in ordering a new arbitration.

Did the Superior Court however err in ordering that the new arbitration be held before another arbitrator?

(b) *Referral of Case to Another Arbitrator*

The appellant contended that the Superior Court had erred in ordering that the new arbitration be held before another arbitrator, since there was no real, objective reason for doubting the impartiality of the *mis en cause* arbitrator.

On this point, in my opinion, the appellant did not succeed in establishing that the Superior Court had erred in the exercise of its discretion so as to justify intervention by this Court. Though he did not actually say so, Lebrun J. was probably of the view that there could quite reasonably be doubt as to the ability of a grievance arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Conclusion

//*L'Heureux-Dubé J.*//

For these reasons, the appeal is dismissed with costs.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. -- I agree entirely with the Chief Justice on the outcome of this case. However, I would adopt the approach taken by the trial judge, Lebrun J., and by Baudouin J.A. for the majority of the Court of Appeal, [1990] R.J.Q. 2183.

When faced with a privative clause an appellate court will be held to a high standard of deference toward an administrative tribunal. However, an error on a question of law which goes to jurisdiction will always be reviewable (see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 000, and the decisions cited therein).

Although the arbitrator in the case at bar had jurisdiction to dispose of the grievances before him, as the lower courts correctly held, he could not in so doing commit an excess of jurisdiction. In *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, Dickson J. (as he then was), speaking for the Court, made this point very clearly (at p. 389):

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added.]

Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence. That is the case here.

In my view, the formalism and inflexibility demonstrated by the arbitrator in this case have no place in the hearing of a grievance. If the arbitrator had doubts as to the relevancy of the evidence sought to be introduced, he could have taken it under advisement as courts regularly do. This would have facilitated and speeded up the hearing. Furthermore, as is often the case, the relevance or otherwise of the evidence in question would have become apparent during the proceedings. In these circumstances, the ends of justice would have been better served for all the parties involved.

In any event, I subscribe entirely to the reasons of the majority of the Court of Appeal that the evidence presented by the respondent was relevant to the consideration and disposition of the grievances before the arbitrator. The arbitrator's refusal to consider such evidence was an excess of jurisdiction.

For these reasons, I would dispose of the appeal as the Chief Justice suggests, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Lapierre, St-Denis & Associés, Montréal.

Solicitors for the respondent: Joli-Coeur, Lacasse, Simard, Normand & Associés, Trois-Rivières.

TAB 8

1 # APPORTIONING PROJECT COSTS & RISKS

2

3 The estimated capital cost of the CxL Project is shown below:

4

5 **Table 1 - Line Cost**

	Estimated Cost ($000's)
Materials	27,811
Labour	10,170
Equipment Rental & Contractor Costs	68,686
Sundry	235
Contingencies	20,936
Overhead [1]	17,100
Allowance for Funds Used During Construction [2]	20,651
Real Estate	69,683
Total Line Work	**$235,272**

[1] Overhead Costs allocated to the Project are for corporate services costs. These costs are charged to capital projects through a standard overhead capitalization rate. As such they are considered "Indirect Overhead".
[2] AFUDC is calculated using the Board's approved interest rate methodology (EB-2016-0160) to the Project's forecast monthly cash flow and carrying forward closing balances from the preceding month.

TAB 9

Case Name:
Baker *v*. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches,
the Canadian Foundation for Children, Youth and the Law,
the Defence for Children International-Canada,
the Canadian Council for Refugees,
and the Charter Committee on Poverty Issues *Interveners*

Indexed as: Baker *v*. Canada (Minister of Citizenship and Immigration)

File No.: 25823.

1998: November 4; 1999: July 9.

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

on appeal from the federal court of appeal

Immigration -- Humanitarian and compassionate considerations -- Children's interests -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Application denied without hearing or formal reasons -- Whether procedural fairness violated -- Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) – Immigration Regulations, 1978, SOR/93-44, s. 2.1 -- Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law -- Procedural fairness -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Whether participatory rights accorded consistent with duty of procedural fairness -- Whether failure to provide reasons violated principles of procedural fairness -- Whether reasonable apprehension of bias.

Courts -- Appellate review -- Judge on judicial review certifying question for consideration of Court of Appeal -- Legal effect of certified question -- Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration -- Humanitarian and compassionate considerations -- Standard of review of humanitarian and compassionate decision -- Best interests of claimant's children -- Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law -- Review of discretion -- Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court -- Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context,

with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

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By L'Heureux-Dubé J.

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; **disapproved:** *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4; *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238; **not followed:** *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157; *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170; *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62; *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241; *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646; **referred to:** *Ramoutar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2972 (FC), [1993] 3 F.C. 370; *Minister of Employment and Immigration v. Jiminez-Perez*, 1984 CanLII 127 (SCC), [1984] 2 S.C.R. 565; *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643; *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879; *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105; *R. v. Higher Education Funding Council*, *ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525; *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57; *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *R. v. Civil Service Appeal Board*, *ex parte Cunningham*, [1991] 4 All E.R. 310; *R. v. Secretary of State for the Home Department*, *ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71; *Taabea v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R.

484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748; *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3.

By Iacobucci J.

Applied: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141; **referred to:** *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038.

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APPEAL from a judgment of the Federal Court of Appeal, 1996 CanLII 3884 (FCA), [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

Roger Rowe and *Rocco Galati*, for the appellant.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for the respondent.

Sheena Scott and *Sharryn Aiken*, for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and *Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and *Marie Chen*, for the intervener the Canadian Council of Churches.

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

1 L'HEUREUX-DUBÉ J. -- Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other

two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
> Letter of Aug. '93 from psychiatrist from Ont. Govm't.
> Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of "assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

> **82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court -- Trial Division.
>
> **83.** (1) A judgment of the Federal Court -- Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court -- Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. . . .

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
>
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.
>
> Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. *Federal Court -- Trial Division* (1995), 101 F.T.R. 110

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held

that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. *Federal Court of Appeal*, 1996 CanLII 3884 (FCA), [1997] 2 F.C. 127

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not

create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

IV. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> > (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
> >
> > (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
> >
> > (iii) Was there a reasonable apprehension of bias in the making of this decision?
>
> (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

V. Analysis

A. *Stated Questions Under Section 83(1) of the Immigration Act*

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a "serious question of general importance" be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2972 (FC), [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a "question of general importance" has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. *The Statutory Scheme and the Nature of the Decision*

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, 1984 CanLII 127 (SCC), [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should

attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, has become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. *Procedural Fairness*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory,

institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will

be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council*, *ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be

accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would

otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour

of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court -- Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result -- the claimant and his or her close family members -- and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were

before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the decision-making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for

administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at paras. 180-81.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the

concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, *ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department*, *ex parte Doody*, [1994] 1 A.C. 531, imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the

decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-

day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this

was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. *Review of the Exercise of the Minister's Discretion*

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) <u>The Approach to Review of Discretionary Decision-Making</u>

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that

"[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction

conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and

non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under

the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court -- Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a "serious question of general importance" by the Federal Court -- Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating

between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary

> foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the "serious question of general importance" stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H & C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and

liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) *International Law*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) *The Ministerial Guidelines*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate"

considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner

inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. *Conclusions and Disposition*

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

78 IACOBUCCI J. - I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*,

Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight*

Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed with costs.

Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.

Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.

Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.

EB-2022-0140

TAB 10

4.0 PROCEDURAL FAIRNESS/ RIGHT TO BE HEARD

Although different tribunals have different powers and perform different functions, they all must follow the same general rules regarding the process they use to reach decisions. This concept is known as 'procedural fairness', or 'natural justice'. The requirement for procedural fairness is generally triggered if a decision "is administrative and affects the rights, privileges or interests of an individual." At a high level, procedural fairness includes ensuring that anyone materially affected by a decision of a tribunal has an opportunity to present their views on the matter to an unbiased decision maker. This is sometimes referred to as the right to be heard. The standards for meeting the right to be heard are flexible, and requirements will vary depending on the nature of the decision and what type of impact it will have on individuals.

Parties that may be directly impacted by a proceeding must be able to meaningfully participate in the process, but the OEB can place boundaries on the nature of that participation. The courts have accepted that tribunals have broad authority on how to control their hearings, and how best to balance the rights of participation with efficient and effective decision making. Panels of Commissioners can make procedural determinations during the hearing to balance fairness and efficiency.

