ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Application EB-2023-0098 by Ontario Power Generation Inc. for an Order or Orders pursuant to section 78.1 of the OEB Act for a variance account to capture the nuclear revenue requirement impact of the overturning of the Ontario *Protecting a Sustainable Public Sector for Future Generations Act, 2019*;

AND IN THE MATTER OF a Motion pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* to Review and Vary the June 27, 2023 Decision and Order in EB-2023-0098.

BOOK OF AUTHORITIES OF ONTARIO POWER GENERATION INC.

Date: August 11, 2023

Mr. Charles Keizer
Torys LLP
79 Wellington St. W., 30th Floor
Box 270
TD South Tower
Toronto, Ontario M5K 1N2
Tel: 416-865-7512
ckeizer@torys.com

Mr. Jonathan Myers
Torys LLP
79 Wellington St. W., 30th Floor
Box 270
TD South Tower
Toronto, Ontario M5K 1N2
Tel: 416-865-7532
jmyers@torys.com

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TAB 1

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

DECISION AND ORDER

EB-2023-0098

ONTARIO POWER GENERATION INC.

Application for variance account to capture the nuclear revenue requirement impact of the overturning of Bill 124

BEFORE: Pankaj Sardana
Presiding Commissioner

Michael Janigan
Commissioner

David Sword
Commissioner

June 27, 2023

1 OVERVIEW

Through this Decision and Order, the Ontario Energy Board (OEB) denies the accounting order application filed by Ontario Power Generation Inc. (OPG) on March 1, 2023. OPG proposed that a new variance account be approved to record the impact of the overturning of Bill 124[1] on its nuclear revenue requirement, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order.

Bill 124 set a 1% limit on annual wage and total compensation increases for the Ontario public sector employees, including employees at OPG, for a three-year moderation period effective November 8, 2019. The limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in OPG's OEB approved revenue requirements for the 2022-2026 period[2] (2022-2026 Payment Amounts).

The Ontario Superior Court overturned Bill 124 on November 29, 2022 and declared it to be "void and of no effect". OPG's affected unions have indicated that they will seek enhanced wages for the periods that their members' compensation has or would have been restrained due to Bill 124.

The proposed variance account would record the difference between the forecast compensation costs included in OPG's last nuclear payment amounts order[3] and the compensation costs for the nuclear facilities resulting from the overturning of Bill 124.

[1] *Protecting a Sustainable Public Sector for Future Generations Act, 2019*
[2] EB-2020-0290, Decision and Order, November 15, 2021
[3] *Ibid.*

2 CONTEXT AND PROCESS

OPG filed an application with the OEB on March 1, 2023, under section 78.1 of the *Ontario Energy Board Act, 1998* seeking approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the overturning of Bill 124, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order.

OPG also requested that the OEB issue an interim order effective March 1, 2023, approving the establishment of the requested variance account on an interim basis. On March 22, 2023, the OEB approved the establishment of the new variance account on an interim basis effective March 1, 2023.

The OEB issued the Notice of Hearing and Procedural Order No. 1 on March 22, 2023 which adopted the intervenors from the 2022-2026 Payment Amounts proceeding as intervenors in this proceeding, including cost award eligibility.

The following intervenors notified the OEB of their intention to participate in the proceeding:

- Association of Major Power Consumers in Ontario (AMPCO)
- Canadian Manufacturers & Exporters (CME)
- Consumers Council of Canada (CCC)
- Power Workers' Union (PWU)
- School Energy Coalition (SEC)
- Society of United Professionals (SUP)
- Vulnerable Energy Consumers Coalition (VECC)

The Notice of Hearing and Procedural Order No. 1 also provided for interrogatories and written submissions by OEB staff and intervenors, and a reply submission by OPG.

After OPG filed its interrogatory responses on May 4, 2023, SEC and CME filed a letter with the OEB on May 9, 2023 requesting OPG to provide further information on two topics addressed in OPG's interrogatory responses: 1) the timing of OPG's knowledge of the legal challenge to Bill 124, and 2) OPG's 2022 actual Return on Equity (ROE).

OPG filed a reply letter on May 12, 2023, which provided further information in response to SEC and CME's requests. The OEB reviewed OPG's reply letter and found that the information provided by OPG was adequate, and that parties should file their final submissions in accordance with the schedule established by the OEB.

3 VARIANCE ACCOUNT

Accounting Order Process for the Treatment of Unforeseen Events

OPG's current rate framework includes provisions related to "unforeseen events". As described in its 2022-2026 Payment Amounts application and approved through the OEB's approval of a settlement proposal (Settlement Proposal) reached by the parties in that proceeding, the process for applying for an accounting order is as follows:

> OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities. OPG's most recent accounting order application pursuant to these requirements was filed, and approved by the OEB, in EB-2018-0002.[4]

In addition to the requirement that the event be "unforeseen", the application referenced EB-2018-0002, which was a proceeding in which the OEB approved a proposed OPG accounting order. In that case the OEB adopted the criteria outlined in the OEB's Filing Requirements for Electricity Distribution Rate Applications (the Filing Requirements) for the establishment of a new deferral or variance account. These Filing Requirements are not specific to OPG, but are typically applied to OEB regulated utilities. The Filing Requirements indicate that the following eligibility criteria must be met:[5]

1. Causation: the forecasted expense must be clearly outside of the base upon which rates were derived.
2. Materiality: the forecasted amounts to be recorded in the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, otherwise they must be expensed or capitalized in the normal course and addressed through organizational productivity improvements.

[4] EB-2020-0290, Exhibit A1, Tab 3, Schedule 2, p. 13
[5] Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 2 Cost of Service, December 15, 2022, Section 2.9.2 Establishment of New Deferral and Variance Accounts

3. Prudence: the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred, although the final determination of prudence will be made at the time of disposition. For any costs incurred, in terms of the quantum, this means that the distributor must provide evidence demonstrating that the option selected represented a cost-effective option (not necessarily least initial cost) for ratepayers.

The criteria for approving an accounting order under OPG's approved rate framework, therefore, are that the costs in question be "unforeseen" at the time the rate framework was approved, and that the three criteria from the Filing Requirements be met.

Was the overturning of Bill 124 unforeseen?

The "unforeseen" criterion is related to, and may be considered a subset to, the causation criterion. When applying for cost-based rates, utilities are expected to present as complete a picture of their forecast test year costs and revenues as possible – this is the "base upon which rates [are] derived". Where a cost or revenue can reasonably be foreseen (even if it is not certain), the best forum in which to address this is in the main rates case, and not through a later request for a deferral or variance account. All parties filed arguments on the foreseeability issue.

Some intervenors and OEB staff argued that the overturning of Bill 124 was not an unforeseen event because OPG knew or should have known that there was a material risk that Bill 124 could be overturned. OPG's 2022-2026 Payment Amounts proceeding was filed with the OEB on December 31, 2020 while the first legal challenge to Bill 124 was filed on February 11, 2020, more than 10 months earlier. Legal challenges were filed by the PWU and the SUP – the unions whose increased compensation is proposed to go into the new variance account – on November 24, 2020, more than a month before the application was filed.[6] Some intervenors argued that the existence of appeals from its own unions was a clear indication to OPG that Bill 124 could be overturned, and that it did not disclose this in the OPG's 2022-2026 Payment Amounts proceeding.

SEC, CCC, AMPCO and OEB staff noted that no deferral or variance account related to Bill 124 was sought by OPG during the 2022-2026 Payment Amounts proceeding. SEC further submitted that OPG cannot now, after agreeing to a settlement for 2022-2026 Payment Amounts, request approval to record for later disposition any additional costs

[6] OPG reply to SEC Request for Further IR Responses, May 12, 2023

that were known to OPG and the parties at the time. SEC argued that the settlement negotiations for OPG's 2022-2026 Payment Amounts would have unfolded differently if OPG had disclosed to parties at the time the legal proceedings were launched that, if the challenge was successful, it would seek approval to record the impacts in a variance account.[7]

OPG submitted that the decision on Bill 124 was an unforeseen event because OPG did not have any special insight into the status or probable outcomes of the challenges against Bill 124. OPG submitted that it was therefore impossible for it to conclude whether Bill 124 would likely be overturned during OPG's 2022-2026 Payment Amounts proceeding or any other time leading up to the decision on Bill 124.[8] OPG submitted that the existence of a mere possibility of an event does not mean that the event is not "unforeseen" and that this is incorrect on the plain language meaning of the term, which requires that the event in question be probable (i.e., likely to occur).[9]

OPG further submitted that it would not have been appropriate or sensible to include the risks of Bill 124 being overturned in the cost forecasts from OPG's 2022-2026 Payment Amounts proceeding due to the high degree of uncertainty around the costs in the proceeding.[10]

Findings

The OEB does not accept that the overturning of Bill 124 was unforeseen. That is not to say that OPG would have known with certainty that Bill 124 would be overturned, only that it was a foreseeable and material risk to their forecast employee compensation costs. The OEB makes the following findings:

- Based on the record in this proceeding, the OEB concludes that OPG was clearly aware of the legal challenges to Bill 124 before filing the EB-2020-0290 application, as was filed by the Ontario English Catholic School Teacher's Association in the Superior Court of Justice on February 11, 2020 and the considerable attention this garnered in the media and at the Ontario Legislature.[11]

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[7] SEC submission, p. 3
[8] OPG reply submission, pp. 6-7
[9] OPG reply submission, p. 2
[10] OPG reply submission, p. 13
[11] Although not the basis of the OEB's finding, this finding is consistent with certain statements in OPG's December 2019 Management Discussion and Analysis, which is a publicly available document accompanying OPG's audited consolidated financial statements. See, for example, pages 66, 69 and 76.

- While the OEB notes OPG's position that all possible outcomes of the legal challenge to Bill 124 may not have been known at the time of OPG's EB-2020-0290 payment amounts application, the OEB finds that the risk of Bill 124 being overturned was certainly present prior to the Settlement Agreement and the Decision and thus a known variable that OPG should have taken into consideration and governed themselves accordingly, for example by identifying the issue and also by seeking a specific variance account as part of their application.
- OPG was aware of the risk entailed with the legal challenge at the time of the Settlement Agreement. As noted by several intervenors in their submissions, the disclosure of the risk and its potential O&M budgetary implications by OPG should have been disclosed by OPG to allow it to inform the settlement negotiations.
- The OEB concludes that the exercise of reasonable and prudent foresight on OPG's part could have prevented OPG's request for a variance account in this proceeding and a possible result that might significantly alter the agreed- upon budget and the subsequent OEB Decision that approved those Settlement Agreement terms. Accordingly, the OEB finds that the evidence on the record does not support the argument that the overturning of Bill 124 was unforeseen, nor therefore the need for a variance account after-the fact that is designed to allow for the recovery of increased compensation costs from ratepayers..

Causation

In the pre-filed evidence, OPG stated that the cost impacts resulting from the overturning of Bill 124 "will result in a nuclear revenue requirement impact that is not reflected in the payment amounts established by the EB-2020-0290 Payment Amounts Order".[12] OPG explained that the impacts arise "from a change in a law and could not have formed a part of the approved revenue requirement as OPG was obliged to abide by applicable laws and had no knowledge of the outcome of the Bill 124 Decision at the time of the payment amounts application".[13]

OEB staff, AMPCO, PWU and SUP supported OPG's position that the amounts to be recorded in the proposed account would be incremental to the base upon which OPG's nuclear payments amounts are set. PWU submitted that the revenue requirement impacts arise from additionally incurred compensation costs above the one percent

[12] OPG Application, p. 11
[13] *Ibid.*

prescribed by Bill 124, which was the basis for compensation costs included in OPG's 2022-2026 Payment Amounts proceeding for prescribed generating facilities.[14] SUP submitted that there would have been no regulatory basis for including anything in excess of the Bill 124 wage caps that were included in OPG's 2022-2026 Payment Amounts.[15]

SEC, VECC and CCC disagreed and argued that the causation criterion had not been met, as the Settlement Agreement reached between the parties was intended to cover all OM&A, including employee compensation.

In response, OPG submitted that the compensation amounts to be recorded in the proposed variance account are outside the base upon which OPG's 2022-2026 Payment Amounts were derived.[16] OPG submitted that the overturning of Bill 124 is an unforeseen event and explained that something unforeseeable is something that is not reasonably predictable or is speculative, such that the related costs cannot properly form part of the base costs included in the revenue requirement.

Findings

The OEB finds that the causation criterion is related to the foreseeability criterion. The OEB has already found that the possibility of Bill 124 being overturned was a foreseeable outcome, and while the costs related to the overturning of Bill 124 are incremental to the compensation amounts currently embedded in OPG's payment amounts, OPG could have foreseen the impact to its compensation expense from the risk of Bill 124 being overturned during or prior to the EB-2020-0290 proceeding, and it could have sought to account for that risk in that proceeding. It is not appropriate to create a new variance account to track amounts that could have been foreseen and addressed (for example through a request for a variance account at the time of the EB-2020-0290 proceeding) when the rate framework was being established.

Materiality

In the pre-filed evidence, OPG stated that the forecast amounts "will result in an annualized nuclear revenue requirement impact that is expected to be higher than the $10M materiality threshold".[17] For PWU-represented employees, OPG estimated impacts between $14 million and $48 million per year between 2022 and 2026, totaling

[14] PWU submission, p. 1
[15] SUP submission, p. 1
[16] OPG reply submission, p. 3
[17] OPG Application, p. 11

approximately $130 million cumulatively.[18] No compensation estimate was available for SUP-represented employees in OPG's responses to interrogatories due to the pending arbitration outcome when the interrogatory responses were filed. In its reply submission, OPG confirmed that it has since then received the arbitration decision, which is currently estimated to result in an incremental cost impact of $58 million due to the overturning of Bill 124.[19]

OEB staff, CCC, AMPCO and VECC noted that the materiality criteria requires not only that a certain dollar threshold be reached, but that the absence of an account would likely "have a significant influence on the operation of the [utility]". They submitted that based on OPG's estimated achieved 2022 ROE for its regulated business, OPG does not need additional funding to cover the impacts that would be recorded in the proposed account, and that the absence of an account would not result in a significant influence on the operation of the utility. OPG estimated its 2022 actual ROE for its regulated facilities will be between 12.5% and 13.0%, which is in excess of the OEB approved 2022 ROE of 8.66%.[20]

OEB staff submitted that variances from forecast costs are part of business risk, for which the utility is compensated through its return on equity.[21] OEB staff submitted that utilities are expected to manage their costs throughout the term of the rate framework and should not expect to have access to "true ups" (for example through a deferral or variance account) every time a cost is higher than what was forecast.

Other parties either supported the conclusion that OPG's compensation forecasts are material or made no submissions on the issue. For example, SUP and AMPCO submitted that the impact of overturning Bill 124 is expected to exceed the OEB-defined materiality threshold for new variance account requests. PWU submitted that OPG's application for the variance account satisfies the materiality criteria for the establishment of a deferral or variance account.

In response, OPG noted that there is no requirement for the OEB to consider the implications of OPG's achieved ROE to provide the relief sought by OPG through establishing this variance account.[22] OPG submitted that there can be no certainty that the level of financial performance achieved by OPG in 2022 will continue in subsequent

[18] Exhibit L, OPG response to OEB staff interrogatory 1
[19] OPG reply submission, p. 7
[20] OPG reply to SEC Request for Further IR Responses, May 12, 2023
[21] OEB staff submission, p. 2
[22] OPG reply submission, p. 4

years. OPG further submitted that, in any event, the OEB approved Settlement Proposal already provides for an asymmetrical earnings sharing mechanism to address any over-earnings.