Although the OEB must respect the rights to procedural fairness, the OEB controls its own process. The applicable legislation provides limited specific guidance on this process and provides significant leeway to tribunals such as the OEB. The OEB can and will control its processes so they are efficient and effective. The OEB is committed to active adjudication in its proceedings and will do so in a manner that ensures procedural fairness is maintained.

In most proceedings where a decision may adversely impact Aboriginal or treaty rights and the Constitutional duty to consult with Indigenous peoples is triggered, the OEB also must consider whether, based on the evidence before it, it is satisfied that the duty to consult has been discharged before it can issue a final decision approving an application. The OEB welcomes active participation by Indigenous peoples in OEB hearings to ensure that their voices are heard where they have a substantial interest in the proceeding. This includes concerns about any adverse impacts on their Aboriginal or treaty rights when within the OEB's mandate, as well as other issues as may be within the scope of the hearing.

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[6] Baker v. Canada (Minister of Citizenship and Immigration), [1999] Supreme Court of Canada
[7] See, for example, ***Re: Sound v. Fitness Industry Council of Canada***, 2014 FCA 48 (CanLII), para. 42

TAB 11

Case Name:

Re:Sound v. Fitness Industry Council of Canada, 2014 FCA 48 (CanLII)

BETWEEN:

RE:SOUND

Applicant

and

FITNESS INDUSTRY COUNCIL OF CANADA
and GOODLIFE FITNESS CENTRES INC.

Respondents

Heard at Toronto, Ontario, on November 19, 2013.
Judgment delivered at Toronto, Ontario, on February 24, 2014.

REASONS FOR JUDGMENT BY: **EVANS J.A.**

CONCURRED IN BY **TRUDEL J.A.**
WEBB J.A.

Date: 20140310

Docket:
A-353-12

Citation: 2014 FCA 48

CORAM: **EVANS J.A.**
TRUDEL J.A.
WEBB J.A.

BETWEEN:

RE:SOUND

Applicant

and

FITNESS INDUSTRY COUNCIL OF CANADA
and GOODLIFE FITNESS CENTRES INC.

Respondents

REASONS FOR JUDGMENT

<u>EVANS J.A.</u>

Introduction

[1] Section 19 of the *Copyright Act*, R.S.C. 1985, c. C-42 (Act) entitles performers and makers of sound recordings to an equitable remuneration from those who use these recordings in a public performance.

[2] Re:Sound is a not-for-profit collective society authorized under the Act to administer the performance rights of performers and record labels in sound recordings. In particular, Re:Sound collects and distributes equitable remuneration on behalf of performers and makers of sound recordings of musical works in accordance with royalty tariffs certified by the Copyright Board (Board).

[3] In a decision dated July 6, 2012, the Board approved *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012* (*Tariff 6.B*). *Tariff 6.B* prescribes the amount of equitable remuneration to be collected by Re:Sound from those using published sound recordings of musical works to accompany fitness classes, skating, dance instruction, and other physical activities.

[4] *Tariff 6.B* requires fitness centres to pay an annual flat fee to Re:Sound for each venue where recorded music in Re:Sound's repertoire is used in conjunction with fitness classes. The Board based the royalty on the average of the payments made by fitness centres under agreements with the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the composers, lyricists, and music publishers of recorded music to accompany dance instruction and fitness activities, in lieu of the amounts set in *SOCAN Tariff 19 – Use of Recorded Music to Accompany Dance Instruction and Fitness Activities, 2011-2012* (*SOCAN Tariff 19*).

[5] Re:Sound has brought an application for judicial review to set aside *Tariff 6.B*. The application is opposed by the respondents, the Fitness Industry Council of Canada (FIC), the industry's trade association, and Goodlife Fitness Centres Inc. (Goodlife), a major player in the fitness industry. They had participated in the proceedings before the Board as objectors to Re:Sound's proposed *Tariff 6.B*.

[6] Re:Sound alleges in its application for judicial review that the Board committed three errors in setting the royalty rates for the use of recorded music to accompany fitness classes: (i) it breached the duty of fairness by basing *Tariff 6.B* on a ground that was not considered during the hearing and on evidence that Re:Sound had no opportunity to address; (ii) it erred in law when it interpreted the Act as providing that royalties under section 19 should be based, not on the number of all recordings used in fitness classes that are eligible for equitable remuneration, but on the percentage of those for which the performers or makers had authorized Re:Sound to collect royalties on their behalf; and (iii) it set the royalty at an unreasonably low level.

[7] For the reasons that follow, I would allow the application for judicial review on the ground that the Board breached the duty of fairness. However, I am not persuaded that the Board committed a legal error when it reduced the section 19 royalties payable to Re:Sound to reflect the percentage of eligible recordings used in fitness classes that performers or makers had brought into Re:Sound's repertoire by authorizing it to act on their behalf. Since I have concluded that the Board must redetermine the royalty after hearing additional submissions, it is unnecessary to opine on the

reasonableness or otherwise of the royalty set by the Board in *Tariff 6.B* for the use of recordings to accompany fitness classes.

[8] As already noted, *Tariff 6.B* also includes royalties payable to the makers and performers of sound recordings of musical works that are used to accompany skating, dance instruction, and other physical activities. Re:Sound made relatively few submissions on these aspects of *Tariff 6.B* to either the Board or this Court. I shall deal with Re:Sound's challenge to these royalties after my analysis of its application to review the royalties approved for the use of recorded music in fitness classes.

Factual background

[9] The Board has a statutory jurisdiction to set tariffs of royalties payable to the owners of copyright in sound recordings (composers, lyricists, and music publishers). It also approves royalty tariffs payable as "equitable remuneration" to the holders of "neighbouring rights" in published sound recordings (performers and makers) for the performance in public or the communication to the public by telecommunication in Canada of their recordings.

[10] The right of performers and makers to an equitable remuneration is not an exclusive right: unlike traditional copyright owners, holders of neighbouring rights in musical works cannot bring an action to recover equitable remuneration against a person who, without authorization, performs their recordings in public. The only legal recourse they may have is against a collective society that has failed either to file a proposed tariff with the Board as required by subsections 67.1(1) and (2) of the Act, or to distribute to the beneficiaries the royalties that have been approved by the Board and collected from the users by the collective society.

[11] Nor can a collective society bring an action against a user to recover equitable remuneration when no tariff has been proposed, unless the Minister of Industry has given written consent: subsection 67.1(4). However, if users default in making the royalty payments in an approved tariff, a collective society may recover them in a court of competent jurisdiction: subsection 68.2(1).

[12] The recognition of neighbouring rights in Canadian law is relatively recent. They were added to the Act in 1997 (S.C. 1997, c. 24) in order to implement obligations assumed by Canada on March 4, 1998 when it acceded to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 43 (Rome Convention). For the limited protection previously enjoyed by makers and performers of recorded music, see the first neighbouring rights decision of the Board in *Tariff No. 1.A – Commercial Radio, 1998-2002*, dated August 13, 1999, at 2-3 (*Tariff 1.A*).

[13] *Tariff 6.B* is the first neighbouring rights tariff that the Board has certified for the use of sound recordings to accompany fitness classes. However, it has certified two related tariffs.

[14] First, *SOCAN Tariff 19* is the most recent SOCAN tariff of royalties approved by the Board to be paid to the composers and lyricists of recorded music used to accompany dance, aerobics, body building, and other similar activities.

[15] Second, in 2006 the Board certified *NRCC Tariff No. 3 – Use and Supply of Background Music, 2003-2009* proposed by the Neighbouring Rights Collective of Canada (NRCC), Re:Sound's predecessor, for the holders of neighbouring rights in published sound recordings used as background music in an establishment.

[16] Re:Sound is an umbrella organization for its five member societies, which are comprised of performers or makers, in Quebec and elsewhere in Canada. It distributes the royalties collected from users either to the member society to which the performer or maker belongs or directly to the individuals entitled to them. Re:Sound is currently the only collective society authorized by the Board to collect section 19 royalties from the users of sound recordings.

[17] The proceedings from which this application arises commenced on March 30, 2007 when Re:Sound filed a proposed tariff for the use of recorded music to accompany, among other things, fitness classes. If approved as filed, Re:Sound's proposed *Tariff 6.B* would, the Board found, impose royalty payments of approximately $86 million annually on the Canadian fitness industry which, according to Re:Sound, has an annual revenue of around $2 billion. In objecting to Re:Sound's proposed tariff, the FIC and Goodlife submitted that the Board should impose royalties totalling approximately $3 million.

[18] The Board certified *Tariff 6.A* on July 15, 2011 to deal with the tariff proposed by Re:Sound for sound recordings used in connection with dance. A year later, the Board certified T*ariff 6.B* for the use of recorded music to accompany other physical activities, including fitness classes. It is common ground between the parties to this application that under *Tariff 6.B* as approved by the Board, the annual amount that Re:Sound can collect from users is less than that proposed by the FIC and Goodlife.

[19] The Board's five-year long decision-making process comprised formal and informal procedural steps, including interrogatories and responses, written submissions, and the filing of expert evidence. Only 11 days were spent on the oral hearing. I shall describe the aspect of the Board's procedure relevant to Re:Sound's allegation that it was denied procedural fairness in my analysis of that issue.

Decision of the Board

[20] The Board's reasons describe and analyze at length the expert evidence and submissions of the parties in support of their respective positions on the appropriate bases for determining the equitable remuneration payable to Re:Sound for the use of recorded music to accompany fitness classes: paras. 9-63, and 98-147.

[21] It suffices to say here that the Board found most of the expert evidence and submissions of Re:Sound and the respondents to be unsatisfactory. Consequently, it rejected the royalties that the parties proposed.

[22] One point is, however, worth noting. An expert witness for the respondents, Dr. David Reitman, suggested that since *SOCAN Tariff 19* concerned royalties payable to composers and lyricists of recorded music played in conjunction with physical activities similar to those targeted in *Tariff 6.B*, it was an appropriate benchmark for *Tariff 6.B*. It was argued that *SOCAN Tariff*

19 had been in existence in various forms for 30 years and was "a reality in the marketplace": at para. 136. It was thus a reliable indicator of the market value of recorded music when used in conjunction with physical activities.

[23] The Board, however, agreed with Re:Sound that *SOCAN Tariff 19* was not an appropriate benchmark: at para. 147. It had never been the subject of even cursory examination, important terms of the Tariff were ambiguous, and its enforcement had proved problematic: at paras. 136, 140-144. As evidence of the difficulties with *SOCAN Tariff 19*, the Board noted (at para. 146) that, rather than attempting to enforce the rates certified in the Tariff, SOCAN collected nearly one third of its "*Tariff 19* royalties" under confidential licensing agreements that it had made with individual users subject to *SOCAN Tariff 19*, including some of Canada's largest fitness centres and dance instruction providers. After the hearing on *Tariff 6.B* was closed, the Board requested SOCAN to deposit copies of these agreements with it, which it did.

[24] The Board recognized that its rejection of both the expert evidence adduced by the parties, and the other suggested bases for setting the royalties, left it in a difficult position. Nonetheless, it decided (at paras. 161-164) not to exercise the option of declining to approve a tariff after considering *SOCAN v. Bell Canada,* 2010 FCA 139 at paras. 25-30. Since the Board had not rejected the factual information filed by the parties it had some evidence of the value of recorded music to fitness classes. Consequently, it held, Re:Sound was entitled to a tariff.

[25] The Board acknowledged (at para. 167) that flat fee royalties are generally an unsatisfactory reflection of the value of music to users, because they do not take account of the number of participants in a targeted activity or the amount of music used. Nonetheless, the Board decided that this was the best solution to its dilemma in this case. A flat fee for all users is easy to administer because minimal compliance monitoring is needed. In addition, *Tariff 6.B* was only transitional, in the sense that the period that it covered ended in 2012, the year of its approval, and the Board would likely be given better evidence on which to base a more permanent, multi-year tariff to start in 2013: see paras. 165-167.

[26] The Board calculated (at paras. 83-97, 168-169) the amount of the flat fee as follows. It computed the average "*Tariff 19* royalties" paid to SOCAN under the agreements with fitness centres that it had supplied to the Board. The Board determined that 53% of the musical recordings played at fitness centres were eligible recordings under section 20. It then adjusted this percentage down to 36.6% to reflect the fact that Re:Sound's repertoire consisted of only a portion of the eligible recordings played at fitness classes. This calculation produced an annual flat fee of $105.74 to be paid by each venue using sound recordings to accompany fitness classes that were in the repertoire of Re:Sound or one of its member collectives.

Statutory Framework

[27] The statutory provisions relevant to the disposition of this application are contained in the *Copyright Act*. Section 2 defines a collective society for the purpose of the Act.

2. "collective society" means a society, association or corporation that carries on the business of collective administration of copyright or of the	2. « société de gestion » Association, société ou personne morale autorisée — notamment par voie de cession, licence ou mandat — à

remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

se livrer à la gestion collective du droit d'auteur ou du droit à rémunération conféré par les articles 19 ou 81 pour l'exercice des activités suivantes :

(*a*) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

a) l'administration d'un système d'octroi de licences portant sur un répertoire d'oeuvres, de prestations, d'enregistrements sonores ou de signaux de communication de plusieurs auteurs, artistes-interprètes, producteurs d'enregistrements sonores ou radiodiffuseurs et en vertu duquel elle établit les catégories d'utilisation qu'elle autorise au titre de la présente loi ainsi que les redevances et modalités afférentes;

(*b*) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.

b) la perception et la répartition des redevances payables aux termes de la présente loi.

[28] Subection 19(1) creates a right to an equitable remuneration for makers and performers of sound recordings when performed in public. In order to produce the funds required to provide an equitable remuneration, those who perform the recordings in public are liable to pay royalties to the collective society authorized to collect them. Subsection 20(1) sets out the eligibility criteria for equitable remuneration and the conditions under which the right applies: the maker of a sound recording must be a Canadian citizen or a permanent resident (or, in the case of a corporation, have its headquarters in Canada), or the fixations for the recording must have occurred in Canada.

[29] Other provisions in sections 19 and 20, not relevant to the present proceeding, apply the right to equitable remuneration and the eligibility criteria to parties to the Rome Convention. Recordings emanating from the United States will normally not be eligible for equitable remuneration because the United States is not party to the Rome Convention. They can therefore be performed in public in Canada without the user being liable to pay a royalty under section 19.

19. (1) If a sound recording has been published, the performer and maker are entitled, subject to subsection 20(1), to be paid equitable remuneration for its performance in public or its communication to the public by

19. (1) Sous réserve du paragraphe 20(1), l'artiste-interprète et le producteur ont chacun droit à une rémunération équitable pour l'exécution en public ou la communication au public par

telecommunication, except for a communication in the circumstances referred to in paragraph 15(1.1)(d) or 18(1.1)(a) and any retransmission.

...

(2) For the purpose of providing the remuneration mentioned in this section, a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(*a*) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or

(*b*) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

(3) The royalties, once paid pursuant to paragraph (2)(a) or (b), shall be divided so that

(*a*) the performer or performers receive in aggregate fifty per cent; and

(*b*) the maker or makers receive in aggregate fifty per cent.

20. (1) The right to remuneration conferred by subsection 19(1) applies only if

(*a*) the maker was, at the date of the first fixation, a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or, if a

télécommunication — à l'exclusion de la communication visée aux alinéas 15(1.1)d) ou 18(1.1)a) et de toute retransmission — de l'enregistrement sonore publié.

[…]

(2) En vue de cette rémunération, quiconque exécute en public ou communique au public par télécommunication l'enregistrement sonore publié doit verser des redevances :

a) dans le cas de l'enregistrement sonore d'une oeuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir;

b) dans le cas de l'enregistrement sonore d'une oeuvre littéraire ou d'une oeuvre dramatique, soit au producteur, soit à l'artiste-interprète.

(3) Les redevances versées en application de l'alinéa (2)a) ou b), selon le cas, sont partagées par moitié entre le producteur et l'artiste-interprète.

20. (1) Le droit à rémunération conféré par le paragraphe 19(1) ne peut être exercé que si, selon le cas :

a) le producteur, à la date de la première fixation, soit est un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des*

corporation, had its headquarters in Canada; or

réfugiés, soit, s'il s'agit d'une personne morale, a son siège social au Canada;

(*b*) all the fixations done for the sound recording occurred in Canada.

b) toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu au Canada.

…

[…]

[30] The first part of Part VII of the Act establishes the Copyright Board and confers its powers. Only a few provisions are sufficiently relevant to this application to warrant inclusion here.

66. (3) The chairman must be a judge, either sitting or retired, of a superior, county or district court.

66. (3) Le gouverneur en conseil choisit le président parmi les juges, en fonction ou à la retraite, de cour supérieure, de cour de comté ou de cour de district.