Findings

The OEB finds that the quantum of costs related to the overturning of Bill 124likely exceeds OPG's $10 million materiality threshold. OPG has estimated that the impact of overturning Bill 124 will lead to increased compensation costs of between $14 and $48 million per year from its PWU-represented employees; no compensation estimate was submitted for SUP-represented employees. The OEB's materiality test is a two-pronged test that speaks to both the amount of additional costs that a utility expects to incur due to a change in circumstances, and also to whether these costs will significantly influence the utility's operations. In this instance, the OEB expects OPG to be able to manage these costs within its approved revenue requirement (which ranges between $2.4 billion and $3.5 billion) over the 2022 to 2026 period.

Further, the OEB notes that OPG expects its actual 2022 return on equity for its regulated facilities to be in the range of 12.5-13%. The expected return is well above the 2022 ROE value set by the Board in October 2021 of 8.66%. The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future returns, but notes that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.

OPG's cost of capital has a component for regulatory risk. This includes an allowance for external factors that could have an impact on OPG. While OPG may be insulated by other measures from the financial consequences of events that are truly unforeseeable, such protection was not intended to apply to the fallout from risks that were known and the potential costs estimable or, if uncertain, possibly tracked through a variance account established when the rate framework was approved.

Prudence

In the pre-filed evidence, OPG stated that the cost impacts resulting from the overturning of Bill 124 "are appropriate to be recorded in a variance account pending

the consideration of prudence since these compensation costs reflect costs necessary for the continued operation of OPG's nuclear facilities".[23]

For purposes of establishing an account, the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred, although final determination of prudence of any costs recorded is determined when a utility seeks to clear a deferral or variance account.[24]

OEB staff, CCC, AMPCO, and SEC submitted that because the evidence filed in OPG's 2022-2026 Payment Amounts proceeding indicated that OPG's compensation costs were already above market median under Bill 124, further cost increases resulting from the overturning of Bill 124 are imprudent.

In response, OPG submitted that any aspects of prudence to be considered in the future disposition of the account balance should not affect the OEB's consideration of whether to approve the account requested in the current application.[25] OPG submitted that it has demonstrated that the cost impacts of the overturning of Bill 124 would be recorded to the account based on a reasonable plan, reflecting the renewed collective agreements with the PWU and the SUP.

Findings

The OEB notes that the Filing Requirements provide that the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred in order to meet the prudence criteria. While it is not unreasonable to expect that OPG may incur these costs in the event that the finding of unconstitutionality of Bill 124 is upheld, such a finding is moot as the OEB has determined that other criteria set out in the approved Settlement Proposal and the Filing Requirements have not been met. In addition to assessing the foreseeability of these costs, the OEB is of the view that the proposed account does not meet two of the OEB's three standard tests of causation and materiality.

As such, the OEB denies OPG's request to establish a variance account for the purpose of recording the budgetary implications of Bill 24 litigation results for OPG.

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[23] OPG Application, p. 11
[24] Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 2 Cost of Service, December 15, 2022, Section 2.9.2 Establishment of New Deferral and Variance Accounts
[25] OPG reply submission, p. 23

Effective Date of Variance Account

In the pre-filed evidence, OPG proposed that the variance account be eligible to record the nuclear revenue requirement impacts of the overturning of Bill 124, effective March 1, 2023. As the OEB is denying the application to create the account, it is not necessary to consider the effective date.

On March 22, 2023, the OEB approved the establishment of a new variance account on an interim basis effective March 1, 2023. The purpose of this interim order was to allow for an effective date as early as March 1, 2023 in the event that the OEB ultimately approved the creation of the variance account. As a result of this decision, this interim order is no longer in effect.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The interim order issued on March 22, 2023 is rescinded.
2. Cost eligible intervenors shall submit to the OEB and copy Ontario Power Generation Inc. any cost claims no later than July 4, 2023.
3. Ontario Power Generation Inc. may file with the OEB and forward to the applicable intervenor any objections to the claimed costs of that intervenor by July 11, 2023.
4. An intervenor whose cost claims were objected to may file with the OEB and forward to Ontario Power Generation Inc. any responses to the objections by July 18, 2023.
5. Ontario Power Generation Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

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-2023-0098** 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, Vithooshan Ganesanathan at Vithooshan.Ganesanathan@oeb.ca, and OEB Counsel, Michael Millar at Michael.Millar@oeb.ca.

DATED at Toronto June 27, 2023

ONTARIO ENERGY BOARD

Nancy Marconi

Digitally signed by Nancy Marconi
Date: 2023.06.27 14:10:32 -04'00'

Nancy Marconi
Registrar

TAB 2

Unions rally against wage-cap law; Ten more groups to file court challenge against Bill 124 in the new year

The Toronto Star

December 18, 2019 Wednesday

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Section: NEWS; Pg. A3

Length: 552 words

Byline: Robert Benzie Queen's Park Bureau Chief

Body

Labour unions are escalating the constitutional battle against Premier Doug Ford's controversial legislation capping wage settlements.

A week after education unions launched charter challenges, a slew of other labour organizations joined the fray.

"In terms of challenging this undemocratic legislation, the more the merrier," said Fred Hahn, Ontario president of the Canadian Union of Public Employees.

"This challenge is about defending workers' rights protected under the Charter of Rights and Freedoms."

Hahn said Tuesday that 10 unions representing more than 250,000 broader public-sector workers would be filing a co-ordinated charter challenge against Bill 124 in the new year.

They follow the four teacher unions who announced their legal fight last week.

Also Tuesday, the Ontario Nurses Association (ONA) announced its own separate court push.

"This legislation is nothing but a continued attack on the right to free collective bargaining without interference, as was affirmed in 2015 in a Supreme Court of Canada ruling," ONA president Vicki McKenna said. "More alarming is the fact that this legislation could likely deepen the already serious nursing shortage in Ontario and have negative effects on health care and public safety."

Sharleen Stewart, president of SEIU Healthcare, which represents 60,000 health workers across the country, said the Progressive Conservatives are making the same mistake the previous Liberal government did with Bill 115.

That was former premier Dalton McGuinty's 2012 law imposing settlements on teachers, which was struck down by the courts as unconstitutional three years ago, even though then-premier Kathleen Wynne had already repealed it.

So far, the government has paid out more than $100 million to the teacher unions as a legal remedy resolving Bill 115 with tens of millions more expected.

"For the government to set limits on bargaining undermines the rights of workers who already face systemic discrimination across the board," Stewart said.

Bill 124, which was passed last month and is retroactive to this past June, limits any salary increases across the broader public sector to one per cent a year for the next three years.

Treasury Board president Peter Bethlenfalvy said Tuesday that the government is confident its law can withstand a constitutional challenge.

"Our government conducted a series of good-faith consultations with public-sector employers and bargaining agents on managing compensation growth responsibly," Bethlenfalvy said.

"During that time, 23 in-person sessions took place. These sessions were attended by 68 employer organizations in sectors covering more than 2,500 collective agreements and 57 bargaining agents who collectively represent over 780,000 workers across all sectors of Ontario's public service.

"This legislation enables the government to manage public-sector compensation growth in a fair, consistent, and time-limited manner. It supports our ongoing efforts to restore the province to a position of fiscal health and demonstrate respect for taxpayers' dollars."

The wage-cap bill is a major sticking point in the government's thorny labour negotiations with education unions. High school teachers will hold another rotating strike Wednesday, targeting York and Halton public secondary schools and 10 other smaller education boards.

Load-Date: December 18, 2019

End of Document

TAB 3

Unions say wage-cap law violates rights

The Globe and Mail

September 13, 2022 Tuesday

Ontario Edition

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Section: NEWS; Pg. A6

Length: 931 words

Byline: By JEFF GRAY, Staff

Body

Coalition launches constitutional challenge of Ontario's Bill 124, which limited pay raises for the public sector

Lawyers for a coalition of unions acting for hundreds of thousands of Ontario's public-sector workers were in court on Monday to launch their constitutional challenge of the province's Bill 124, legislation that temporarily caps annual compensation increases at 1 per cent.

Leaders of the Ontario Federation of Labour and unions acting for nurses, teachers and other public-sector workers involved in the challenge held a morning rally in the rain outside the Toronto courthouse where the case is being heard.

They argue the legislation, a political flashpoint throughout the pandemic, has driven away nurses and personal support workers, and many who remain suffer from burnout as the health care system buckles under the strain of COVID-19.

"Bill 124 is not just an attack on unions," said JP Hornick, president of the Ontario Public Service Employees Union (OPSEU). "Unions are the front line for all workers in setting what our standards should be."

Interim Opposition NDP leader Peter Tabuns told the crowd by the courthouse steps that the wage-hike caps, imposed in 2019 when inflation was low, amount to large wage cuts now, with inflation at more than 7 per cent.

His party pointed to new government data on Monday that said the average emergency-room wait for patients in July was 20 hours, saying this is further evidence of the crisis.

Over a two-week hearing before Ontario Superior Court Justice Markus Koehnen, union lawyers will argue the bill is an unjustifiable violation of the rights to collective bargaining and to strike that courts have recognized as embedded in the guarantee of free association in the Charter of Rights and Freedoms.

Unions say wage-cap law violates rights

The bill, passed as a cost-saving measure before the pandemic, limits all workers in the public sector - including universities and colleges, school boards, Crown corporations and agencies as well as direct employees of the provincial government - to 1-per-cent compensation increases a year for a three-year period. Because unions negotiate contracts at different times, some have come through that three-year period, including Ontario's education workers now in bargaining.

Ontario Premier Doug Ford, who boasted of growing support among private-sector construction unions in his spring re-election campaign, has refused demands from public-sector union leaders to repeal Bill 124, even as the pandemic plunged health care and long-term care into crisis. In previous remarks, he has stressed that the bill is temporary, and noted his government's $5,000 pandemic retention payments to nurses.

Speaking shortly after his Progressive Conservative government was re-elected in June, he pledged to treat nurses in upcoming labour talks "fairly," noting the rising rate of inflation.

However, union leaders say that even after the three-year periods expire, Bill 124 still forbids unions from seeking any back pay to make up for lost increases.

It also blocks arbitrators from awarding any such increases to workers, such as hospital nurses, who cannot strike. If the bill were struck down, the government could face a long list of catch-up wage demands.

In its written arguments filed with court, the provincial government denies the legislation violates the Charter. Lawyers for the Ministry of the AttorneyGeneral say Bill 124 was needed to rein in Ontario's finances without cutting services, laying off workers or raising taxes. They rely on evidence from former Bank of Canada governor David Dodge about the pressures on the province's books when the law was passed. But since then, the pandemic has forced Ontario to run record deficits.

The government argues Bill 124 does not stop collective bargaining or forbid strikes. All it does, the government says, is "foreclose one particular bargaining or arbitral outcome."

"The Charter does not guarantee unlimited annual raises for public sector workers," the submission reads.

Ontario argues Bill 124's compensation limits are similar to those imposed by other provinces and the federal government in the past and upheld by the courts. The bill does not trip over the legal hurdle of "substantial interference" in collective bargaining, they say, as it is timelimited and "broad-based" and allows bargaining on other matters, including compensation increases below 1 per cent.

Union lawyers spent much of Monday outlining their case that Bill 124 does amount to substantial interference in collective bargaining and has affected many low-paid public-sector hospital and long-term care workers, a large number of whom make just over minimum wage.

The unions also argue the bill violates Charter provisions against sexual discrimination, noting many affected workers are women and many are racialized. The government counters that its legislation applies to all workers it covers equally and does not target women.

No decision is expected soon, and the matter could end up before the Ontario Court of Appeal and then the Supreme Court of Canada. The Ontario government has not said if it would consider using the Constitution's notwithstanding clause to restore the legislation if it lost in the courts.

Mr. Ford enacted the rarely used clause just last year, when a court overruled his spending limits on election advertising for third parties, such as unions. Mr. Ford also threatened to use the clause, despite widespread opposition from constitutional experts, after a lower-court judge tossed out his 2018 legislation cutting the number of Toronto's city councillors nearly in half.

Notes

PUBLISHER: The Globe and Mail Inc.

Load-Date: September 13, 2022

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TAB 4

Consistent with the OEB's approval in the EB-2016-0152 Decision, OPG is not proposing a nuclear industry productivity adjustment as part of the proposed X-factor.[26] The nature and scale of the work planned by OPG for the IR term – in particular the ongoing DRP and the optimized shutdown of the Pickering station – mean that past productivity trends would not be a reasonable indicator of predicted productivity for OPG during the IR term.

2.3.2 Off-Ramp

Each year, OPG is required to file an analysis of the actual annual regulatory return, after tax on rate base, both dollars and percentages, for the combined regulated business (i.e., both hydroelectric and nuclear). This analysis includes a comparison of the regulated business' achieved ROE against the approved ROE included in the payment amounts. OPG proposes that this reporting requirement continue to be the basis for determining if its actual ROE is outside the +/-300 basis point trigger established by the RRF for determining whether a regulatory review may be initiated.

2.3.3 Treatment of Unforeseen Events

OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision.[27] The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities.[28] OPG's most recent accounting order application pursuant to these requirements was filed, and approved by the OEB, in EB-2018-0002.

3.0 PERFORMANCE SCORECARD

OPG currently reports to the OEB on a suite of performance metrics, as approved in the EB-2016-0152 Decision.[29] The OEB also directed OPG to file a proposal for a detailed scorecard

[26] EB-2016-0152 Decision, p. 138.
[27] Ibid, pp. 134, 142.
[28] EB-2016-0152 Payment Amounts Order, p. 13.
[29] EB-2016-0152 Decision, pp. 148-52.

TAB 5

Exhibits	Ex. A1-11-1 (Summary of OEB Directives and Undertakings from Previous Proceedings), Ex. A2-2-1 (Business Planning and Budgeting; See Section 6), Ex. D2-1-3 (Capital Projects – Nuclear Operations; See Section 3.5), Ex. I1-3-2 (Payment Amount Smoothing)
Interrogatories	Ex. L-A2-02-Staff-021, Ex. L-A2-02-Staff-022, Ex. L-A2-02-Staff-023, Ex. L-I1-03-Staff-345, Ex. L-A2-02-CCC-019, Ex. L-A2-02-CCC-020, Ex. L-A2-02-CME-005, Ex. L-A2-02-Energy Probe-004, Ex. L-A1-03-SEC-005, Ex. L-A2-02-SEC-014
Undertakings	None

RATE FRAMEWORK

Issue 2.1 Is OPG's approach to incentive rate-setting for establishing the nuclear payment amounts appropriate?

Complete Settlement

The Parties accept OPG's proposed rate framework to the five-year IR term from 2022 to 2026, including a nuclear stretch factor applicable for years 2023 to 2026 and an adjustment to the stretch factor in 2026 to account for the closure of the Pickering station, with the modifications as set out in Section 2, Part A above. In particular, the nuclear stretch factor that would apply is 0.6% for 2023-2025 and 0.3% for 2026. The stretch factor will apply to the cost categories set out in OPG's evidence (see Ex. A1-3-2, p. 12), with the addition of Asset Service Fees and subject to the inclusion of the entire capital-related revenue requirement, excluding the DRP.

Additionally, and in contemplation of the MRP, the Parties agree that OPG shall file an application with the OEB regarding any changes to the Hydroelectric Incentive Mechanism and other impacts arising from the MRP with sufficient time for the OEB to adjudicate the application prior to the scheduled implementation of the MRP.

Approval

Parties in Support: OPG, AMPCO, CME, CCC, Energy Probe, LPMA, OAPPA, OSEA, QMA, SEC, VECC
Parties Taking no Position: Environmental Defence, PWU, Society

Evidence

The evidence in relation to this issue includes the following:

Exhibits	Ex. A1-3-1 (Summary of Application), Ex. A1-11-1 (Summary of OEB Directives and Undertakings from Previous

	Proceedings), Ex. A1-3-2 (Nuclear Rate-setting Framework and Performance Reporting), Ex. A2-2-1 (Business Planning and Budgeting), Ex. A2-3-1 (Rating Agency Reports), Ex. I1-1-1 (Summary of Revenue Requirement and Revenue Deficiency), Ex. I1-3-1 (Payment Amount Smoothing)
Interrogatories	Ex. L-A1-03-Staff-003, Ex. L-A1-03-Staff-004, Ex. L-A1-03-Staff-009, Ex. L-A1-03-Staff-005, Ex. L-A1-03-Staff-006, Ex. L-A1-03-CME-011, Ex. L-A1-03-Energy Probe-003, Ex. L-F2-01-Energy Probe-053, Ex. L-A1-03-PWU-012, Ex. L-A1-03-SEC-007, Ex. L-I1-01-VECC-037
Undertakings	None

Issue 2.2 Is it appropriate to establish an earnings sharing mechanism or similar type of mechanism for the 2022 to 2026 period?

Complete Settlement

The Parties agree to an ESM based on the performance of the combined nuclear and regulated hydroelectric business on an asymmetrical basis, with a 100 basis point deadband to the OEB-approved ROE rate and 50/50 sharing above the deadband, assessed over a cumulative 5-year period from 2022-2026. Any such amount will be recorded in the Earnings Sharing Deferral Account.

Approval

Parties in Support: OPG, AMPCO, CME, CCC, Energy Probe, LPMA, OAPPA, OSEA, QMA, SEC, VECC
Parties Taking no Position: Environmental Defence, PWU, Society

Evidence

The evidence in relation to this issue includes the following:

Exhibits	None
Interrogatories	Ex. L-A1-03-Staff-008
Undertakings	None

TAB 6

Table 6: Impact of Settlement Proposal on Hydroelectric-related DVA and Other Amount Amortization[12]

($ millions)	2022	2023	2024	2025	2026	Total
Proposed Hydroelectric DVA Disposition	$43.70	$43.70	$43.70	$22.80	$22.80	$176.70
Settled Hydroelectric DVA Disposition	$34.00	$34.00	$34.00	$22.80	$22.80	$147.60
Variance	$(9.70)	$(9.70)	$(9.70)	$ -	$ -	$(29.10)

Table 7: Impact of Settlement Proposal and Updated Rate Smoothing Proposal on Deferred Revenue Amounts[13]

($ millions)	2022	2023	2024	2025	2026	Total
Proposed Deferred Revenue Amounts	$241.20	$299.90	$167.00	$103.40	$(44.80)	$766.70
Updated Deferred Revenue Amounts	$82.40	$125.70	$ -	$ -	$ -	$208.10
Variance	$(158.80)	$(174.20)	$(167.00)	$(103.40)	$44.80	$(558.60)

OEB staff filed a submission on July 22, 2021 that supported the settlement proposal. OEB staff submitted that the settlement proposal is consistent with the OEB's statutory objectives under section 1 of the OEB Act, in particular, the protection of consumers with respect to prices and the adequacy, reliability and quality of electricity service, and the promotion of cost effectiveness in the generation of electricity, while facilitating the maintenance of a financially viable electricity sector.[14]

Findings

The OEB approved the settlement proposal at the conclusion of the oral hearing on August 6, 2021, with written reasons to follow. The approved settlement proposal is attached as Schedule A to the Decision. The OEB approved the settlement proposal

[12] *Ibid.* The other amounts include tax impacts associated with the recovery of the Pension & OPEB Cash Versus Accrual Differential Deferral Account and the recovery of the COVID-19 pandemic impact debit (hydroelectric).
[13] *Ibid.* / p. 14. The updated rate smoothing proposal was filed on July 16, 2021 under separate cover.
[14] OEB Staff Submission on Settlement Proposal / p. 9.

orally to provide regulatory certainty to OPG, intervenors and OEB staff in preparing submissions for the remaining unsettled issues.

The OEB's reasons for approving the settlement proposal are as follows.

The OEB finds that the settlement proposal represents a reasonable outcome for ratepayers and will result in just and reasonable payment amounts. Relative to OPG's application, the settlement proposal includes:

- $603.6 million (3.62%) reduction in total revenue requirement over the 2022-2026 period[15]
- Significant reductions to rate base in each year of the 2022-2026 period[16]
- 2.8 TWh increase to the total nuclear production forecast over the 2022-2026 period[17]
- 25.9% reduction in revenue deficiency[18]
- $57.6 million reduction in Nuclear DVA balances for disposition[19]
- $29.1 million reduction in Hydroelectric DVA balances for disposition.[20]

Some of these numbers will change based on the OEB's findings on the unsettled issues.[21]

The OEB has considered the settlement proposal in the context of its statutory objectives under section 1 of the OEB Act, specifically to protect customers with respect to:

- Electricity prices
- Adequacy, reliability and quality of electricity service
- Promotion of cost effectiveness in electricity generation while facilitating the maintenance of a financially viable electricity sector.

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[15] *Ibid.* / p. 15.
[16] *Ibid.* / p. 20.
[17] *Ibid.* / p. 15.
[18] OEB Staff Submission on Settlement Proposal / p. 4.
[19] Settlement Proposal / pp. 9-13.
[20] *Ibid.*
[21] The numbers may also be impacted by the agreement to update the ROE rate for the 2022-2026 period based on the prevailing ROE specified by the OEB in accordance with the OEB's Cost of Capital Parameters letter as of the effective date of the final payment amounts order in this proceeding.

The OEB finds that the settlement proposal is comprehensive as there was full settlement on 30 of the 36 issues in this proceeding. Further, there was partial settlement on four issues. Given the comprehensive nature of the settled and partially settled issues, the OEB finds that the expected outcomes of the settlement proposal will serve to protect customers and provide OPG with the funding it requires to operate its prescribed generation facilities safely and effectively during the 2022-2026 period.

The settlement proposal explicitly requests that the OEB consider and accept the proposal as a package.[22] The OEB is familiar with this type of request. It is common that settlement proposals filed with the OEB include such a condition. The OEB finds that this is a reasonable request given the joint effort required by parties during a settlement conference to discuss, propose, refine, and agree on proposals for the OEB's consideration.

The OEB notes that the settlement conference was attended by parties with diverse interests. Representatives for 13 intervenors participated in the settlement conference, including eight ratepayer groups.[23] The OEB considered OEB staff's submission regarding the settlement proposal. OEB staff supported the settlement proposal and recommended the OEB approve it. OEB staff "strongly" believed the settlement proposal was in the public interest and was a "good outcome" for ratepayers.[24]

The OEB appreciates the effort involved by the parties to participate in a settlement conference given the number of participants and the complexity of the issues. While the OEB panel of Commissioners was not privy to the discussion, the filing of the settlement proposal is evidence that parties successfully adapted to a virtual settlement conference "room" and overcame logistical barriers.

The OEB found the schedule, mutually proposed by parties for procedural steps after the settlement proposal, to be extremely helpful. The proposed schedule demonstrated a concerted effort to streamline the proceeding and gain efficiencies:

- Eliminated procedural steps provisionally established in Procedural Order No. 1 (as shown in the illustrative schedules)
- Reduced the oral hearing from potentially 22 days to three days
- Submissions focused on only the four partially settled issues and one unsettled issue.

[22] Settlement Proposal / p. 6.
[23] *Ibid.* / p. 4.
[24] OEB Staff Submission on Settlement Proposal / pp. 9-10.

This contracted hearing schedule enabled the Decision to be issued in 2021, before the start of the 2022-2026 payment amounts period and within the OEB's 355-day metric for this proceeding.

This may be the first substantial settlement proposal filed in an OPG proceeding since OPG became subject to OEB regulation. In addition, the OEB acknowledges the "new" aspects of the settlement proposal that were not included in OPG's application. This indicates a progressive discussion and resolution among participants during the settlement conference, specifically:

- Earning sharing mechanism – an asymmetrical mechanism applicable to both OPG's hydroelectric and nuclear generation businesses. While it is "new" to OPG, it is a common aspect for other OEB-regulated entities selecting the Custom IR option.[25]

- COVID-19 pandemic impact – ratepayers will receive a credit of $46.6 million disposed over a three-year period (2022-2024) related to OPG's response to the COVID-19 pandemic in 2020 and 2021,[26] notwithstanding that the 2020 and 2021 payment amounts were approved on final basis. It is a novel proposal given the pandemic's unexpected impact on OPG's nuclear production.

- Lower return on a portion of rate base – for $358 million of actual 2017-2021 in-service capital additions that are in excess of OPG's forecasted and the OEB-approved amounts set out in OPG's 2017-2021 Payment Amounts proceeding,[27] the long-term debt rate replaces the higher ROE rate on the equity portion in the applicable weighted average cost of capital.[28] OEB staff remarked that this is a "reasonable and creative" approach.[29] The OEB agrees.

- Resume the Pension and Other Post-Employment Benefit (OPEB) Cost Variance Account – this variance account enables the true-up of pension and OPEB costs

[25] Settlement Proposal / p. 18.
[26] *Ibid.* / pp. 19-20.
[27] More specifically, as shown at Settlement Proposal / pp. 23-24, the $358 million amount is calculated as: (a) 100% of the difference between OPG's actual 2017-2021 in-service capital additions and the forecasted amounts in OPG's 2017-2021 Payment Amounts proceeding; and (b) 50% of the difference between the 2017-2021 forecasted and OEB-approved in-service capital additions in OPG's 2017-2021 Payment Amounts proceeding. These amounts exclude the Darlington Refurbishment Program (DRP)-related capital.
[28] Settlement Proposal / pp. 23-24.
[29] OEB Staff Submission on Settlement Proposal / pp. 8-9.

recovered from ratepayers to the actual costs incurred by OPG.[30] The resumption effectively extends the status quo in place since 2011, ensuring that neither OPG nor ratepayers are harmed by forecasting variances and cost volatility.

The OEB is satisfied with the results of the approved settlement proposal.

[30] Settlement Proposal / pp. 28-29.

TAB 7

likely that wage increases will exceed 1% in certain years. In this regard, a directional approximation of the impact can be observed from a response to an interrogatory submitted in EB-2020-0290 (Ex. L-F4-03-PWU-023), which asked OPG to "quantify the impact on the test period revenue requirement had wage escalation been set at inflation beginning in 2021". In response, OPG stated:

> OPG understands the question to refer to future collective agreements that will be subject to the Bill 124 moderation periods. If the wage escalation were to be set at an assumed inflation rate of 2% per year for April 1, 2021 to March 31, 2024 for the PWU and 2% per year for January 1, 2022 to December 31, 2024 for the Society, estimated revenue requirement impact would [be] an increase of approximately **$33M in 2022, $39M in 2023, $42M in 2024, $36M in 2025 and $28M in 2026**, for impacts on wages and resulting impacts on pension costs. As in EB-2016-0152, Ex. L-6.6-13 PWU-015, these estimates were determined on the basis of compensation costs reflected in OM&A expenses and are inclusive of associated income tax impacts (calculated at 25% tax rate /(1-25% tax rate)).

The estimates set out above are in excess of OPG's accounting order materiality threshold of $10M per year, and reflect wage increases that are lower than recent observed increases in inflation.

3.0 NEW VARIANCE ACCOUNT

OPG requests the OEB's approval to establish a new variance account, the Impact of Overturning Bill 124 Variance Account, to record the nuclear revenue requirement impacts resulting from the overturning of Bill 124.

3.1 Justification

This Application is being filed pursuant to the accounting order process as part of OPG's rate framework, as described in EB-2020-0290, Ex. A1-3-2 and accepted by the parties pursuant to the terms of the OEB approved settlement proposal (Decision and Order, Schedule A, p. 17):

> OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that

> has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities. OPG's most recent accounting order application pursuant to these requirements was filed, and approved by the OEB, in EB-2018-0002.

OEB staff submitted an interrogatory in EB-2020-0290 (Ex. L-A1-03-Staff-009) requesting that OPG further describe the accounting order process. In response, OPG stated:

> Following a material, unforeseen event which OPG believes would satisfy the requirements [of an accounting order], OPG would provide notice to the OEB of its intention to file an application for an accounting order seeking approval to record the impacts related to the event in a deferral account. OPG would then file its application setting out the detail and rationale for the request. OPG would follow the process as determined by the OEB with respect to its review and adjudication of the application.

The cost impacts resulting from the overturning of Bill 124:

(i) will result in a nuclear revenue requirement impact that is not reflected in the payment amounts established by the EB-2020-0290 Payment Amounts Order, which arises from a change in a law and could not have formed a part of the approved revenue requirement as OPG was obliged to abide by applicable laws and had no knowledge of the outcome of the Bill 124 Decision at the time of the payment amounts application;

(ii) will result in an annualized nuclear revenue requirement impact that is expected to be higher than the $10M materiality threshold; and

(iii) recognizing that the prudence of any costs recorded would be determined in a separate process, are appropriate to be recorded in a variance account pending the consideration of prudence since these compensation costs reflect costs necessary for the continued operation of OPG's nuclear facilities.

3.2 Account Operation and Reporting

TAB 8

The Nova Scotia Board of Censors (also known as the Amusements Regulation Board of Nova Scotia)

and

The Attorney General in and for the Province of Nova Scotia *Appellants*;

and

Gerard McNeil *Respondent.*

1977: May 24, 25; 1978: January 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Constitutional law — Provincial regulatory statute — Legislative authority — Censorship — Films and theatrical performances — Presumption of validity of provincial statute — Essential nature of statute — Theatres and Amusements Act, R.S.N.S. 1967, c. 304 — British North America Act, 1867, ss. 91(27), 92(13), (16).

Civil rights — Fundamental freedoms — Power of legislature to determine in light of local standards what is fit for viewing on moral grounds — Theatres and Amusements Act, R.S.N.S. 1967, c. 304 — British North America Act, 1867, ss. 91(27), 92(13), (16).

The respondent had become concerned about the wide powers of the Nova Scotia Board of Censors (also known as the Amusements Regulation Board of Nova Scotia) and, after the Board, in exercising the authority which the *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304, purported to confer on the Board, prevented the film "Last Tango in Paris" from being exhibited in the theatres of Nova Scotia, the respondent made application for a declaration that certain sections of the Act as amended and certain regulations made thereunder were *ultra vires* and beyond the legislative competence of the Province of Nova Scotia. Respondent's standing to take the proceedings was confirmed (see [1976] 2 S.C.R. 265). The challenge was to the statutory provisions purporting to authorize the Board to regulate and control the film industry within the Province of Nova Scotia according to standards fixed by the Board, on the ground that citizens of Nova Scotia are thereby denied, on moral grounds, their right to exercise

The Nova Scotia Board of Censors (connue également sous le nom de Amusements Regulation Board of Nova Scotia)

et

Le procureur général de la province de la Nouvelle-Écosse *Appelants*;

et

Gerard McNeil *Intimé.*

1977: 24 et 25 mai; 1978: 19 janvier.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR SUPRÊME DE LA NOUVELLE-ÉCOSSE, DIVISION D'APPEL

Droit constitutionnel — Loi provinciale de réglementation — Compétence législative — Censure — Films et représentations théâtrales — Présomption de validité de la loi provinciale — Caractère véritable de la Loi — Theatres and Amusements Act, R.S.N.S. 1967, c. 304 — Acte de l'Amérique du Nord britannique, 1867, art. 91(27), 92(13) et (16).

Libertés publiques — Libertés fondamentales — Pouvoir de la législature provinciale de déterminer, compte tenu des normes locales, ce qui, pour des raisons morales, peut être projeté — Theatres and Amusements Act, R.S.N.S. 1967, c. 304 — Acte de l'Amérique du Nord britannique, 1867, art. 91(27), 92(13) et (16).