…

[…]

66.52 A decision of the Board respecting royalties or their related terms and conditions that is made under subsection 68(3), sections 68.1 or 70.15 or subsections 70.2(2), 70.6(1), 73(1) or 83(8) may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.

66.52 La Commission peut, sur demande, modifier toute décision concernant les redevances visées au paragraphe 68(3), aux articles 68.1 ou 70.15 ou aux paragraphes 70.2(2), 70.6(1), 73(1) ou 83(8), ainsi que les modalités y afférentes, en cas d'évolution importante, selon son appréciation, des circonstances depuis ces décisions.

…

[…]

66.6 (1) The Board may, with the approval of the Governor in Council, make regulations governing

66.6 (1) La Commission peut, avec l'approbation du gouverneur en conseil, prendre des règlements régissant :

(*a*) the practice and procedure in respect of the Board's hearings, including the number of members of the Board that constitutes a quorum;

a) la pratique et la procédure des audiences, ainsi que le quorum;

…

[…]

66.7 (1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and

66.7 (1) La Commission a, pour la comparution, la prestation de serments, l'assignation et l'interrogatoire des témoins, ainsi que pour la production d'éléments de preuve, l'exécution de ses décisions et toutes autres questions relevant de sa compétence, les

privileges as are vested in a superior court of record.

…

attributions d'une cour supérieure d'archives.

[…]

[31] The second part of Part VII is headed "Collective Administration of Performing Rights and of Communication Rights". The following provisions are relevant to the present application.

67. Each collective society that carries on

(*a*) the business of granting licences or collecting royalties for the performance in public of musical works, dramatico-musical works, performer's performances of such works, or sound recordings embodying such works, or

…

must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer's performances or sound recordings, that are in current use.

67. Les sociétés de gestion chargées d'octroyer des licences ou de percevoir des redevances pour l'exécution en public ou la communication au public par télécommunication — à l'exclusion de la communication visée au paragraphe 31(2) — d'oeuvres musicales ou dramatico-musicales, de leurs prestations ou d'enregistrements sonores constitués de ces oeuvres ou prestations, selon le cas, sont tenues de répondre aux demandes de renseignements raisonnables du public concernant le répertoire de telles oeuvres ou prestations ou de tels enregistrements d'exécution courante dans un délai raisonnable.

67.1 (1) Each collective society referred to in section 67 shall, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 68(3) expires, file with the Board a proposed tariff, in both official languages, of all royalties to be collected by the collective society.

67.1 (1) Les sociétés visées à l'article 67 sont tenues de déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 68(3), un projet de tarif, dans les deux langues officielles, des redevances à percevoir.

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 68(3) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it, on or before the March 31 immediately before its proposed effective date.

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 68(3), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

(3) A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years.

(3) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

(4) If a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

…

(*c*) the recovery of royalties referred to in section 19.

(4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit… ou pour recouvrement des redevances visées à l'article 19.

(5) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board.

(5) Dès que possible, la Commission publie dans la Gazette du Canada les projets de tarif et donne un avis indiquant que tout utilisateur éventuel intéressé, ou son représentant, peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

68. (1) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection 67.1(5) or raised by the Board, and

(*a*) send to the collective society concerned a copy of the objections so as to permit it to reply; and

(*b*) send to the persons who filed the objections a copy of any reply thereto.

68. (1) La Commission procède dans les meilleurs délais à l'examen des projets de tarif et, le cas échéant, des oppositions; elle peut également faire opposition aux projets. Elle communique à la société de gestion en cause copie des oppositions et aux opposants les réponses éventuelles de celle-ci.

(2) In examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board

(2) Aux fins d'examen des projets de tarif déposés pour l'exécution en public ou la communication au public par télécommunication de prestations d'oeuvres musicales ou d'enregistrements sonores constitués de ces prestations, la Commission :

(*a*) shall ensure that

(i) the tariff applies in respect of performer's performances and sound recordings only in the situations referred to in the provisions of section 20 other than subsections 20(3) and (4),

(ii) the tariff does not, because of linguistic and content requirements of Canada's broadcasting policy set out in section 3 of the Broadcasting Act, place some users that are subject to that Act at a greater financial disadvantage than others, and

(iii) the payment of royalties by users pursuant to section 19 will be made in a single payment; and

(*b*) may take into account any factor that it considers appropriate.

(3) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to

(*a*) any objections to the tariffs under subsection 67.1(5); and

(*b*) the matters referred to in subsection (2).

(4) The Board shall
(*a*) publish the approved tariffs in the Canada Gazette as soon as practicable; and

(*b*) send a copy of each approved tariff, together with the reasons for the Board's decision, to each collective

a) doit veiller à ce que :

(i) les tarifs ne s'appliquent aux prestations et enregistrements sonores que dans les cas visés à l'article 20, à l'exception des paragraphes 20(3) et (4),

(ii) les tarifs n'aient pas pour effet, en raison d'exigences différentes concernant la langue et le contenu imposées par le cadre de la politique canadienne de radiodiffusion établi à l'article 3 de la Loi sur la radiodiffusion, de désavantager sur le plan financier certains utilisateurs assujettis à cette loi,

(iii) le paiement des redevances visées à l'article 19 par les utilisateurs soit fait en un versement unique;

b) peut tenir compte de tout facteur qu'elle estime indiqué.

(3) Elle homologue les projets de tarif après avoir apporté aux redevances et aux modalités afférentes les modifications qu'elle estime nécessaires compte tenu, le cas échéant, des oppositions visées au paragraphe 67.1(5) et du paragraphe (2).

(4) Elle publie dès que possible dans la Gazette du Canada les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à chaque société de gestion ayant déposé un projet de tarif et aux opposants.

society that filed a proposed tariff and to any person who filed an objection.

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

(2) No proceedings may be brought against a person who has paid or offered to pay the royalties specified in an approved tariff for

…

(*c*) the recovery of royalties referred to in section 19.

(3) Where a collective society files a proposed tariff in accordance with subsection 67.1(1),

(*a*) any person entitled to perform in public or communicate to the public by telecommunication those works, performer's performances or sound recordings pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(*b*) the collective society may collect the royalties in accordance with the previous tariff, until the proposed tariff is approved.

68.2 (1) La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

(2) Il ne peut être intenté aucun recours … pour recouvrement des redevances visées à l'article 19, contre quiconque a payé ou offert de payer les redevances figurant au tarif homologué.

(3) Toute personne visée par un tarif concernant les oeuvres, les prestations ou les enregistrements sonores visés à l'article 67 peut, malgré la cessation d'effet du tarif, les exécuter en public ou les communiquer au public par télécommunication dès lors qu'un projet de tarif a été déposé conformément au paragraphe 67.1(1), et ce jusqu'à l'homologation d'un nouveau tarif. Par ailleurs, la société de gestion intéressée peut percevoir les redevances prévues par le tarif antérieur jusqu'à cette homologation.

Issues and analysis

[32] The Court must determine two primary issues in order to dispose of this application for judicial review of *Tariff 6.B* in respect of the use of sound recordings to accompany fitness classes.

(1) Did the Board deprive Re:Sound of a fair opportunity to participate in the decision-making process in breach of the duty of fairness when it set the royalty on a basis not addressed by the parties, and on material that Re:Sound had neither seen nor had an opportunity to comment on?

(2) Did the Board err in law when it interpreted the Act as entitling Re:Sound to collect royalties under section 19 in respect only of those eligible sound recordings played at fitness centres the performers or makers of which had authorized it or one of its member collectives to act for them in the administraion of their right to equitable remuneration?

[33] First, though, it is necessary to determine the standard of review applicable to each question.

ISSUE 1: What is the applicable standard of review?

(i) *Breach of the duty of procedural fairness*

[34] The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[35] Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 *et seq*. (*Dunsmuir*) of whether David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.

[36] However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.

[37] In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness: *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560 at 568-569 (*Prassad*). These procedural aspects include: whether the "hearing" will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.

[38] *Dunsmuir* does not address the standard of review applicable to tribunals' procedural choices when they are challenged for breach of the duty of fairness. However, the Court held (at para. 53) that the exercise of administrative discretion is normally reviewable on a standard of reasonableness. This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.

[39] That said, administrative discretion ends where procedural unfairness begins: *Prassad* at 569. A reviewing court must determine for itself on the correctness standard whether that line has been crossed. There is a degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision-makers have discretion over their procedure.