Alarmé par les vastes pouvoirs de la Nova Scotia Board of Censors (ou Amusements Regulation Board of Nova Scotia) et notamment par l'interdiction opposée par la Commission, dans l'exercice du pouvoir conféré par la *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304, contre la présentation du film «Dernier tango à Paris» en Nouvelle-Écosse, l'intimé a demandé que soient déclarés *ultra vires* et hors de la compétence législative de la province de la Nouvelle-Écosse, certains articles de la Loi modifiée et certains règlements d'application. La qualité de l'intimé pour agir a été confirmée (voir [1976] 2 R.C.S. 265). L'intimé attaque les dispositions de la Loi qui autorisent la Commission à réglementer et contrôler l'industrie du cinéma dans les limites de la Nouvelle-Écosse selon des normes qu'elle établit. Il prétend qu'on refuse ainsi aux citoyens de la Nouvelle-Écosse, pour des raisons morales, l'exercice de leur liberté de choisir parmi les films et représentations théâtrales qui pourraient leur être offerts, ceux qu'ils

their freedom of choice in the viewing of films and theatre performances which might otherwise be available to them. It was also alleged that the legislation constituted an invasion of fundamental freedoms. The questions raised on the application were reserved for the consideration of the Appeal Division, which granted the application by declaring "that the word 'prohibiting' in Sections 2(1)(b) and 2(1)(g) and subsections (2) and (3) of Section 3" of the Act and "that regulations 4, 5(1), 13, 18 and 32 made pursuant to" the Act were null and void and of no effect being *ultra vires* the legislature of Nova Scotia.

Held (Laskin C.J. and Judson, Spence and Dickson JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.: The Court cannot ignore the rule that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted. The Act and Regulations read as a whole were primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia and the impugned provisions were enacted to reinforce the authority of the Board to perform that regulatory task which included the authority to prevent the exhibition of films which the Board, applying its own local standards, considers as unsuitable for viewing by provincial audiences. The impugned legislation was concerned with dealings in and the use of property (in this case films) wholly within the Province and constituted nothing more than the exercise of provincial authority over transactions wholly within the Province, *i.e.* the "regulating, exhibition, sale and exchange of films" irrespective of the origin of those films. Morality and criminality are not to be regarded as co-extensive. The impugned legislation was not concerned with criminality as such *i.e.* the creation of a criminal offence *per se* but rather in regulating a business within the province so as to prevent exhibitions which did not comply with the standards of propriety established by the Board. Its true object, purpose, nature and character was the regulation of a local trade. The legislation had a valid provincial purpose and therefore was valid.

That is not to say that Parliament is in any way restricted in its authority to pass laws penalizing immoral acts or conduct but simply that the provincial legislature in regulating a local trade may set its own standards which in no sense exclude the operation of the federal law.

Regulations 4 and 5(1) which provide that no theatre owner shall permit the use of any unauthorized film or

veulent voir, et que la Loi porte atteinte à leurs libertés fondamentales. Une ordonnance a renvoyé les questions soulevées par la demande à l'examen de la Division d'appel qui a accueilli la demande en déclarant «que le mot «interdiction» aux alinéas 2(1)b) et 2(1)g) et les paragraphes (2) et (3)» de la Loi et «que les articles 4, 5(1), 13, 18 et 32 du Règlement édicté aux termes de» la Loi sont nuls et de nul effet étant *ultra vires* de la législature de la Nouvelle-Écosse.

Arrêt (le juge en chef Laskin et les juges Judson, Spence et Dickson étant dissidents): Le pourvoi doit être accueilli.

Les juges Martland, Ritchie, Pigeon, Beetz et de Grandpré: La Cour ne peut négliger la règle selon laquelle il faut aborder toute question relative à la validité d'une loi provinciale en présumant qu'elle est valide. La Loi et le Règlement pris globalement sont principalement orientés vers la réglementation, la surveillance et le contrôle de l'industrie du cinéma dans la province de la Nouvelle-Écosse et les dispositions attaquées ont été édictées pour renforcer le pouvoir de réglementation conféré à la Commission, notamment le pouvoir d'interdire la projection de films qui, selon les normes locales appliquées par la Commission, ne peuvent être exhibés au public de la province. La Loi attaquée vise le commerce et l'utilisation de biens (en l'espèce de films) situés entièrement dans les limites de la province et constitue seulement l'exercice d'une compétence provinciale sur des opérations ayant lieu entièrement dans les limites de la province, à savoir la «réglementation, la projection, la vente et l'échange de films», quelle que soit leur origine. La moralité et la criminalité ne sont pas la même chose. La législation contestée ne se rapporte pas à la criminalité en soi, mais plutôt à la réglementation d'une entreprise à l'intérieur de la province en vue de prévenir des projections qui ne sont pas conformes aux normes de décence adoptées par la Commission. La législation contestée a pour objet, but, nature et caractère véritables, la réglementation et le contrôle d'un commerce local et constitue donc une loi provinciale valide.

Cela ne veut pas dire qu'il y a des limites au pouvoir du Parlement d'adopter des lois sanctionnant la conduite ou les actes immoraux, mais simplement qu'en réglementant un commerce local, la législature provinciale peut établir ses propres normes qui n'excluent en aucune façon l'application de la loi fédérale.

Les articles 4 et 5(1) du Règlement qui prévoient qu'aucun propriétaire de salle de spectacle ne doit per-

theatrical performance in his theatre, Reg. 13 which prohibits advertising a performance without the permission of the Board, and Reg. 18 are of the same character as those considered in *Quong Wing v. The King* (1914), 49 S.C.R. 440 and therefore valid.

Regulation 32 is invalid as being virtually indistinguishable from s. 159(2) of the *Criminal Code*, the use of the word "indecent" being the common factor. That Regulation is however clearly severable from the balance of the Regulations and the statute and it in no way detracts from, varies or curtails the authority vested in the Board under the statute.

The validity of the legislation might also be sustained by viewing the determination of what is and what is not acceptable for public exhibition on moral grounds as a matter of a "local and private nature in the Province" within the meaning of s. 92(16) of the *B.N.A.Act*, and, as this is not a matter coming within any of the enumerated classes in s. 91, it is in a field in which the Legislature is free to act.

Having regard to the presumption of constitutional validity there was no basis for finding that the legislation was invalid as infringing fundamental freedoms such as freedom of association, of assembly, of speech, of the press, of other media, of conscience or religion.

Per Laskin C.J. and Judson, Spence and Dickson JJ. *dissenting*: The Appeal Division invalidated certain provisions of the Act and the Regulations on the basis that they invaded exclusive federal power in relation to the criminal law. The Board had refused to sanction the showing of "Last Tango in Paris" and gave no reason for rejecting it and respondent had failed in his efforts to appeal the decision to the Governor in Council. An administrative authority like the Board, which is given unfettered and unguided power and discretion to prohibit the public exhibition of a film, and whose statutory power is challenged as being unconstitutional, cannot shield its exercise of that power by refusing to disclose the grounds upon which it has acted. Such an administrative authority must act in good faith, however wide its powers and regardless of the ambit of its discretion. Further, on the constitutional side, the validity of legislation (or a power given by legislation) is not to be judged from the standpoint of matters to which it might be limited, but upon the general terms in which it is in fact couched. In this case the issues before the Court did not engage the licensing authority of the Board, did not

mettre la projection d'un film qui n'a pas été autorisé ni de représentation théâtrale qui n'a pas été approuvée, l'art. 13 qui interdit d'annoncer une représentation sans avoir préalablement obtenu l'autorisation de la Commission, et l'art. 18 sont de même nature que les dispositions examinées dans *Quong Wing c. Le Roi* (1914), 49 R.C.S. 440 et sont donc valides.

Le Règlement 32 est invalide puisqu'il est virtuellement identique au par. 159(2) du *Code criminel*, l'utilisation du mot «indécent» en étant le dénominateur commun. Cependant, on peut nettement séparer cet article des autres articles du Règlement et de la Loi et il n'amoindrit, ne modifie ni ne restreint aucunement le pouvoir accordé à la Commission par la Loi elle-même.

On peut également appuyer la validité de la législation en considérant la détermination de ce qui est ou non présentable au public, pour des raisons morales, comme une matière «d'une nature purement locale ou privée dans la province» au sens du par. 92(16) de l'*A.A.N.B.*, et comme il ne s'agit pas d'une matière relevant des catégories de sujets énumérés à l'art. 91, c'est un domaine sur lequel la législature peut librement légiférer.

Compte tenu de la présomption de validité constitutionnelle, on ne peut conclure que la législation est invalide parce qu'elle empiète sur des libertés fondamentales comme la liberté d'association, la liberté de réunion, la liberté d'expression, la liberté de la presse et des autres moyens de diffusion, la liberté de conscience et de religion.

Le juge en chef Laskin et les juges Judson, Spence et Dickson *dissidents*: La Division d'appel a annulé certaines dispositions de la Loi et du Règlement au motif qu'elles empiétaient sur la compétence fédérale exclusive en matière de droit criminel. La Commission a refusé d'autoriser la projection du film «Dernier tango à Paris» sans motiver son refus et le demandeur n'a pas obtenu gain de cause en appel de cette décision auprès du gouverneur en conseil. Un organisme administratif comme la Commission, doté par la Loi d'un pouvoir absolument discrétionnaire et autonome d'interdire la projection publique d'un film, ne peut protéger l'exercice de ce pouvoir en refusant de révéler les motifs de sa décision lorsqu'on conteste la constitutionnalité dudit pouvoir. Un tel organisme administratif doit agir de bonne foi, quelle que soit l'étendue de ses pouvoirs et de sa discrétion. Du point de vue du droit constitutionnel, la validité de la législation (ou d'un pouvoir donné par législation) ne doit pas être jugée du point de vue des cas auxquels on pourrait limiter son application mais en fonction de termes très généraux de son texte. Les questions soumises à la Cour en l'espèce ne touchent pas

relate to any film classification system and were not concerned with the safety or suitability of premises. The Board asserted an unlimited statutory authority to determine for the general public what films were fit for viewing. There were no criteria set by the Act and no provision distinguishing or classifying films as being fit for viewing by adults but not by children. Only Reg. 32 purports to establish any criteria, namely "indecent or improper performance". Thus what was involved was the unqualified power of the Board to determine the fitness of films for public viewing on considerations which might extend beyond the moral and include the political, the social and the religious. At its narrowest, in this case the Board asserted authority to protect public morals and to safeguard the public from exposure to ideas and images in films that it regarded as morally offensive, indecent, or probably obscene. The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing in films, art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law. The contention that morality is not coextensive with the criminal law cannot of itself bring legislation respecting public morals within provincial competence. The federal power in relation to the criminal law extends beyond control of morality and is wide enough to embrace antisocial conduct or behaviour.

It was not enough to save the provisions of the impugned legislation that they were part of a wider legislative scheme. The provisions in question went beyond the licensing provisions and engaged the public directly. The appeal should be dismissed and the impugned provisions held *ultra vires*.

[*Severn v. The Queen* (1878), 2 S.C.R. 70; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Home Oil Distributors Limited v. A.G. of British Columbia*, [1940] S.C.R. 444; *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543; *Lord's Day Alliance of Canada v. A.G. of British Columbia*, [1959] S.C.R. 497; *Proprietary Articles Trade Association v. Attorney-General of Canada*, [1931] A.C. 310; *Bédard v. Dawson*, [1923] S.C.R. 681; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Smith v. The Queen*, [1960] S.C.R. 776; *Stephens v. The Queen*, [1960] S.C.R. 823; *Mann v. The Queen*,

le pouvoir de la Commission de délivrer des permis, ni le système de classification des films et ne se rapportent pas à la sécurité ni à la qualité des salles de projections. La Commission affirme que la Loi lui confère un pouvoir illimité de décider quels films peuvent être présentés au grand public. La Loi n'impose aucun critère d'action et aucune disposition ne différencie ni ne classifie les films selon qu'ils peuvent être présentés à tous ou aux adultes seulement. Seul l'art. 32 du Règlement fixe des critères, soit, toutes «représentations indécentes ou inconvenantes». Ainsi, il s'agit ici du pouvoir illimité de la Commission de la Nouvelle-Écosse de décider si les films peuvent être présentés au public, selon des critères non seulement moraux mais pouvant être également politiques, sociaux et religieux. Utilisant son pouvoir dans sa portée la plus étroite en l'espèce, la Commission revendique le droit de protéger les bonnes mœurs en évitant que le public soit exposé à des films, des idées et des images qu'elle considère comme moralement offensants, indécents et probablement obscènes. La définition de ce qui est décent, indécent ou obscène, dans un comportement ou dans une publication, ce qui peut moralement être montré au public dans les films, dans les arts ou dans les spectacles, relève de la compétence exclusive du Parlement du Canada au terme de son pouvoir énuméré de légiférer relativement au droit criminel. L'allégation que la moralité et le droit criminel ne coïncident pas ne peut faire en elle-même qu'une législation sur les bonnes mœurs soit de compétence provinciale. Le pouvoir fédéral en matière de droit criminel s'étend au-delà du contrôle de la moralité et est assez large pour comprendre les comportements anti-sociaux.

Il ne suffit pas pour épargner les dispositions prohibitives attaquées de la Loi de la Nouvelle-Écosse qu'elles fassent partie d'un ensemble législatif plus large. Les dispositions contestées vont plus loin que l'octroi de permis car elles touchent directement le public. Le pourvoi doit être rejeté et les dispositions contestées doivent être jugées *ultra vires*.

[Arrêts mentionnés: *Severn c. La Reine* (1878), 2 R.C.S. 70; *Renvoi relatif à The Farm Products Marketing Act*, [1957] R.C.S. 198; *Shannon c. Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Home Oil Distributors Limited c. Le procureur général de la Colombie-Britannique*, [1940] R.C.S. 444; *Caloil Inc. c. Le procureur général du Canada*, [1971] R.C.S. 543; *Lord's Day Alliance of Canada c. Le procureur de la Colombie-Britannique*, [1959] R.C.S. 497; *Proprietary Articles Trade Association c. Le procureur général du Canada*, [1931] A.C. 310; *Bédard c. Dawson*, [1923] R.C.S. 681; *O'Grady c. Sparling*, [1960] R.C.S. 804; *Smith c. La Reine*, [1960] R.C.S. 776; *Stephens c. La*

Queen[31] where a municipal zoning by-law prohibiting signs on residential property was construed by the majority of this Court to be inapplicable to the posting of federal election signs, this being a matter outside of provincial competence.

For all the foregoing reasons I would dismiss this appeal and answer the constitutional question in the negative. The respondent is entitled to its costs in this Court but there will be no costs to or against any of the intervenants. In view of the conclusion to which I have come on the basis of the federal criminal law power and the exercise thereof, I find it unnecessary to consider the larger issue, raised but not pressed by the intervenant the Canadian Civil Liberties Association, of the relation of censorship to free speech and the constitutional authority in that respect of Parliament and the provincial Legislatures.

The judgment of Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—This is an appeal brought with leave of this Court from a judgment of the Appeal Division of the Supreme Court of Nova Scotia rendered pursuant to an application made at the instance of the respondent McNeil whose standing to initiate the proceedings in a representative capacity on behalf of other Nova Scotians was confirmed by order of this Court (see [1976] 2 S.C.R. 265).

The respondent's application was for a declaration that certain sections of the *Theatres and Amusements Act*, R.S.N.S. 1967 c. 304 as amended, and certain Regulations made thereunder were *ultra vires* and beyond the legislative competence of the Province of Nova Scotia.

The exciting cause of the application appears to have been the exercise by the Nova Scotia Amusements Regulation Board (hereinafter referred to as "the Board") of the authority which the Act purports to confer on it, to prevent a film entitled "Last Tango in Paris" from being exhibited in the theatres of Nova Scotia.

[31] [1965] S.C.R. 798.

McKay c. La Reine[31], où la majorité des juges de cette Cour ont statué qu'un règlement municipal interdisant tout écriteau sur des propriétés résidentielles ne s'applique pas aux affiches électorales fédérales parce que cette matière échappe à la compétence provinciale.