[40] Thus, writing for the majority in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 27, Justice L'Heureux-Dubé included the decision-maker's procedural choice and agency practice as factors that courts must take into account when determining the contents of the duty of fairness in any given context. She stated that considerable weight should be given to this choice when the legislature had conferred broad procedural discretion on the agency or its expertise extended to procedural issues.

[41] Justice Abella endorsed these observations when writing for the majority in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 230-231. She said (at para. 231):

> Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies.

[42] In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

(ii) *Interpreting the* Copyright Act

[43] Statutory decision-makers constituting a "discrete and special administrative regime" (*Dunsmuir* at para. 55), such as the Board in this case, are presumptively owed curial deference in the interpretation and application of their enabling statute: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39. Administrative tribunals' interpretation of their enabling legislation is thus normally subject to judicial review on a standard of reasonableness: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 21-22.

[44] The substantive legal question in dispute in the present application is whether the *Copyright Act* entitles a collective society to a tariff calculated on the basis of all the sound recordings eligible for equitable remuneration that are used to accompany particular activities, or only those in respect of which makers or performers have authorized the society to act on their behalf. This is a question of statutory interpretation because it is not limited to the facts of this case.

[45] Re:Sound contends that the presumption that reasonableness is the standard for reviewing an administrative tribunal's interpretation of its enabling legislation is rebutted when the Board is interpreting the Act: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (*Rogers*).Writing for the majority in that case, Justice Rothstein stated (at para. 14):

> It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[46] In my view, *Rogers* is distinguishable because the question of statutory interpretation in dispute in the present case arises from the Board's approval of a proposed royalty under subsection 68(3) of the *Copyright Act*. Determining whether a collective society represents eligible recordings not in its repertoire when proposing a tariff under section 67.1 is not within a statutorily created "shared primary jurisdiction between the administrative tribunal and the courts": *Rogers* at para. 18.

[47] This conclusion does not rest on a finding that there are *no* circumstances under which a court could be required to determine at first instance whether a collective society represented all eligible recordings used to accompany particular activities, or only those that had been brought into its repertoire as a result of some form of authorization from the performer or maker.

[48] For example, while a collective society that has failed to file a tariff may not bring an action to recover equitable remuneration from a user, it can do so with the written consent of the Minister of Industry: subsection 67.1(4). A user of a recording of music sued in such an action might seek to reduce the amount claimed by the collective society, on the ground that the society may only collect royalties in respect of recordings for which their makers or performers have authorized it to act for them.

[49] In my view, this theoretical and somewhat remote possibility is not sufficient to bring the present case within the *Rogers* exception. The requirement of Ministerial consent before a society can bring an action to recover equitable remuneration instead of seeking the Board's approval of a tariff is a clear indication that Parliament intended the Board to have primary jurisdiction over the collective enforcement of neighbouring rights, including the interpretation of the statutory provisions governing this complex, rate-setting scheme. No such provision limited the copyright holder's right in *Rogers* to bring an infringement action that could have required a court to decide the same legal question as that decided by the Board.

[50] Courts have long been familiar with the individual law of copyright through their jurisdiction over infringement actions. However, they have no similar knowledge of the statutory scheme for the collective administration of the right to equitable remuneration, a complex and technical matter that the Act entrusts almost exclusively to the Board: compare *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, 247 D.L.R. (4th) 193 at para. 110.

[51] The superior expertise of the Board in the setting of royalty rates for the collective administration of the right to equitable remuneration further supports the conclusion that the Court should apply a standard of reasonableness to the Board's interpretation of the aspects of the statutory scheme in question in this application for judicial review.

ISSUE 2: Did the Board breach the duty of fairness by basing the royalties tariff on the average of the amounts paid under licence agreements obtained by the Board from SOCAN after the close of the hearing on *Tariff 6.B*?

(i) *The law*

[52] Agencies such as the Board that administer a complex regulatory program are not restricted to the evidence adduced by the parties. They are charged with exercising broad substantive and procedural discretion to enable them to achieve an outcome that best serves the public interest implicated in the particular program. Thus, when not satisfied with the accuracy or completeness of the parties' evidence these tribunals may seek additional information from other sources.

[53] Since nothing in the Act precludes the Board from seeking extraneous information and relying on it in its decision, it was open to the Board in the present case to obtain from SOCAN copies of the confidential licensing agreements with users: *Society of Composers, Authors and Music Publishers of Canada v. Canada (Copyright Board)* (1993), 16 Admin. L.R. (2d) 187 at para. 51.

[54] However, agencies must ensure that, if they obtain information from third parties, they do not thereby jeopardize parties' participatory rights: to know and to comment on material relevant to the decision; to have notice of the grounds on which the decision may be based; and to have an opportunity to make representations accordingly. The ultimate question for a reviewing court in every case is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry.

(ii) *The facts*

[55] The parties to the present application agree on most of the facts, but disagree on their legal significance in determining if the Board had afforded procedural fairness to Re:Sound.

[56] Re:Sound requested members of the FIC during interrogatories to identify the amounts that they had paid to SOCAN for the public performance of recordings of musical works to accompany fitness classes. One responded in the Fall of 2009 by providing to Re:Sound and the Board the evidence that it had applied in the calculation of *SOCAN Tariff 19* for fitness classes. Others responded to the same interrogatory in a similar manner; some revealed the amounts that they had paid under their confidential agreements with SOCAN.

[57] In February 2010, Re:Sound obtained, with the assistance of a Board order, a copy of a confidential agreement between a user targeted by *SOCAN Tariff 19* and SOCAN under which a user had made its payments. The agreement revealed, among other things, the flat fee paid by the user for the performance in public of sound recordings to accompany fitness classes.

[58] Thus, well before the Board commenced its hearing on the proposed *Tariff 6.B* in April 2010, Re:Sound knew the amounts paid by some fitness clubs to SOCAN, including those used by the Board to calculate the flat fee royalties in *Tariff 6.B*. It also had a copy of the confidential agreement under which one of them had made payments to SOCAN.

[59] On May 16, 2011, more than a year after the oral hearing had closed, the Board ordered SOCAN to answer questions about *SOCAN Tariff 19,* which the FIC and Goodlife had suggested at the hearing as a possible benchmark for *Tariff 6.B* royalties. The Board informed the parties of these requests and of SOCAN's responses, which the Board forwarded to the parties on June 13, 2011.

[60] On June 23, 2011, the Board put further questions to SOCAN and requested copies of SOCAN's agreements with users subject to *SOCAN Tariff 19*. SOCAN responded to the Board on July 26, 2011, and copied the parties. It stated, among other things, that it would courier copies of the agreements to the Board, which it did. Neither SOCAN nor the Board provided copies of these agreements to Re:Sound.

[61] SOCAN's response also included an Excel spreadsheet summarizing aspects of the agreements, including a list of eighteen organizations that had made agreements with it, and the amounts that each had paid in 2007. I infer from the names of most of these organizations that their principal activities were not fitness classes, but skating or dance instruction.

[62] Even though Re:Sound knew that the Board had copies of the agreements, it did not ask the Board to disclose them. Nor did Re:Sound at any time ask the Board for an opportunity to respond orally or in writing to either the spreadsheet or any of the other information obtained by the Board.

[63] In an email dated May 16, 2011 advising the parties of the information that the Board had asked SOCAN to provide, the Secretary General of the Board stated that, once the Board had received SOCAN's responses, it would issue further directions on what information the parties should provide. In an email of June 13, 2011 informing the parties of SOCAN's responses, the Board again told them that it would issue further directions in due course. See Applicant's Record, vol. 1 at 84 and 87.

[64] A further email, dated November 3, 2011, contained an order of the Board stating that in accordance with a Board order of June 23, 2011, it had received from SOCAN on July 26, 2011 copies of agreements with those subject to *SOCAN Tariff 19*, and the Excel file. The Board ordered that these documents were to remain confidential and advised the parties to "conduct themselves accordingly." Unlike the earlier emails to the parties, however, this one did not state that the Board would be issuing further directions to them: see Applicant's Record, vol. 1 at 112.

[65] In the course of its application for judicial review of the Board's decision on *Tariff 6.B* Re:Sound made a request to the Board under rule 317 of the *Federal Courts Rules*, SOR/98-

106, for a copy of the material in the Board's possession relevant to its decision that Re:Sound did not already have. In a covering letter accompanying the transmission of the Board's record, the general counsel to the Board admitted to the paragraphs of Re:Sound's Notice of Application alleging procedural unfairness: Applicant's Record, vol. 2 at 177.