Pour tous ces motifs, je suis d'avis de rejeter ce pourvoi et de répondre à la question constitutionnelle par la négative. L'intimé aura droit à ses dépens dans cette Cour, mais il n'y aura pas d'adjudication de dépens en faveur des intervenants ni contre eux. Compte tenu de ma conclusion fondée sur les pouvoirs fédéraux en matière de droit criminel, je ne crois pas nécessaire d'étudier la question plus large qu'a soulevée, sans insister, l'Association canadienne des libertés civiles, quant aux rapports entre la censure et la liberté d'expression et quant au pouvoir consitutionnel du Parlement et des législatures provinciales à cet égard.

Le jugement des juges Martland, Ritchie, Pigeon, Beetz et de Grandpré a été rendu par

LE JUGE RITCHIE—Pourvoi est interjeté, sur autorisation, d'un arrêt de la Division d'appel de la Cour suprême de la Nouvelle-Écosse, prononcé sur une demande présentée par l'intimé McNeil dont la qualité pour agir au nom des autres citoyens de la Nouvelle-Écosse a été confirmée par décision de cette Cour (voir [1976] 2 R.C.S. 265).

L'intimé demande que la *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304 et ses modifications, et certains règlements y afférents soient déclarés *ultra vires* et hors de la compétence législative de la province de la Nouvelle-Écosse.

C'est l'exercice par la Nova Scotia Amusements Regulation Board (ci-après appellée «la Commission») du pouvoir que la Loi lui confère d'interdire la projection du film «Dernier tango à Paris» dans les cinémas de la Nouvelle-Écosse qui est à l'origine de cette demande.

[31] [1965] R.C.S. 798.

It is the statutory provisions purporting to authorize the Board to regulate and control the film industry within the Province of Nova Scotia according to standards fixed by it, which are challenged by the respondent on the ground that the citizens of Nova Scotia are thereby denied, on moral grounds, their right to exercise their freedom of choice in the viewing of films and theatre performances which might otherwise be available to them, and it is further alleged that the legislation constitutes an invasion of fundamental freedoms.

The questions raised by the application were reserved for the consideration of the Appeal Division by order of Mr. Justice Hart made pursuant to s. 30(3) of the *Judicature Act*, c. 2 of the Statutes of Nova Scotia, 1972, and that Division having reserved its decision granted the following Order:

IT IS HEREBY DECLARED that the words 'prohibiting' in Sections 2(1)*b* and 2(1)*g* and subsections (2) and (3) of Section 3 of the *Theatres and Amusements Act* are null and void and of no effect being *ultra vires* the legislature of Nova Scotia.

IT IS FURTHER DECLARED that regulations 4, 5(1), 13, 18 and 32 made pursuant to the *Theatres and Amusements Act* are null and void and of no effect being ultra vires the legislature of Nova Scotia; . . .

I should say that I have had the benefit of reading the reasons for judgment prepared for delivery by the Chief Justice in which he has recited the relevant sections of the Act and of the Regulations made thereunder which relieves me of the task of reproducing them once again and at the same time enables me to refer to such sections and Regulations as I find necessary for the development of these reasons in the knowledge that they will be read in their proper context.

In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in *Severn v. The Queen*[32], at p. 103, that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly

[32] (1878), 2 S.C.R. 70.

L'intimé attaque les dispositions de la Loi qui autorisent la Commission à réglementer et contrôler l'industrie du cinéma dans les limites de la Nouvelle-Écosse selon des normes qu'elle établit. L'intimé prétend qu'on refuse ainsi aux citoyens de la Nouvelle-Écosse, pour des raisons morales, l'exercice de leur liberté de choisir parmi les films et représentations théâtrales qui pourraient leur être offerts, ceux qu'ils veulent voir, et en outre que la Loi porte atteinte à leurs libertés fondamentales.

Une ordonnance du juge Hart prononcée aux termes du par. 30(3) de la *Judicature Act*, c. 2 des Statuts de la Nouvelle-Écosse, 1972, a renvoyé les questions soulevées par la demande à l'examen de la Division d'appel qui, après avoir pris l'affaire en délibéré, a rendu l'arrêt suivant:

[TRADUCTION] IL EST DÉCLARÉ PAR LA PRÉSENTE que le mot «interdiction» aux alinéas 2(1)b) et 2(1)g) et les paragraphes 3(2) et (3) de la *Theatres and Amusements Act* sont nuls et de nul effet, car ils sont *ultra vires* de la législature de la Nouvelle-Écosse.

IL EST DE PLUS DÉCLARÉ que les articles 4, 5(1), 13, 18 et 32 du Règlement édicté aux termes de la *Theatres and Amusements Act*, sont nuls et de nul effet, car ils sont *ultra vires* de la législature de la Nouvelle-Écosse; . . .

Je dois dire que j'ai eu l'avantage de lire les motifs rédigés par le Juge en chef, dans lesquels il cite les articles pertinents de la Loi et du Règlement, ce qui m'évite de les reproduire de nouveau et me permet d'y référer quand je le jugerai nécessaire pour l'exposé de ces motifs en sachant qu'ils seront lus dans leur contexte.

Dans des affaires de ce genre, la Cour ne peut négliger la règle énoncée dès 1878 par le juge Strong dans l'arrêt *Severn c. La Reine*[32], à la p. 103, selon laquelle il faut aborder toute question relative à la validité d'une loi provinciale en présumant qu'elle est valide. Comme l'a dit le juge

[32] (1878), 2 R.C.S. 70.

enacted. As was said by Fauteux J., as he then was, in the *Reference re The Farm Products Marketing Act*[33], at p. 255:

> There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.

Fauteux, alors juge puîné, dans *Le renvoi relatif à The Farm Products Marketing Act*[33], à la p. 255:

> [TRADUCTION] Il y a une présomption légale quant à l'existence de la bonne foi avec laquelle un corps législatif a l'intention de se limiter à son propre domaine d'activité et il existe une présomption de nature semblable selon laquelle les termes généraux d'une loi n'ont pas pour objet de la faire s'appliquer au-delà de la compétence territoriale du législateur.

When the Act and the Regulations are read as a whole, I find them to be primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia, including the use and exhibition of films in that Province. To this end the impugned provisions are in my view enacted for the purpose of reinforcing the authority vested in a provincially appointed Board to perform the task of regulation which includes the authority to prevent the exhibition of films which the Board, applying its own local standards, has rejected as unsuitable for viewing by provincial audiences. This legislation is concerned with dealings in and the use of property (i.e. films) which take place wholly within the Province and in my opinion it is subject to the same considerations as those which were held to be applicable in such cases as *Shannon v. Lower Mainland Dairy Products Board*[34], *Home Oil Distributors Limited v. A.G. of British Columbia*[35] and *Caloil Inc. v. Attorney General of Canada*[36].

La Loi et le Règlement pris globalement me semblent principalement orientés vers la réglementation, la surveillance et le contrôle de l'industrie du cinéma dans la province de la Nouvelle-Écosse, y compris l'utilisation et la projection de films. Dans cette optique, les dispositions attaquées me semblent édictées pour renforcer le pouvoir de réglementation conféré à un organisme provincial, notamment le pouvoir d'interdire la projection de films qui, selon les normes locales appliquées par la Commission, ne peuvent être exhibés au public de la province. Cette loi vise le commerce et l'utilisation de biens (c.-à-d. de films) situés entièrement dans les limites de la province et, à mon avis, elle est assujettie aux mêmes conditions de validité que celles qui ont été jugées applicables dans des arrêts tels que *Shannon v. Lower Mainland Dairy Products Board*[34], *Home Oil Distributors Limited c. Le procureur général de la Colombie-Britannique*[35] et *Caloil Inc. c. Le procureur général du Canada*[36].

In the *Shannon* case, the Natural Products Marketing legislation was put in issue as constituting an encroachment on "the regulation of trade and commerce" a subject assigned exclusively to the Parliament of Canada by s. 91(2), and in the course of delivering the opinion of the Judicial Committee, Lord Atkin had occasion to say of this ground:

> It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers

Dans l'arrêt *Shannon*, une loi concernant la commercialisation de produits naturels était contestée au motif qu'elle empiétait sur la «réglementation des échanges et du commerce», une matière ressortissant exclusivement au Parlement du Canada aux termes du par. 91(2). En exposant l'opinion du Comité judiciaire, voici ce que lord Atkin a dit sur ce point:

> [TRADUCTION] Il suffit de dire, au sujet de ce premier motif, qu'il est manifeste que la loi en question se borne à la réglementation des opérations qui ont lieu entièrement dans la province et qui, par conséquent,

[33] [1957] S.C.R. 198.
[34] [1938] A.C. 708.
[35] [1940] S.C.R. 444.
[36] [1971] S.C.R. 543.

[33] [1957] R.C.S. 198.
[34] [1938] A.C. 708.
[35] [1940] R.C.S. 444.
[36] [1971] R.C.S. 543.

TAB 9

A-105-16

2018 FCA 55

Edgar Schmidt (*Appellant*)

v.

Attorney General of Canada (*Respondent*)

and

The Canadian Civil Liberties Association and **the British Columbia Civil Liberties Association** (*Interveners*)

INDEXED AS: SCHMIDT V. CANADA (ATTORNEY GENERAL)

Federal Court of Appeal, Stratas, Near and Rennie JJ.A.—Ottawa, February 8, 2017 and March 20, 2018.

Constitutional Law — Examination of bills and regulations — Applicable standard — Appeal from Federal Court decision dismissing appellant's action for declaratory relief — Appellant seeking declaration concerning meaning of three legislative provisions (examination provisions): two requiring Minister of Justice (Minister) to "ascertain" or "examine" whether proposed legislation is "inconsistent" with Canadian Charter of Rights and Freedoms or Canadian Bill of Rights, as case may be (Canadian Bill of Rights, s. 3; Department of Justice Act, section 4.1); third applying to proposed regulations and requiring Clerk of Privy Council to examine regulations to ensure, in particular, not inconsistent with purposes, provisions of Charter, Canadian Bill of Rights (Statutory Instruments Act, s. 3) — In certain circumstances, following examination, report of inconsistency must be made to House of Commons or to regulation-making authorities, as case may be — Respondent submitting that report need be made only when no credible argument can be made that proposed legislation meeting these standards; Federal Court agreeing with respondent — Whether Minister's interpretation of examination provisions, in particular, threshold at which report of inconsistency must be made, reasonable — Minister's interpretation of examination provisions reasonable, in fact, correct — Text of Canadian Bill of Rights, s. 3, Department of Justice Act, s. 4.1 examined — Though French, English versions thereof slightly different, provisions sharing common meaning in that Minister must examine provisions in question, make determination on existing inconsistencies with guaranteed rights, freedoms — Issue having to be determined herein whether statute considered inconsistent with Canadian Bill of Rights, Charter when statute "more-likely-than-not inconsistent" or whether statute inconsistent if no "credible argument" can be made that statute is consistent — Appellant's submission that Minister must satisfy herself that proposed legislation is more-likely-than-not inconsistent contrary to text of provisions — Context, purpose of examination provisions reviewed — No part of formal job of Minister of Justice, respondent to give legal advice to Parliament regarding whether proposed legislation constitutional — In conclusion, examination provisions requiring Minister to report whenever no credible argument supporting constitutionality of proposed legislation — Minister's view of what examination provisions requiring acceptable, defensible, correct — Therefore, "credible argument" examination standard used by Department of Justice in review of legislation under Canadian Bill of Rights, s. 3, Department of Justice Act, s. 4.1, Statutory Instruments Act, s. 3 reasonable reading of what legislation requiring — Appeal dismissed.

Construction of Statutes — Canadian Bill of Rights, s. 3, Department of Justice Act, s. 4.1, Statutory Instruments Act, s. 3 (examination provisions) requiring Minister of Justice, Clerk of Privy

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Council to examine whether proposed legislation, regulations "inconsistent" with Canadian Charter of Rights and Freedoms or Canadian Bill of Rights — Whether Minister of Justice's interpretation of examination provisions, in particular, threshold at which report of inconsistency must be made, reasonable — When reviewing courts review administrative decision-makers' interpretations of legislative provisions, they must take care not to interpret legislative provisions in definitive way, then use definitive interpretation as yardstick to measure what administrator has done — Minister's interpretation of examination provisions reasonable, in fact, correct — Text of Canadian Bill of Rights, s. 3, Department of Justice Act, s. 4.1 examined — Though French, English versions slightly different, sharing common meaning — Taken together, key words asking Minister of Justice to examine provisions in question, make determination on existing inconsistencies with guaranteed rights, freedoms — Appellant's submission that Minister must satisfy herself that proposed legislation more-likely-than-not inconsistent contrary to text of provisions — Examination provisions requiring Minister to report whenever finding no credible argument supporting constitutionality of proposed legislation.

This was an appeal from a Federal Court decision dismissing the appellant's action for declaratory relief. The appellant sought a declaration concerning the meaning of three legislative provisions (examination provisions). Two require the Minister of Justice (Minister) to "ascertain" or "examine" whether proposed legislation is "inconsistent" with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*, as the case may be (*Canadian Bill of Rights*, s. 3, *Department of Justice Act*, section 4.1). A third applies to proposed regulations and requires the Clerk of the Privy Council to examine them to ensure that, among other things, they are not inconsistent with the purposes and provisions of the Charter and the *Canadian Bill of Rights* (*Statutory Instruments Act*, s. 3). In certain circumstances, following the examination, a report of inconsistency must be made to the House of Commons or to regulation-making authorities, as the case may be. What had to be determined in this case was the threshold for reporting under these provisions.

In the Federal Court, the appellant submitted that a report must be made when proposed legislation is "'more likely than not inconsistent'" with these constitutional and quasi-constitutional standards. The respondent submitted that a report need be made only when no credible argument can be made that the proposed legislation meets these standards. The Federal Court agreed with the respondent.

The main issue was whether the Minister's interpretation of the examination provisions—in particular, the threshold at which a report of inconsistency must be made, was reasonable.

Held, the appeal should be dismissed.

Principles concerning administrative decision-makers and the interpretation of legislation were reviewed. When reviewing courts review administrative decision-makers' interpretations of legislative provisions, they must take care not to interpret the legislative provisions in a definitive way and then use that definitive interpretation as a yardstick to measure what the administrator has done.

The Minister's interpretation of the examination provisions was reasonable and in fact correct. The text of the examination provisions is carefully drawn and speaks of ascertaining or examining in particular whether proposed legislation is inconsistent with certain standards and the requirement to report if it is.

The text of section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act* were examined. The key words in these sections are: "ascertain whether"/"*rechercher si*"/"*vérifier si*" and "are inconsistent"/"*est incompatible*" and the definitions of these words was reviewed. Though the French and English versions are slightly different, they share a common meaning. Taken together, the key words ask the Minister to examine the provisions in question and make a

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determination on existing inconsistencies with guaranteed rights and freedoms.

The heart of the disagreement between the appellant and respondent was when is a statute inconsistent with the *Canadian Bill of Rights* and the Charter. It therefore had to be determined whether it is inconsistent when it is “more-likely-than-not inconsistent” or whether it is inconsistent if no “credible argument” can be made that it is consistent. The appellant’s submission that “not inconsistent” means “consistent for the purposes of the law” was rejected. Had Parliament intended to require the Minister to ensure that the draft provisions are consistent with guaranteed rights, Parliament could have used that word but it did not. The appellant’s submission that the Minister must satisfy herself that proposed legislation is more-likely-than-not inconsistent was contrary to the text of the provisions.

A review of the context and purpose of the examination provisions was made. It is not part of the formal job of the Minister of Justice and the respondent to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither are legal advisors to Parliament. Put bluntly, the executive is not limited to proposing measures that are *certain* to be constitutional or *likely* to be constitutional but is entitled to put forward proposed legislation that, after a “robust review of the clauses of draft legislation” is “defendable in Court”. In the examination provisions, Parliament must be taken to have imposed an obligation on the Minister that the Minister can practically meet, not one that is impossible to meet.

In conclusion, the examination provisions require the Minister to report whenever there is no credible argument supporting the constitutionality of proposed legislation. The Minister’s view of what the examination provisions require was acceptable, defensible and correct. Therefore, the “credible argument” examination standard used by the Department in its review of legislation under section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* was a reasonable reading of what this legislation requires. Finally, while the Federal Court chose to make its own declarations about the meaning of the examination provisions, it could have issued a judgment simply dismissing the appellant’s request for a declaration and letting its reasons in support of the dismissal speak for themselves. However, the Federal Court did not commit any reversible error.

STATUTES AND REGULATIONS CITED

An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, S.C. 2018, c. 29, s. 73.

An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings), S.C. 1997, c. 30, s. 1.

Canadian Bill of Rights, S.C. 1960, c. 44, s. 3.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 10, 11(*b*), 15, 24(2).

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Criminal Code, R.S.C., 1985, c. C-46, ss. 278.1 to 278.91.

Department of Justice Act, R.S.C., 1985, c. J-2, ss. 4.1, 5.

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[84] Parliamentarians may ask the Minister and the Attorney General for their views on the constitutionality of proposed legislation and the Minister and the Attorney General may choose to answer. But Parliamentarians have access to legal advice and support from Law Clerks and other sources: see the affidavit evidence at appeal book, Vol. 1, at pages 399–421. It is not as if Parliamentarians are bereft of access to legal advice and so the examination provisions were enacted to give them that access.

[85] Under our system of government, the executive is accountable to the elected members of Parliament and, should legal proceedings be later brought, to the judiciary. The executive has the power to propose policies to Parliament in the form of bills for Parliament's consideration. It is entitled to propose bills that may violate Charter rights and freedoms but which pursue pressing and substantial objectives and, thus, may be saved under section 1.

[86] A good example of this is seen by *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, S.C. 1997, c. 30, which amended the *Criminal Code* [R.S.C., 1985, c. C-46] to include sections 278.1 to 278.91, which deal with the production of records in sexual offence proceedings. Before this Act was enacted, it was known as Bill C-46. In broad measure, Bill C-46 implemented the dissenting reasons—not the majority reasons—of the Supreme Court in its Charter decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411, (1995), 130 D.L.R. (4th) 235. Thus, it ran the substantial risk of being found to be unconstitutional. But Bill C-46 was found to be constitutional: *R. v. Mills*, [1999] 3 S.C.R. 668, (1999), 180 D.L.R. (4th) 1.

[87] Put bluntly, the executive is not limited to proposing measures that are *certain* to be constitutional or *likely* to be constitutional. Rather, as a constitutional matter, in the words of the Federal Court (at paragraph 177), it is entitled to put forward proposed legislation that, after a "robust review of the clauses of draft legislation" is "defendable in Court". As *Mills* demonstrates, this is not a standpoint unfriendly to constitutional standards. Again, as mentioned at paragraph 36 above, the Charter is a document suffused with balances—not unequivocal, unqualified guarantees of rights and freedoms. And it is a standpoint that recognizes that after proposed legislation is placed before Parliament, there is considerable scope for investigation, questioning and debate in Parliament as to how it may be viewed against guaranteed rights and freedoms; in particular, we see this in the proceedings and often rich deliberations of Parliamentary Committees on proposed legislation. And in the end result, courts have their constitutional role to play too.

[88] The Federal Court put it well when it stated that under our system of government, consistency with guaranteed rights is not the sole responsibility of the Executive, the Minister of Justice and the Attorney General of Canada. Rather (at paragraph 279), "it is an ideal to be strived for collectively and attained through the concerted efforts of the three branches of government working towards a common goal."

[89] Another contextual factor supporting the respondent's interpretation of the examination provisions is the nature of the public service and the conventions surrounding it. To administer and implement laws and to prepare legislative proposals

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that ministers wish to put to Parliament, the executive relies on the public service: *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455, (1985), 23 D.L.R. (4th) 122, at page 470 S.C.R. In Canada, public servants are subject to a convention of political neutrality: *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, (1991), 82 D.L.R. (4th) 321, at page 86 S.C.R.; preamble to the *Public Service Employment Act*, S.C. 2003, c. 22, **ss. 12, 13**. This neutrality supports the threshold for reporting that the respondent urges upon us: one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers: see the evidence at appeal book, Vol. 3, at pages 1128–1129.

[90] In my view, the respondent's view of the examination provisions is also supported by the nature of constitutional law and the giving of advice concerning it. Constitutional law is a variable, debatable and frequently uncertain thing.

[91] Constitutional authorities are not necessarily good precedent in later cases. Courts can now depart more readily from earlier constitutional precedents: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

[92] The constitutional law can change. A few examples will suffice to show this. In section 15 of the Charter, compare *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, (1999), 170 D.L.R. (4th) 1 with *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 and *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paragraph 346. On subsection 24(2) [of the Charter] and the exclusion of evidence, compare *R. v. Stillman*, [1997] 1 S.C.R. 607, (1997), 144 D.L.R. (4th) 193 and *R. v. Collins*, [1987] 1 S.C.R. 265, (1987), 38 D.L.R. (4th) 508 with *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. On the territorial scope of the Charter, compare *R. v. Cook*, [1998] 2 S.C.R. 597, (1998), 164 D.L.R. (4th) 1, at paragraphs 25 and 46–48 with *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at paragraphs 103–113. On the meaning of "detention" under section 10 [of the Charter], compare *R. v. Therens*, [1985] 1 S.C.R. 613, (1985), 18 D.L.R. (4th) 655 with *Grant*, above. On the use of Charter values, compare *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, (1989), 59 D.L.R. (4th) 416 with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and with *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. On the scope of language rights, compare *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, (1986), 27 D.L.R. (4th) 406 with *R. v. Beaulac*, [1999] 1 S.C.R. 768, (1999), 173 D.L.R. (4th) 193. On paragraph 11(*b*) of the Charter, compare *R. v. Askov*, [1990] 2 S.C.R. 1199, (1990), 74 D.L.R. (4th) 355 with *R. v. Morin*, [1992] 1 S.C.R. 771, (1992), 71 C.C.C. (3d) 1 with *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Many more examples can be cited.

[93] Adding to the uncertainty is the fact that the Supreme Court sometimes overrules its own constitutional authorities. Recent examples include *Carter*, above (effectively overruling *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, (1993), 107 D.L.R. (4th) 342); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (overruling *Delisle v. Canada*

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(Deputy Attorney General), [1999] 2 S.C.R. 989, (1999), 176 D.L.R. (4th) 513); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (overruling *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, (1987), 38 D.L.R. (4th) 161); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 (overruling *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, (1996), 140 D.L.R. (4th) 193).

[94] Sometimes, the methodology of analyzing a constitutional issue can change drastically or a different outcome is reached by characterizing the problem differently: for example, compare the analysis of so-called "positive rights" in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, (1994), 119 D.L.R. (4th) 224; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 and *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295. While section 7 of the Charter does not protect economic rights or a right to a job (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407, (1995), 124 D.L.R. (4th) 127), sometimes section 7 can have the effect of allowing a person to keep her job and the economic interests associated with it (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, (1997), 152 D.L.R. (4th) 577).

[95] Sometimes definitive constitutional statements end up being not so definitive. In 2007, we all thought that the doctrine of interjurisdictional immunity could not apply to new situations and was restricted to those already covered by precedent: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. But in a few short years, we were proven to be wrong: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467.

[96] Sometimes, despite decades of silence in the case law, constitutional rights, statuses and entitlements—never before imagined—simply pop up with little advance warning: see, e.g., *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433. Sometimes rights are given exactly the meaning their framers intended: see, e.g., *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, (1987), 40 D.L.R. (4th) 18. But sometimes not: see, e.g., *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

[97] And sometimes there is a stalemate on points of constitutional law: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, (1990), 67 D.L.R. (4th) 161 where the Court split 1-1-1-1-1; *R. v. Rahey*, [1987] 1 S.C.R. 588, (1987), 39 D.L.R. (4th) 481, where the Court split 2-2-2-2; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, (1991), 77 D.L.R. (4th) 385, where six separate reasons were written by seven Justices.

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TAB 10

R. v. Weir, 1999 ABCA 275

Date: 19991008
Docket: 9803-0134-A

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE BERGER

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DALE THOMAS WEIR

Accused (Appellant)

[Note: An erratum was filed on January 27, 2000; the corrections have been made to the text and the erratum is appended to this judgment.]

Appeal from the Conviction by
THE HONOURABLE MADAM JUSTICE SMITH
Dated the 23rd day of January, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL
REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CÔTÉ CONCURRING IN THE RESULT

COUNSEL:

1999 ABCA 275 (CanLII)

G. Lepp
For the Respondent

Ms. M.D. Stewart
For the Accused (Appellant)

1999 ABCA 275 (CanLII)

b) The evidentiary foundation for the prayed for adjudication must be before the Court.

Counsel for the Respondent submits that the present application must fail because neither test is made out.

[9] At the heart of the Respondent's submission is the proposition that a decision of the British Columbia Court of Appeal does not represent a change in the law (whether fundamental or incremental) in the province of Alberta. Only a decision of the Supreme Court of Canada could achieve that result. In the alternative, the Respondent argues that even if a fundamental change in the law were established, the application suffers from a total absence of evidence of the kind referred to by Harradence, J.A. in ***R. v. Brown, supra***.

[10] The Crown's submission results in a practical anomaly. Defence counsel are not fortune tellers. They can hardly be expected to predict the course of constitutional change in Canada's courts. Where there is no suggestion of misconduct or mischief on the part of trial counsel, the failure to anticipate a fundamental change in the law should not operate to deprive an accused/appellant of that which the Supreme Court of Canada has characterized as an entitlement "*to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the Criminal Code*." I suggest that, ***a fortiori***, an accused/appellant is entitled to have his or her culpability determined on the basis of the requirements of enshrined constitutional law (subject, of course, to the requirements of being "still in the system" and establishing a sufficient factual foundation).

[11] The anomaly to which I refer, ***supra***, is, of course, that an inability to anticipate a change in the law would not be fatal but, on the Crown's theory, the failure to adduce an adequate evidentiary record at trial in support of an unanticipated change in the law would be. The Crown asks this Court to endorse a rule that would compel defence counsel to call days and days of expert evidence at trial in order to cover an unforeseen contingency that may, in any event, never arise. Such an interpretation must, surely, be rejected.

[12] Nor do I accept the Crown's contention that a judgment of **any** court in any jurisdiction in Canada would operate to freeze the conduct of cases in the province of Alberta pending the determination of the legal issues raised for the first time in the courts of another province. That issue simply does not arise in the case that is before us. The motion to amend the Notice of Appeal is brought because the highest court of another province has, by majority opinion, declared the constitutional invalidity of s. 163.1(4). I do not accept the Crown's contention that a substantial change in the law is confined to new pronouncements of the Supreme Court of Canada. Reasoned decisions of other Canadian appellate courts are very persuasive when no appellate decision contradicts them. That is especially so where, as here, the decision relied upon

1999 ABCA 275 (CanLII)

TAB 11

Air Canada and Pacific Western Airlines Ltd. *Appellants*

v.

Her Majesty The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia *Respondents*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, and the Attorney General of Newfoundland *Interveners*

and between

Her Majesty The Queen in Right of the province of British Columbia and the Attorney General of British Columbia *Appellants*

v.

Air Canada, Pacific Western Airlines Ltd. and Canadian Pacific Airlines Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Intervener*

INDEXED AS: AIR CANADA *v.* BRITISH COLUMBIA

File Nos.: 20079, 20082, 20085.

1988: June 8, 9, 10; 1989: May 4.

Present: Beetz, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE APPEAL COURT FOR BRITISH COLUMBIA

Taxation — Provincial powers — Tax levied first purchaser of gasoline following manufacture — Tax amended to apply to purchaser ultimately consuming gasoline — Airlines involved in interprovincial and

* Le Dain J. took no part in the judgment.

Air Canada et Pacific Western Airlines Ltd. *Appelantes*

c.

Sa Majesté La Reine du chef de la province de la Colombie-Britannique et le procureur général de la Colombie-Britannique *Intimés*

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de la Saskatchewan, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

et entre

Sa Majesté La Reine du chef de la province de la Colombie-Britannique et le procureur général de la Colombie-Britannique *Appelants*

c.

Air Canada, Pacific Western Airlines Ltd. et Lignes aériennes Canadien Pacifique Ltée *Intimées*

et

Le procureur général de la Saskatchewan *Intervenant*

RÉPERTORIÉ: AIR CANADA *c.* COLOMBIE-BRITANNIQUE

N^os^ du greffe: 20079, 20082, 20085.

1988: 8, 9, 10 juin; 1989: 4 mai.

Présents: Les juges Beetz, McIntyre, Lamer, Wilson, Le Dain*, La Forest et L'Heureux-Dubé.

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

Droit fiscal — Pouvoirs provinciaux — Taxe prélevée sur le premier acheteur d'essence après sa production — Taxe modifiée de manière à frapper l'acheteur qui consomme l'essence — Lignes aériennes fournissant

* Le juge Le Dain n'a pas pris part au jugement.

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international service taxed for fuel purchases in province — Whether or not original tax ultra vires the province — Whether or not amended tax ultra vires the province — If so, whether or not taxes paid by mistake under ultra vires statute refundable — Whether or not taxes contrary to s. 7 Charter right to liberty — If so, whether or not taxes justified under s. 1 — Gasoline Tax Act, 1948, R.S.B.C. 1960, c. 162, s. 25(1), (2), (3), (4), (5) — Miscellaneous Statutes Amendment Act, 1976, S.B.C. 1976, c. 32, s. 7 — Constitution Act, 1867, ss. 91(2), 92(2), (10)(a) — Canadian Charter of Rights and Freedoms, ss. 1, 7.

Statutes — Retroactive operation — Taxing statutes — Ultra vires taxing provision amended — Amendment providing for retroactive operation of amendment — Whether or not retroactive application of taxing provision ultra vires the province — Finance Statutes Amendment Act, 1981, S.B.C. 1981, c. 5, s. 20.

In 1980, Air Canada, Pacific Western Airlines and Canadian Pacific Airlines commenced separate actions (which were heard together) against British Columbia, seeking the reimbursement of amounts paid as "gasoline taxes" under the *Gasoline Tax Act* in effect on and following August 1, 1974. (A fiat was no longer necessary to sue the provincial Crown from August 1, 1974.) Air Canada and Pacific Western Airlines sought to recover the taxes paid between August 1, 1974 and the date of trial. Canadian Pacific Airlines' claim was limited to the taxes paid between August 1, 1974 and July 1, 1976.

The Act, as it stood on August 1, 1974, taxed every purchaser on all gasoline sold in the province for the first time after its manufacture in, or importation into, the province. The Act remained in this form until 1976 even though the Privy Council had struck down a similar provision for not being a direct tax within s. 92(2) of the *Constitution Act, 1867*. The definition of "purchaser" was repealed and replaced in July 1976. "Purchaser" was defined to mean any person who, acting for himself or as agent, bought or received delivery of gasoline within the province for his or her own use or consumption. In 1981, legislation was enacted purporting to extend the application of legislation similar to that enacted in 1976 back to August 1, 1974. This legislation also purported to legalize the Crown's retention of the money collected from 1974 to 1976 under the Act as it then stood: moneys collected as taxes, penalties

un service interprovincial et international assujetties à une taxe sur le carburant acheté dans la province — La taxe initiale était-elle ultra vires de la province? — La taxe modifiée est-elle ultra vires de la province? — Dans l'affirmative, des taxes acquittées par erreur en vertu d'une loi qui est ultra vires sont-elles remboursables? — Les taxes portent-elles atteinte au droit à la liberté garanti par l'art. 7 de la Charte? — Dans l'affirmative, les taxes sont-elles justifiées par l'article premier? — Gasoline Tax Act, 1948, R.S.B.C. 1960, chap. 162, art. 25(1), (2), (3), (4), (5) — Miscellaneous Statutes Amendment Act, 1976, S.B.C. 1976, chap. 32, art. 7 — Loi constitutionnelle de 1867, art. 91(2), 92(2), (10)a) — Charte canadienne des droits et libertés, art. 1, 7.