[66] I attach little weight to this opinion on the legality of the Board's procedure in determining whether the Board breached the duty of fairness, especially as the Board is not a party to the application for judicial review. Further, it is not clear that the letter expresses the opinion of the Board, rather than that of its general counsel. I note in this regard that the Board did not propose reopening the hearing in order to cure any breach of the duty of fairness.

(iii) ***Was there a breach of the duty of fairness?***

[67] Re:Sound says that the Board breached the duty of fairness in two respects.

[68] First, the Board failed to disclose to Re:Sound copies of SOCAN's confidential agreements under which fitness clubs had made payments for the use of recorded music at fitness classes, and to provide it with an opportunity to make submissions on them.

[69] Second, the Board ought to have informed the parties to the proceeding before it of the basis on which it was considering fixing the royalties, disclosed the relevant agreements, and invited submissions on the appropriateness of basing the *Tariff 6.B* royalties on the average of the "*Tariff 19* royalties" paid by users under agreements with SOCAN. The oral hearing before the Board had focused on the evidence adduced by the parties and there was no discussion of the possibility of using the amounts paid under the agreements with SOCAN for setting the royalties.

(a) non-disclosure

[70] The principal difficulty with Re:Sound's complaint about the non-disclosure of the SOCAN agreements obtained by the Board after the hearing is that the Board had informed the parties of its request to SOCAN. Re:Sound knew the Board had the agreements, but did not ask for copies. The Board had not indicated that it would refuse a request by Re:Sound for disclosure.

[71] Two months before the start of the hearing, Re:Sound had itself obtained on a confidential basis a copy of one agreement with SOCAN, showing among other things the amounts that the user had paid to SOCAN. Re:Sound included that agreement in the written evidence it submitted to the Board. It also knew the amounts that other users of sound recordings in connection with dance instruction and fitness activities had paid to SOCAN under their agreements.

[72] At the hearing of the application for judicial review, counsel could offer no explanation for Re:Sound's failure to ask the Board for copies of the SOCAN agreements, which he now contends were of vital importance to the Board's decision.

[73] In my opinion, Re:Sound cannot say that the SOCAN agreements were so unrelated to the matter at hand that it could not reasonably have been expected to ask to see them, especially since the appropriateness of using *SOCAN Tariff 19* as a benchmark had been the subject of discussion before the Board. No doubt, best practice would indicate that the Board should have taken the initiative and disclosed the agreements without waiting for a request from a party. However, best

administrative practice is not the standard for determining the legality of an agency's procedural choices.

[74] In the absence of a request from experienced counsel acting for a sophisticated client, fairness did not, in the circumstances of this case, require the Board to disclose copies of the SOCAN agreements on its own motion. In my opinion, the Board did not unfairly deprive Re:Sound of its right to know and to respond to information in the Board's possession. Rather, Re:Sound failed to avail itself of a reasonable opportunity to ask the Board to produce information that it knew was in the Board's possession.

(b) lack of notice of the basis of the Board's decision

[75] Is it nonetheless open to Re:Sound to say that it was deprived of a fair hearing because it had no prior notice of the basis of the Board's decision, and thus had no opportunity to make submissions on the appropriateness of the Board's methodology? In my view it is.

[76] Administrative proceedings are dynamic in nature: the key questions often emerge as a matter progresses, especially one as long and complex as that dealing with *Tariff 6.B*. Just as a regulatory tribunal is not limited to the evidence produced by the parties, so its identification of the appropriate bases of its decision is not confined to those advanced by the parties at the start of the proceeding.

[77] Nonetheless, it is a breach of the duty of fairness for a tribunal to base its decision on a ground that could not reasonably have been anticipated by those affected and that they did not have an opportunity to address. As Sarah Blake puts it in *Administrative Law in Canada*, 5th ed. (Markham, Ontario: LexisNexis Canada, 2011) at 43:

> A party should not be left in the position of discovering, upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was unaware it was in issue.

In my opinion, that is exactly what happened in this case.

[78] The oral hearing on Re:Sound's proposed *Tariff 6.B* was principally focused on the expert evidence of the parties in support of the tariffs that they were proposing, although the appropriateness of using other tariffs, including *SOCAN Tariff 19*, as benchmarks was also considered. However, the Board did not base the calculation of royalties in *Tariff 6.B* on those in *SOCAN Tariff 19*, but on the discounted amounts paid to SOCAN under individual licensing agreements by users to which the Tariff applied. These agreements were not discussed during the hearing.

[79] The parties in the present proceeding did not have an opportunity to make submissions on whether the agreements were an appropriate basis for determining the value of recorded music in the context of fitness classes. It is true that Re:Sound had included in its written evidence to the Board a copy of one agreement with SOCAN and the amounts paid under agreements by the fitness clubs on which the Board based the flat fee royalty. Nonetheless, given the complexity and range of the possible benchmarks for *Tariff 6.B*, and the absence of any discussion at the hearing of using the amounts paid under the licence agreements by fitness clubs targeted by *SOCAN Tariff 19*, fairness

required the Board to notify Re:Sound that it was contemplating basing the royalty on the amounts paid under those agreements.

[80] Moreover, both Re:Sound and the respondents had proposed royalties based on the number of the ultimate consumers of the music: club members (Re:Sound), or the average weekly number of participants in fitness classes (respondents). The parties did not canvass before the Board the advantages and disadvantages of basing royalties on a flat fee in the circumstances of the present case.

[81] Since the tariff set by the Board was based entirely on a methodology not raised as an issue at any point in the decision-making process, *Tariff 6.B* cannot stand. The matter must be remitted to the Board for redetermination of the royalties payable for the use of recordings of musical works in fitness classes after it has disclosed to the parties any information that it alone has on the ground on which it based its decision and has provided the parties with an opportunity to address it.

(iv) *Should relief be denied?*

[82] The respondents say that if, contrary to their submissions, a breach of the duty of fairness had occurred, the Court should not intervene because it has not prejudiced Re:Sound. They argue that even if Re:Sound had been given an opportunity to make submissions on the basis of the Board's decision and had managed to persuade the Board that its methodology was flawed, the Board's only option would have been to set no tariff at all for the years in question. This would obviously have been detrimental to Re:Sound and those it represents.

[83] How the Board would have responded to Re:Sound's submissions is, in my view, pure speculation. For example, the Board could have decided to increase the royalty if it had thought that it was inappropriate to use one or more of the agreements as a basis for calculating an average flat fee. Only in the clearest cases will an administrative decision vitiated by such a serious breach of procedural fairness as occurred here be permitted to stand on the ground that it would have made no difference to the tribunal's decision: see, for example, *Canadian Cable Television Association v. American College Sports Collective of Canada, Inc.*, 1991 CanLII 13580 (FCA), [1991] 3 F.C. 626 (F.C.A.). This is not one of them.

[84] The respondents also rely on *Tariff 6.B's* "transitional" nature and the likelihood that the Board will have better evidence on which to base a more permanent tariff. In my view, these are not sufficient for the Court to exercise its discretion in this case to deny relief. The Board's breach of the duty of fairness was fundamental. Moreover, if relief were to be denied, the performers and makers who had authorized Re:Sound to act on their behalf in the administration of their right to equitable remuneration in respect of particular recordings might suffer a significant financial loss for the years 2008-2012.

[85] The respondents also argue that, even if the Court were to find that a breach of the duty of fairness had occurred, it should exercise its discretion not to grant the relief requested, on the ground that Re:Sound had an adequate alterative administrative remedy: a request to the Board to hear submissions on the suitability of the agreements for setting a flat fee royalty. I do not agree.

[86] First, the Board's express jurisdiction to vary an order under section 66.52 of the Act is exercisable only if the Board is satisfied that there has been a material change in circumstances since it rendered its decision. In my view, learning the basis of a tribunal's decision when the decision is published is not, for this purpose, a "change in circumstances since the decision was made".

[87] Second, tribunals generally have implied jurisdiction to correct breaches of the duty of fairness by reopening a decision: *Posluns v. Toronto Stock Exchange*, 1968 CanLII 6 (SCC), [1968] S.C.R. 330 at 340, and, more generally, *Chandler v. Alberta Association. of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848; and see *Canadian Recording Industry Association v. Canada (Attorney General),* 2006 FCA 336 (Copyright Board's reconsideration cured any prior breach of the duty of procedural fairness).