Législation — Effet rétroactif — Lois fiscales — Modification d'une disposition fiscale qui était ultra vires — Modification ayant un effet rétroactif — La province avait-elle compétence pour appliquer rétroactivement une disposition fiscale? — Finance Statutes Amendment Act, 1981, S.B.C. 1981, chap. 5, art. 20.

En 1980, Air Canada, Pacific Western Airlines et Lignes aériennes Canadien Pacifique ont engagé des actions distinctes (qui ont été entendues ensemble) contre la Colombie-Britannique pour obtenir le remboursement de sommes payées à titre de «taxes sur l'essence» en vertu de la *Gasoline Tax Act*, telle qu'elle s'appliquait à partir du 1er août 1974. (À compter de cette date, il n'était plus nécessaire d'obtenir une autorisation pour poursuivre la Couronne provinciale.) Air Canada et Pacific Western Airlines demandaient le remboursement des taxes qu'elles avaient payées entre le 1er août 1974 et la date du procès. La réclamation de Lignes aériennes Canadien Pacifique se limitait aux taxes versées entre le 1er août 1974 et le 1er juillet 1976.

La Loi, telle qu'elle était le 1er août 1974, imposait une taxe à tous les acheteurs d'essence vendue dans la province pour la première fois après y avoir été produite ou importée. La loi n'a pas été modifiée avant 1976, bien que le Conseil privé eût déjà invalidé une disposition analogue parce que la taxe qu'elle prévoyait n'était pas directe au sens du par. 92(2) de la *Loi constitutionnelle de 1867*. La définition du terme «acheteur» a été abrogée et remplacée en juillet 1976. Selon la nouvelle définition, un «acheteur» était une personne qui, agissant en son propre nom ou à titre de mandataire, achetait ou recevait de l'essence dans la province pour son usage personnel ou pour l'usage de son mandant ou d'autrui. En 1981, a été adoptée une loi ayant pour effet de rendre applicable à partir du 1er août 1974 un texte semblable à celui adopté en 1976 et, en outre, d'autoriser la Couronne à retenir les sommes perçues de 1974 à 1976 en

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or interest under the Act during that period were to "be conclusively deemed to have been confiscated by the government without compensation".

Air Canada and Pacific Western Airlines alleged that none of the definitions made the tax a direct tax in the province for provincial purposes so as to give the province jurisdiction under s. 92(2) of the *Constitution Act, 1867*. All three airlines contended that, even if the 1976 version of the statute were constitutional, they were still entitled to be reimbursed for moneys paid between 1974 and 1976 because the 1981 attempt to give the 1976 tax retroactive effect was invalid.

At trial the province conceded that the Act as it existed before 1976 was *ultra vires*, but the 1976 Act was held to be valid. The 1981 legislation to give the tax retroactive effect, however, was found to be *ultra vires*. The airlines were therefore entitled to recover taxes paid between 1974 and 1976 but not the taxes paid after 1976.

The Court of Appeal dismissed the appeal by Air Canada and Pacific Western Airlines on the issue of their liability after 1976. The Attorney General cross-appealed against Air Canada and Pacific Western Airlines and appealed against Canadian Pacific Airlines on the issue of the province's liability to repay the taxes collected between 1974 and 1976. The Court of Appeal, by majority, dismissed the Crown appeals. Appellants were granted leave to appeal to this Court.

The constitutional questions before this Court queried: (1) if the *Gasoline Tax Act*, as amended in 1976 and 1981, was *ultra vires* in its application or otherwise constitutionally inapplicable to the airlines here; (2) whether the application of the *Gasoline Tax Act* to the airlines violated s. 7 of the *Canadian Charter of Rights and Freedoms*; and (3) if so, whether its application was justified under s. 1.

Held (Wilson J. dissenting in part): The appeal by Air Canada and Pacific Western Airlines should be dismissed, the Crown's cross-appeal against them should be allowed and the Crown's appeal against Canadian Pacific Airlines should be allowed. As to the first constitutional question, the *Gasoline Tax Act*, as it existed in 1974, was constitutionally invalid, but the amendments of 1976 and 1981 were valid. The second constitutional

vertu de la loi alors en vigueur: les sommes perçues en vertu de la loi à titre de taxes, de pénalités ou d'intérêts étaient «définitivement réputées avoir été confisquées par le gouvernement, sans indemnisation».

Air Canada et Pacific Western Airlines allèguent qu'aucune des définitions ne faisait de la taxe un impôt direct dans les limites de la province pour des objets provinciaux, de manière à conférer à la province compétence en vertu du par. 92(2) de la *Loi constitutionnelle de 1867*. Les trois lignes aériennes font valoir que, même si la loi dans sa version de 1976 était constitutionnelle, elles ont droit néanmoins au remboursement des sommes versées entre 1974 et 1976, puisque la tentative en 1981 de donner à la taxe imposée en 1976 un effet rétroactif était invalide.

En première instance, la province a reconnu que la loi telle qu'elle existait avant 1976 était *ultra vires*, mais la loi de 1976 a été jugée valide. La loi de 1981 donnant à la taxe un effet rétroactif a cependant été jugée *ultra vires*. Les lignes aériennes avaient donc droit au remboursement des taxes payées entre 1974 et 1976, mais non de celles versées après 1976.

La Cour d'appel a rejeté l'appel formé par Air Canada et Pacific Western Airlines sur la question de leur assujettissement à la taxe après 1976. Le procureur général a formé un appel incident contre Air Canada et Pacific Western Airlines et a interjeté appel contre Lignes aériennes Canadien Pacifique sur la question de l'obligation pour la province de rembourser les taxes perçues entre 1974 et 1976. La Cour d'appel, à la majorité, a rejeté les appels de la Couronne. Les appelantes ont obtenu l'autorisation de pourvoi en cette Cour.

Les questions constitutionnelles dont la Cour est saisie sont de savoir: (1) si la *Gasoline Tax Act* telle que modifiée en 1976 et 1981 est *ultra vires* dans son application aux lignes aériennes en l'espèce ou par ailleurs constitutionnellement inapplicables à ces dernières; (2) si l'application de la *Gasoline Tax Act* aux lignes aériennes viole l'art. 7 de la *Charte canadienne des droits et libertés*; et (3) dans l'affirmative, si son application est justifiée en vertu de l'article premier.

Arrêt (le juge Wilson est dissidente en partie): Le pourvoi d'Air Canada et de Pacific Western Airlines est rejeté et le pourvoi incident formé par la Couronne contre elles est accueilli. Le pourvoi de la Couronne contre Lignes aériennes Canadien Pacifique est accueilli. En ce qui concerne la première question constitutionnelle, la *Gasoline Tax Act*, telle qu'elle existait en 1974, était inconstitutionnelle, mais les modifications y

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question should be answered in the negative; the third did not need to be answered.

Per Lamer, La Forest and L'Heureux-Dubé JJ.: The Crown could not rely on the Act as it existed in 1974 to justify collection or retention of the taxes levied between 1974 and 1976. The Act could not be "read down" so as to apply only to persons who purchased gasoline for their own use or consumption as it was in practice applied.

The 1976 tax met the requirements of s. 92(2) of the *Constitution Act, 1867*: it was a direct tax, imposed in the province and for provincial purposes. A direct tax is one demanded from the very person who it is intended or desired should pay it. The 1976 Act clearly taxed the ultimate consumer of the gasoline and made no provision for passing it on to others, whatever the opportunities of recouping it by other means. The transaction attracting the tax took place in the province and the purchaser had a sufficient presence in the province to be taxed there. Nothing in the *Constitution Act, 1867* requires that the taxpayer must benefit from the tax. A person, a transaction or property in the province may be taxed by the province if taxed directly.

The Act did not impose a consumption tax and references to consumption or use in the definition of purchaser merely defined the taxpayer. Since the tax was imposed in the province in respect of the purchase of gasoline, it did not matter where it was consumed, whether in airspace or in another province. That the tax could have an effect on persons outside the province was of no consequence.

The *Charter* right to "life, liberty or security of the person" could not be invoked here. The airlines were required to pay taxes in the same way as other purchasers of gasoline within the province. An ordinary tax like the one at issue could not be equated with expropriation.

Federal jurisdiction over trade and commerce (s. 91(2)), interprovincial undertakings (s. 92(10)(*a*)) and aeronautics was not violated by the 1976 Act. Any alleged violation of the trade and commerce power would be based on the impugned tax's being characterized as a consumption tax on the airlines' fuel. The federal power over interprovincial undertakings and aeronautics did not create an immunity for the airlines

apportées en 1976 et 1981 sont valides. La deuxième question constitutionnelle reçoit une réponse négative; il n'est pas nécessaire de répondre à la troisième.

Les juges Lamer, La Forest et L'Heureux-Dubé: La Couronne ne peut s'appuyer sur la loi telle qu'elle était en 1974 pour justifier la perception de la taxe et la conservation des sommes versées à ce titre entre 1974 et 1976. Il ne faut pas «donner une interprétation atténuée» à la loi, de manière qu'elle ne s'applique qu'à ceux qui achètent de l'essence pour leur consommation ou pour leur usage personnels, car c'était ainsi qu'on l'appliquait dans la pratique.

La taxe de 1976 respectait les exigences du par. 92(2) de la *Loi constitutionnelle de 1867*: c'était une taxe directe imposée dans les limites de la province, pour des objets provinciaux. L'impôt direct est celui exigé de la personne même qui doit l'assumer. De toute évidence, la loi de 1976 assujettissait à une taxe le consommateur réel de l'essence et n'envisageait pas qu'elle serait reportée sur autrui, quelles que fussent les possibilités d'en recouvrer le montant par d'autres moyens. L'opération entraînant l'assujettissement à la taxe a eu lieu dans la province et l'acheteur y avait une présence suffisante pour y être assujetti. Rien dans la *Loi constitutionnelle de 1867* n'exige que le contribuable tire avantage de la taxe. La province peut imposer une personne, une opération ou des biens dans les limites de son territoire, à condition qu'elle le fasse au moyen d'une taxe directe.

La loi n'impose pas une taxe à la consommation et, si la définition du terme «acheteur» parle de consommation ou d'usage, c'est simplement pour définir le contribuable. Puisque la taxe frappe l'essence achetée dans les limites de la province, le lieu de consommation de cette essence n'a pas d'importance, qu'il s'agisse de l'espace aérien ou d'une autre province. Que la taxe puisse avoir un effet sur des personnes à l'extérieur de la province ne tire pas à conséquence.

Le droit «à la vie, à la liberté et à la sécurité de la personne», garanti par la *Charte*, ne peut être invoqué en l'espèce. Les lignes aériennes sont tenues au paiement de taxes au même titre que tout autre acheteur d'essence dans la province. Une taxe ordinaire comme celle en l'espèce ne peut être assimilée à une expropriation.

La loi de 1976 n'empiète pas sur la compétence fédérale relative aux échanges et au commerce (par. 91(2)), aux entreprises interprovinciales (al. 92(10)*a*)) et à l'aéronautique. Toute allégation d'un empiétement sur le pouvoir en matière d'échanges et de commerce reposerait sur la caractérisation de la taxe en cause comme une taxe à la consommation frappant le carburant des lignes aériennes. Le pouvoir fédéral sur les

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from otherwise valid provincial legislation. By and large federal undertakings, like other private enterprises functioning within the province, must operate in a provincial legislative environment, and must like them pay provincial taxes imposed within the province.

The words of the 1976 Act clearly indicated that the Legislature meant to give effect to the whole of the statute in its amended form from the date of its enactment. The argument that the 1976 Act was invalid because the Legislature could not amend an *ultra vires* statute so as to make it *intra vires* was without merit.

The taxing provisions of the 1981 legislation, like the 1976 legislation, were a proper exercise of the province's power to impose direct taxation in the province. The sole difference was that the 1981 provisions were given retroactive effect—a result that was not constitutionally barred. The tax illegally collected under the *ultra vires* provision before 1976 would be equal to the amount levied in 1981 and the moneys owing by the taxpayers under the 1981 provision was simply to be taken out of the equal amounts collected from those taxpayers under the invalid tax. The subsection which referred to "confiscation" was nothing more nor less than machinery for collecting the taxes properly imposed in the other subsections and accordingly could not taint their constitutionality.

The 1981 legislation does not violate the principle enunciated in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576. *Amax* concerned a situation where the province sought to avoid repaying a tax it was bound by law to pay. It simply sought in an indirect way to give effect to an invalid statute. Here the Legislature did directly what it was empowered to do—impose a direct tax and give it retroactive effect.

The argument that, apart from the 1981 Act, the airlines could not recover on the basis that the tax was paid under a mistake of law (the "mistake of law" rule) could not succeed. The rule was rejected as having been constructed on inadequate foundations as lacking in clarity and resulting in undue harshness. It should not in any event be extended to the constitutional plane. The development of the law of restitution had rendered otiose the distinction between mistakes of fact and mistakes of law. It should play no part in the law of restitution. Recovery should generally be allowed in any case of enrichment at the plaintiff's expense caused by a

entreprises interprovinciales et sur l'aéronautique ne faisait pas échapper les lignes aériennes à l'application d'une loi provinciale par ailleurs valide. En règle générale, les entreprises fédérales, comme les autres entreprises privées exploitées dans la province, doivent fonctionner dans le cadre que forment les lois provinciales et payer les taxes provinciales imposées dans la province.

Il se dégage des termes employés dans la loi de 1976 que le législateur a voulu que la loi au complet, dans sa version modifiée, ait effet à partir de la date de son adoption. L'argument selon lequel la loi de 1976 était invalide parce que le législateur ne pouvait, en modifiant une loi qui était *ultra vires*, la rendre *intra vires*, est sans fondement.

Les dispositions fiscales de la loi de 1981, comme celles de la loi de 1976, constituent un exercice légitime du pouvoir de la province d'imposer une taxe directe dans les limites de son territoire, la seule différence étant que les dispositions de 1981 ont un effet rétroactif, ce que la Constitution n'interdit pas. Les sommes illégalement perçues avant 1976 en vertu de la disposition invalide sont égales aux sommes prélevées en 1981 et les sommes dues par les contribuables en vertu de la disposition de 1981 étaient simplement compensées par les sommes égales qu'avaient versées ces contribuables en acquittement de la taxe invalide. Le paragraphe qui parle de «confiscation» n'est rien d'autre qu'un mécanisme pour la perception de taxes légitimement imposées par les autres paragraphes et ne compromet donc pas leur constitutionnalité.

La loi de 1981 ne viole pas le principe posé dans *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576. L'arrêt *Amax* visait une situation où la province cherchait à éviter d'avoir à rembourser une taxe alors qu'elle était tenue en droit de le faire. Elle cherchait simplement un moyen indirect de donner effet à une loi invalide. En l'espèce, le législateur a fait directement ce qu'il avait la compétence de faire: imposer une taxe directe et lui donner un effet rétroactif.

On ne peut retenir l'argument selon lequel, abstraction faite de la loi de 1981, les lignes aériennes ne pourraient être remboursées parce que la taxe a été payée à la suite d'une erreur de droit (règle de «l'erreur de droit»). La règle a été rejetée parce qu'elle a des fondations inadéquates, qu'elle manque de clarté et qu'elle a des conséquences trop sévères. De toute façon, elle ne devrait pas être étendue au domaine constitutionnel. L'évolution du droit en matière de restitution rend inutile la distinction entre les erreurs de fait et les erreurs de droit. Elle ne devrait pas entrer en jeu dans le droit relatif à la restitution. Le recouvrement devrait

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mistake, subject to any available defences or equitable reasons for denying recovery. Restitution should apply against public bodies as well as to private individuals.