[88] However, even if section 66.52 is not exhaustive of the Board's power to reopen a final decision, it was not incumbent on Re:Sound in this case to request a reconsideration before applying for judicial review. Re:Sound could not have raised before the Board its other two grounds of review, namely the Board's error of law in reducing the repertoire to recordings for which the performers or makers had authorized it to act for them, and the unreasonably low royalties in *Tariff 6.B*.

ISSUE 3: Did the Board err in law when it reduced the royalties payable to Re:Sound to reflect the percentage of eligible sound recordings used to accompany fitness classes for which Re:Sound or one of its member collectives had been specifically authorized by makers or performers to collect royalties?

[89] As already noted, this is a question that turns on the interpretation of the *Copyright Act* and the Board's interpretation of it is reviewable in this Court on a standard of reasonableness. No provision in the Act expressly deals with the issue in dispute. Rather, the Board based its decision on inferences that it drew from provisions of the Act dealing with other matters and on the practical implications for the operation of the statutory scheme that would flow from Re:Sound's position.

[90] An administrative agency's interpretation of its enabling legislation is unreasonable if it is inconsistent with the provision in dispute or with the broader statutory scheme. In undertaking this exercise, a reviewing court must apply the general principles of statutory interpretation by examining the statutory text, context and objectives. A court may also supplement the reasons given by the agency for its decision with those that could be given to support the decision: *Dunsmuir* at para. 48. If the court is not satisfied that the interpretation is unreasonable in the above sense, it must defer; that the party challenging the decision has an equally plausible reading of the enabling legislation is not sufficient to warrant judicial intervention.

(i) *Reasons of the Board*

[91] The Board gave three reasons for concluding that Re:Sound was not entitled to collect equitable remuneration on behalf of the performers and makers of all eligible recordings used to

accompany fitness classes, but could collect only for those in respect of which the maker or performer had authorized it or a member collective to act on their behalf. The Board's discussion is found at paras. 70-82 of its reasons.

[92] First, in most other regimes under the Act a collective society can only collect royalties in respect of the recordings in its repertoire. Exceptionally, the Act provides that under the extended licensing schemes governing retransmission (paragraph 31(2)(*d*) and section 76) and private copying (subsection 83(11)), copyright owners who have not joined a collective society can claim their share from a collective society designated by the Board, unless they have elected to opt out of the scheme. The sections of the Act on the collective administration of the right to equitable remuneration contain no analogous provisions allowing a collective society to collect section 19 royalties on behalf of performers or makers who did not authorize it to act for them in respect of particular recordings.

[93] Second, Re:Sound's interpretation is inconsistent with subsection 67.1(4) of the Act, which I reproduce again for the reader's convenience.

67.1 …	67.1 […]
(4) <u>If a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for</u> (*c*) <u>the recovery of royalties referred to in section 19</u>.	(4) <u>Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit</u>… ou pour recouvrement des redevances visées à l'article 19.

[94] The Board reasoned that this provision envisages that a tariff could be certified for a specified use, but not in respect of all eligible sound recordings. If, as Re:Sound contends, it automatically collects for all eligible recordings used in connection with a particular activity, the words "with respect to the … sound recording in question" would be redundant.

[95] Third, subparagraph 68(2)(*a*)(i) provides that a tariff applies only in respect of performers and makers of recordings eligible for equitable remuneration under section 20. The purpose of this provision is to ensure that royalties are not collected on behalf of non-eligible recordings, not, as Re:Sound argues, that royalties must be paid in respect of all eligible recordings.

[96] In my view, the first of the Board's reasons supports its interpretation. The relevance of subsection 67.1(4) in this context is, however, less clear. The French version of the statutory text does not contain words equivalent to "with respect to the work, performer's performance or sound recording in question", which, according to the Board, support the view that Re:Sound does not

necessarily collect royalties on behalf of all eligible recordings used for the purpose identified in the tariff.

[97] The French version of subsection 67.1(4) suggests a situation where a collective society has proposed no tariff at all: « Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercise de quelque recours que ce soit … pour recouvrement des redevances visées à l'article 19. »

[98] On this basis, the function of subsection 67.1(4) is to provide an incentive for collective societies to file a proposed tariff in accordance with the three preceding subsections. That is, a collective society that fails in its duty to file a tariff cannot, without the written consent of the Minister, look to other legal proceedings to recover equitable remuneration from users of sound recordings of musical works. If this is correct, subsection 67.1(4) is of little assistance in determining for whom a collective society may collect.

[99] In light of the differences in the English and French versions of the statutory text, and bearing in mind that reasonableness is the standard of review applicable to the Board's interpretation of these provisions of the Act, I am not persuaded that the Board committed an error of law in relying on subsection 67.1(4) to support its decision, especially since other provisions of the Act provide a reasonable basis for the Board's decision.

[100] I do not find subparagraph 68(2)(*a*)(i) to be helpful in supporting the Board's decision. I agree with the Board that this paragraph does not require a collective society to collect royalties for all eligible recordings performed in public in connection with specified activities. It merely stipulates that tariffs may apply only to performers and makers of sound recordings eligible under section 20: that is, the maker of the recording was a citizen or permanent resident of Canada or a Rome Convention country at the time of the first fixation, or all the fixations done for the recording occurred in Canada or a Rome Convention country.

[101] In short, of the three reasons given by the Board, the first supports its decision, the second may, and third is not relevant to the issue in dispute.

(ii) *Reasons that could be given*

[102] In my opinion, four additional considerations support the reasonableness of the Board's decision that Re:Sound can collect section 19 royalties in respect only of sound recordings of musical works for which they have received authorization from the maker or performer.

[103] First, as relevant to the present application, section 2 defines "collective society" as a society in the business of the collective administration of the section 19 right to equitable remuneration "for the benefit of those who, by … appointment of it as their agent or otherwise authorize it to act on their behalf in relation to that collective administration, …". Thus, for the purpose of the Act, a collective society collects royalties on behalf of those who in any manner have authorized it to act for them in connection with the collective administration of their rights under the Act. This includes proposing a tariff to the Board.

[104] Second, an indication of the reasonableness of an administrative interpretation is that it is consistent with earlier decisions by the agency: see *Communications, Energy and Paperworkers' Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at paras. 5 and 8. The first neighbouring rights tariff approved by the Board was *Tariff 1.A*. In its reasons for decision, the Board set out its understanding of the essential architecture of the then new statutory scheme for the collective administration of the right to equitable remuneration. It is open to this Court to consider the Board's reasons in *Tariff 1.A* in assessing the reasonableness of the decision under review in the present proceeding.

[105] *In Tariff 1.A*., two collective societies, the NRCC and SOGEDAM, representing different groups of neighbouring rights holders, proposed different royalty tariffs for the broadcasting of recordings eligible for equitable remuneration. The Board had to decide not only what the broadcasters should pay, but also to resolve disputes over the respective rights of the two collective societies. The tariff ultimately certified by the Board applied to all the section 19 rights holders represented by each society.

[106] Because of the requirement in subparagraph 68(2)(*a*)(iii) of the Act that users shall pay section 19 royalties in a single payment, the Board held that one collective society should collect the entirety of the royalties from the users targeted by the Tariff. It selected the NRCC as the sole collecting agent and left SOGEDAM with the responsibility of collecting its members' share from the NRCC.

[107] For present purposes, the most immediately relevant issue decided in *Tariff 1.A* was that the sound recordings before the Board were the eligible recordings in the collective societies' respective repertoires, and that each collective society proposing a tariff must prove that it administers the repertoire that it claims. In that case, these included makers and performers who, in one way or another, had authorized the NRCC or one of its sub-collectives to act on their behalf. However, the Board held, if either the maker or performer had authorized a collective society to collect in respect of a particular recording, it could collect the royalties for both of them. The Board rejected the NRCC's argument that it could collect on behalf of all eligible recordings used by broadcasters, regardless of any authorization by the rights holders. The Board's detailed discussion of these issues is found at 11-19 of its reasons for the decision to approve *Tariff 1.A.*

[108] The NRCC, Re:Sound's predecessor, did not apply for judicial review of the decision in *Tariff 1.A*, which has stood for nearly fifteen years. Counsel for Re:Sound argues that it is distinguishable from the present case in that the scope of a collective society's repertoire arose in *Tariff 1.A* in the context of a dispute between two collective societies.

[109] In my view, this factual distinction is immaterial. The Board's reasons in *Tariff 1.A* do not indicate that the principle that a collective society's repertoire is limited to recordings for which makers or performers have authorized it to act on their behalf applies only if more than one collective society proposes a tariff of section 19 royalties.

[110] Third, section 67 of the Act imposes a duty on a collective society, when requested by a member of the public, to provide information about its repertoire of performers' performances and sound recordings that are in current use. It is difficult to see how this obligation could be discharged if, as Re:Sound argues, its repertoire includes all performances and recordings eligible for equitable

remuneration. While a collective society would be aware of eligible recordings and performances for which it had been authorized to act, this would not necessarily be true of the others.

[111] Fourth, it would be anomalous if a collective society were able to collect royalties for all eligible recordings used in a particular context, but distributed them only to the performers and makers of recordings in its repertoire, and to those whom it was able to discover. Re:Sound stated that it holds in a trust account the money that it had collected but could not distribute pending its identification of those who had not signed up with it. What happens to the funds owing to those that Re:Sound never identifies is unclear. In my view, Parliament should not lightly be taken to have intended to create a regime that produces such cumbersome and impractical results.

(iii) *Re:Sound's arguments*

[112] In addition to attacking the reasons advanced in support of the Board's decision, Re:Sound says that the decision is unreasonable because it is inconsistent with two fundamental principles on which the right to equitable remuneration is based: that users should pay performers and makers for their use of sound recordings, and that users should only be required to make a single payment of equitable remuneration.

[113] Re:Sound's argument that a user will get a "free ride" if *Tariff 6.B* excludes performers and makers who have not authorized it to act as their agent in respect of particular recordings assumes that Re:Sound has a monopoly in proposing tariffs of section 19 royalties.

[114] I agree with the respondents that the Act contains no provision to this effect. I see nothing to prevent performers or makers from forming their own or joining an existing collective society to represent them in the administration of their rights to equitable remuneration. Re:Sound may currently be the only collective society representing holders of section 19 rights, but it does not follow from this that others may not come into existence and thereby inject a healthy measure of competition. Indeed, two collective societies proposed tariffs in *Tariff 1.A* on behalf of different groups of makers and performers, although the Board authorized only one of them, the NRCC, to collect for both.

[115] True, on the Board's interpretation of the Act performers and makers will not receive equitable remuneration until they sign up with a collective society. However, this seems a relatively easy step to take, especially since it is only necessary for either the maker *or* performer to bring a recording into a collective society's repertoire to enable it to collect royalties for both. In our legal system rights holders must normally take some action to vindicate their rights. When Parliament intends to make exceptions to the "opt in" principle generally applicable to the collective administration of rights under the Act, as it has done for retransmission and private copying, it has expressly so provided.

[116] Nor is the potential existence of more than one society representing different makers and performers inconsistent with the principle that a user may not be required to make more than a single payment in order to discharge its obligation to pay an equitable remuneration in accordance with subparagraph 68(2)(*a*)(iii).

[117] Again, *Tariff 1.A* is instructive. After considering the tariffs proposed by two collective societies, the Board designated the NRCC to collect the amounts set by the Board on behalf of both collective societies, and left it to SOGEDAM to claim its members' share from the NRCC: see 35-39 of the Board's reasons.

[118] Finally, Re:Sound says that the Board erred in law by reading into section 20 an additional eligibility requirement, namely that makers or performers can only receive equitable remuneration for a recording for which they have appointed a collective society to act for them. Again, I do not agree.

[119] Requiring a performer or maker to sign up a recording with a collective society before being able to receive equitable remuneration is not of the same character as the eligibility conditions in section 20, namely, the maker's place of residence at the date of first fixation, or where the fixations occurred. These cannot be changed after the recording has been made and determine whether equitable remuneration is ever payable in respect of a particular recording. In contrast, makers or performers of recordings may at any time authorize a collective society to act on their behalf in respect of a recording. Moreover, as already noted, signing up with a collective society is hardly an onerous requirement.

[120] In short, none of the arguments advanced by Re:Sound in favour of its interpretation of the Act persuades me that the Board's decision was unreasonable.

ISSUE 4: Did the Board commit reviewable errors in setting equitable remuneration royalties for the use of eligible recordings of music to accompany physical activities other than fitness classes?

[121] As I have already noted, *Tariff 6.B* applies to the use of music to accompany, not only fitness classes, but also skating, dance instruction, and other physical activities. Re:Sound directed relatively few submissions to the application of *Tariff 6.B* to activities other than fitness classes, no doubt because the grounds of review relied on to challenge *Tariff 6.B* with respect to fitness classes also applied, to differing extents, to these other activities. The respondents were similarly taciturn on these aspects of *Tariff 6.B.* I can be equally brief.

[122] Noting that "little or no attention" was given during the proceedings to the use of recorded music to accompany physical activities other than fitness classes, the Board had to use "the best information available to [it]": para. 173.

[123] It set the royalties for dance instruction in the same way as it did for fitness classes: at paras. 174-175. Since the agreements between SOCAN and individual users provide for the payment of an amount that was essentially the minimum royalty under *SOCAN Tariff 19*, the Board used this figure as a base and reduced it to reflect Re:Sound's repertoire. The resulting amount, $23.42, was payable by each venue to Re:Sound as a flat annual fee for the use of recorded music to accompany dance instruction and other physical activities targeted in *Tariff 6.B* for which no specific fee had been set.

[124] The Board set the royalty for skating by reference to *SOCAN Tariff 7*, which deals only with this activity: at para. 176. It took the minimum rate paid under this latter tariff and adjusted it down to reflect the percentage of eligible recordings in Re:Sound's repertoire. This produced a royalty of 0.44% of gross receipts from admissions, exclusive of sales and amusement taxes, payable annually by each skating venue, subject to a minimum of $38.18.

[125] Re:Sound challenged the Board's decision on the royalties payable with respect to skating, dance instruction, and other physical activities on the ground that the Board had erred in law by limiting the recordings in respect of which Re:Sound could collect royalties to those for which performers or makers had authorized it to act on their behalf. For the reasons given above, I do not agree.

[126] Since this was the only ground on which Re:Sound challenged the royalty set in *Tariff 6.B* for skating, this aspect of the Board's decision stands.

[127] However, because the Board set the royalties for dance instruction, and all other physical activities for which no specific rate was set, in the same way as it did for fitness classes, I would set aside this aspect of *Tariff 6.B* on the ground of a breach of the duty of procedural fairness. In these circumstances, it is not necessary to consider Re:Sound's allegation that the royalty for these activities was also unreasonably low.

Conclusions

[128] For all of the above reasons, I would allow Re:Sound's application for judicial review and set aside the decision of the Board approving *Tariff 6.B* for breach of the duty of fairness, in so far as it applies to royalties for the performance in public of recorded music to accompany fitness classes, dance instruction, and other physical activities for which no specific rate has been set. I would also remit the matter to the Board for redetermination after the parties have had an opportunity in accordance with the duty of fairness to address the appropriateness of the ground on which the Board based its decision.

[129] Since Re:Sound was unsuccessful on the equally important issue of statutory interpretation concerning the percentage of eligible recordings on which the Board had to base royalties, I would award no costs.

"John M. Evans"

J.A.

"I agree,
Johanne Trudel J.A."

"I agree,
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**A-353-12**
STYLE OF CAUSE:	RE:SOUND v. FITNESS INDUSTRY COUNCIL OF CANADA and GOODLIFE FITNESS CENTRES INC.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 19, 2013
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	TRUDEL J.A. WEBB J.A.
DATED:	February 24, 2014

APPEARANCES:

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Andrea Rush Daniel Del Gobbo	FOR THE RESPONDENTS
David Fewer	FOR THE RESPONDENTS

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David Fewer Barrister and Solicitor Ottawa, Ontario	FOR THE RESPONDENTS

EB-2022-0140

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. ("**HONI**") pursuant to s. 92 of the Act for an Order or Orders granting leave to construct transmission line facilities (the "**Project**") in the West of Chatham area.

AND IN THE MATTER OF a Motion by The Ross Firm Group to review and vary Procedural Order #1 and determinations on the filing of evidence and form of the hearing (the "**Motion**").

ONTARIO ENEGRY BOARD

BOOK OF AUTHORITIES & CITED DOCUMENTS OF THE INTERVENERS – THE ROSS FIRM GROUP

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