être généralement permis dans les cas d'enrichissement aux dépens du demandeur, quand il résulte d'une erreur, sous réserve des moyens de défense et des raisons d'équité qui permettraient de refuser le recouvrement. La restitution devrait s'appliquer à l'égard des organismes publics comme à l'égard des particuliers.

Restitutionary principles, however, preclude recovery where the plaintiff has suffered no loss. If the taxing authority retains a payment to which it was not entitled, it will be unjustly enriched but not at the taxpayer's expense if the economic burden of the tax has been shifted to others. Generally, it is preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Rather, its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the taxpayer's expense. The taxpayer must show that it bore the burden of the tax to make out its claim. What the province received was relevant only in so far as it was received at the taxpayer's expense.

Les principes de la restitution s'opposent toutefois au recouvrement dans le cas où le demandeur n'a subi aucune perte. Si l'autorité fiscale garde un paiement auquel elle n'avait pas droit, elle reçoit un enrichissement illégitime mais cet enrichissement ne se produit pas aux dépens du contribuable si la charge économique de la taxe a été reportée sur d'autres personnes. Permettre au fisc de conserver l'enrichissement est en règle générale préférable à une intervention des tribunaux pour faire passer cet enrichissement au contribuable. Le droit en matière de restitution n'a pas pour objet de donner des profits fortuits à des demandeurs qui n'ont subi aucune perte. Il sert plutôt à garantir que, dans le cas où un demandeur a été privé d'une richesse qu'il avait en sa possession ou qui lui revenait, cette richesse lui sera rendue. Le recouvrement pour fins de restitution est égal au gain réalisé par la province aux dépens du contribuable. Pour établir le bien-fondé de sa demande, le contribuable doit démontrer qu'il a supporté la charge de la taxe. Ce qu'a pu recevoir la province n'est pertinent que dans la mesure où c'était aux dépens du contribuable.

Apart from this, while the principles of unjust enrichment can operate against a government to ground restitutionary recovery, where the effect of an unconstitutional or *ultra vires* statute is in issue, special considerations operate to take the case out of the normal restitutionary framework and require a rule responding to the underlying policy concerns specific to this problem. The rule is against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes. The policies that underlie this rule are numerous. Chief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it, either on the same or on a new generation of taxpayers, to finance the operations of government. It could lead to fiscal chaos, particulary where a long-standing taxation measure is involved. The tax here is of broad general application and has been imposed for decades.

Par ailleurs, les principes de l'enrichissement illégitime (ou sans cause) peuvent jouer contre un gouvernement et justifier le recouvrement aux fins de restitution mais, dans une affaire où il est question de l'effet d'une loi inconstitutionnelle ou *ultra vires*, certaines considérations spéciales font sortir l'affaire du cadre normal de la restitution et exigent une règle qui réponde aux questions de politiques sous-jacentes spécifiques à ce problème. La règle interdit la restitution d'impôts invalides, du moins dans le cas de lois inconstitutionnelles. Les principes qui sous-tendent cette règle sont nombreux. Un des plus importants est la protection du trésor public et la reconnaissance du fait que, si l'impôt était remboursé, un gouvernement moderne se verrait obligé d'adopter le moyen inefficace qui consiste à l'imposer de nouveau, soit aux mêmes contribuables, soit à ceux d'une nouvelle génération afin de financer les opérations gouvernementales. Cela pourrait mener au chaos fiscal surtout dans le cas d'une mesure fiscale appliquée depuis longtemps. En l'espèce, la taxe est d'application générale et elle est imposée depuis plusieurs décennies.

Exceptions may exist where the relationship between the state and a particular taxpayer results in the collection of tax which would be unjust or oppressive in the

Il peut y avoir des exceptions dans le cas où les rapports entre l'État et un contribuable donné rendent injuste ou opprimante, dans les circonstances, la percep-

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circumstances. The present case does not, however, call for a departure from the general rule. The tax, though unconstitutional, raised an issue bordering on the technical. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed. Nor was there compulsion. Payment under an *ultra vires* statute does not constitute "compulsion". Before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment. Finally, the fact that the province may have been in a better position to determine that the statute was unconstitutional does not affect the rule. The policy reasons underlying it remain.

The rule against the recovery of unconstitutional and *ultra vires* levies is an exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it. The rule should not apply where a tax is extracted from a taxpayer through a misapplication of the law. Where an otherwise constitutional or *intra vires* statute or regulation is applied in error to a person to whom, on its true construction, it does not apply, the general principles of restitution for money paid under a mistake should be applied, and, subject to available defenses and equitable considerations, the general rule should favour recovery. No distinction should be made between mistakes of fact and mistakes of law.

Per Beetz J.: While agreeing with the reasons and conclusions of La Forest J., it is not necessary to deal with the "Mistake of Law" defence or to express any opinion thereon with respect to private law or public law and with respect to the recovery of taxes levied pursuant to an unconstitutional statute because the new *Gasoline Tax Act* was valid in its entirety. If the rule should be against the recovery of *ultra vires* taxes, at least in the case of unconstitutional taxes, this rule should not extend to cases of error in the application of the law.

Per McIntyre J.: The reasons for judgment of La Forest J. were agreed with, subject to the qualifications expressed by Beetz J.

Per Wilson J. (dissenting in part): British Columbia's *Gasoline Tax Act*, as it existed in 1974, was *ultra vires* the province and could not be relied upon by the Crown to justify the collection or retention of the taxes levied against the appellants between 1974 and 1976. The

tion de l'impôt. Toutefois, il n'y a pas lieu de s'écarter de la règle générale en l'espèce. Malgré son inconstitutionnalité, la taxe soulève une question que l'on pourrait presque qualifier de «technique». Si la loi avait été adoptée sans vice de forme, la perception de la taxe qu'elle imposait n'aurait pas présenté de problème. Il n'y a pas eu de contrainte. Un paiement fait en vertu d'une loi *ultra vires* ne constitue pas une «contrainte». Pour qu'un paiement soit considéré comme involontaire, la personne qui le reçoit doit avoir exercé ou menacé d'exercer un pouvoir qu'elle détient sur la personne ou les biens du contribuable, de sorte que ce dernier n'a d'autre recours immédiat que de payer. Finalement, le fait que la province était peut-être mieux placée pour se rendre compte de l'inconstitutionnalité de la loi, n'a aucun effet sur cette règle. Les raisons de principe demeurent.

La règle interdisant le recouvrement d'impôts inconstitutionnels et *ultra vires* est une règle exceptionnelle et ne devrait pas s'interpréter d'une façon plus large que ce qui est nécessaire pour assurer le respect des valeurs sur lesquelles elle repose. Cette règle ne devrait pas jouer lorsqu'un impôt a été pris à un contribuable par l'application erronée de la loi. Dans un cas où l'on applique à tort une loi ou un règlement par ailleurs constitutionnels ou valides à une personne à laquelle cette loi ou ce règlement, selon leur sens véritable, ne s'appliquent pas, les principes généraux régissant la restitution de fonds versés par suite d'une erreur devraient être appliqués et, sous réserve des moyens de défense et des considérations d'équité, la règle générale devrait permettre le recouvrement. On ne devrait faire aucune distinction entre les erreurs de fait et les erreurs de droit.

Le juge Beetz: Quoique souscrivant aux motifs et aux conclusions du juge La Forest, le juge Beetz estime qu'il n'est pas nécessaire d'exprimer une opinion sur le moyen de défense de «l'erreur de droit», que ce soit en droit privé ou en droit public, ni de se prononcer sur le remboursement de taxes perçues sous le régime d'une loi inconstitutionnelle, puisque l'ensemble de la nouvelle *Gasoline Tax Act* est constitutionnelle. Si la règle devait interdire la restitution d'impôts invalides, du moins dans le cas de lois inconstitutionnelles, cette règle ne devrait pas être étendue à un cas d'application erronée du droit.

Le juge McIntyre: Le juge McIntyre souscrit aux motifs de jugement du juge La Forest, avec les réserves qu'y apporte le juge Beetz.

Le juge Wilson (dissidente en partie): La *Gasoline Tax Act* de la Colombie-Britannique, telle qu'elle était rédigée en 1974, était *ultra vires* de la province et la Couronne ne peut l'invoquer pour justifier la perception de la taxe et la conservation des sommes versées à ce

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unconstitutional aspects were remedied by amendment made in 1976. However, in 1981, the province through the imposition of a retroactive tax and the confiscation of the taxes paid between 1974 and 1976 attempted unsuccessfully to give effect to the earlier unconstitutional legislation in violation of principles already stated by this Court.

Appellants' claim for repayment is not defeated by the doctrine of mistake of law which should not be extended to moneys paid under unconstitutional legislation. Otherwise, taxpayers would be obliged to check out the constitutional validity of taxing legislation before paying on pain of being unable to recover anything paid under unconstitutional laws. The appellants were entitled to rely on the presumption of validity of the legislation and on the representation as to its validity by the legislature enacting and administering it.

Payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute which it is entitled to do, considers itself obligated to pay. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

Payments made under a statute subsequently found to be unconstitutional should be recoverable and the principle should not be reversed for policy reasons in the case of payments made to governmental bodies. If any judicial policy were to be developed, that policy should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer who paid what the legislature improperly said was due.

The appellants were not required to show that the unjust enrichment of the province was at their expense. The argument that their receipt of the money back amounted to a "windfall" because in all likelihood they had recouped it from their customers is no basis on which to deny recovery. Where payments are made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained.

Section 7 of the *Canadian Charter of Rights and Freedoms* had no application to this case for the reasons given by La Forest J.

titre par les appelantes entre 1974 et 1976. Les aspects inconstitutionnels de la loi ont été rectifiés par la modification apportée en 1976. Toutefois en 1981, la province, en imposant une taxe rétroactive et en confisquant les taxes payées entre 1974 et 1976, a tenté sans succès de donner effet à une loi antérieure inconstitutionnelle, en violation des principes déjà énoncés par cette Cour.

La demande de remboursement des appelantes ne peut être rejetée en vertu de la doctrine de l'erreur de droit qui ne devrait pas s'étendre aux sommes versées en vertu d'une loi inconstitutionnelle car les contribuables seraient alors obligés de vérifier la constitutionnalité d'une loi fiscale avant d'acquitter leurs impôts, sous peine de ne pouvoir se faire rembourser des sommes versées en vertu de lois inconstitutionnelles. Les appelantes étaient en droit de présumer la validité de la loi et pouvaient se fonder sur le fait que le législateur, en l'adoptant et en l'appliquant, l'a présentée comme un texte valide.

Des paiements effectués en vertu d'une loi inconstitutionnelle ne sont pas «volontaires» dans un sens qui devrait préjudicier au contribuable. Celui-ci, supposant la loi valide, comme il est en droit de le faire, se considère comme tenu de payer. Tout contribuable qui acquitte des impôts exigés par une loi, quand il n'a aucune raison de douter de sa validité, devrait être considéré comme ayant payé en raison d'une obligation légale de le faire.

Des paiements effectués en vertu d'une loi qui est par la suite jugée inconstitutionnelle devraient pouvoir être recouvrés et le principe ne devrait pas être écarté pour des raisons d'intérêt public dans le cas de paiements faits à des organismes gouvernementaux. S'il convient que les tribunaux adoptent une politique quelconque ce devrait être de répartir la perte équitablement parmi les membres du public. La perte ne devrait pas être subie par un contribuable tout à fait innocent qui a acquitté ce que le législateur exigeait à tort.

Les appelantes n'étaient pas tenues de démontrer que l'enrichissement illégitime de la province avait eu lieu à leurs dépens. On ne peut retenir, pour refuser le remboursement, l'argument selon lequel elles feraient un «profit fortuit» si on leur remboursait des sommes qu'elles ont vraisemblablement déjà récupérées auprès de leurs clients. Lorsque les paiements ont été effectués en vertu d'une loi inconstitutionnelle, rien ne justifie que ces sommes soient retenues.

L'article 7 de la *Charte canadienne des droits et libertés* n'est pas applicable en l'espèce, pour les raisons données par le juge La Forest.

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3. If so, is its application justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. It is unnecessary to answer this question.

The following are the reasons delivered by

WILSON J. (dissenting in part)—I have had the benefit of the reasons of my colleague Justice La Forest on this appeal and I fully agree with his conclusion that the *Gasoline Tax Act, 1948* of British Columbia as it existed in 1974 was *ultra vires* the province and cannot be relied upon by the Crown to justify the collection or retention of the taxes levied against the appellants between 1974 and 1976. I agree with him also that this situation was corrected by the amendments made to the legislation in 1976 and that gasoline tax was properly exigible after 1976.

I take a different view, however, from my colleague of what was done by the province in 1981. I do not doubt for a moment that the province was free in 1981 to impose a retroactive tax covering the period 1974 to 1976. I do not believe, however, that it can do so as a mechanism for the confiscation of payments made under the earlier unconstitutional legislation.

It is, in my view, impossible to divorce s. 25(1) to (4) from s. 25(5). The only possible basis for the confiscation under s. 25(5) is the imposition of the retroactive tax under s. 25(1) to (4). Certainly the payments made under the *ultra vires* legislation could not support such a confiscation since the moneys were not as a constitutional matter properly exigible under that legislation. Moreover, the fact that the amount payable under s. 25(1) to (4) coincides exactly with the amount paid under the *ultra vires* legislation is not, as my colleague suggests, a matter of "good fortune" for the legislature, but makes it perfectly clear that s. 25(1) to (5) were intended to defeat any claim for the return of the money paid under the *ultra vires* legislation. If, of course, such moneys are not recoverable by law in any event, the confiscation provision is unnecessary; the province is then en-

3. Dans l'affirmative, son application est-elle justifiée sur le fondement de l'article premier de la *Charte canadienne des droits et libertés*?

R. Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

LE JUGE WILSON (dissidente en partie)—J'ai eu l'avantage de lire les motifs de mon collègue le juge La Forest en l'espèce et je souscris entièrement à sa conclusion que la *Gasoline Tax Act, 1948* de la Colombie-Britannique telle qu'elle était rédigée en 1974 était *ultra vires* de la province et que la Couronne ne peut l'invoquer pour justifier la perception de la taxe et la conservation des sommes versées à ce titre par les appelantes entre 1974 et 1976. Je suis également d'accord avec lui pour dire que la situation a été rectifiée par les modifications apportées à la loi en 1976 et que la taxe sur l'essence a été perçue à bon droit après 1976.

Mon opinion sur ce qu'a fait la province en 1981 diverge toutefois de celle de mon collègue. Je ne doute pas un instant que la province ait été libre en 1981 d'imposer rétroactivement une taxe visant les années 1974 à 1976. Je ne crois cependant pas qu'elle puisse le faire en créant un mécanisme de confiscation des paiements effectués en vertu d'un texte antérieur qui était inconstitutionnel.

À mon avis, il est impossible de séparer les par. 25(1) à (4) du par. 25(5). Le seul fondement possible de la confiscation qu'opère le par. 25(5) est l'imposition de la taxe rétroactive prévue aux par. 25(1) à (4). Il est certain que les paiements faits en conformité avec une loi *ultra vires* ne pourraient justifier une telle confiscation puisque, du point de vue constitutionnel, les sommes en question n'étaient pas légitimement exigibles en vertu de cette loi. De plus, contrairement à ce qu'affirme mon collègue, ce n'est pas par un «heureux hasard» que le montant dû aux termes des par. 25(1) à (4) correspond exactement au montant versé en vertu de la loi *ultra vires*; ce fait indique très nettement que les par. 25(1) à (5) avaient pour but de faire échec à toute demande de remboursement des sommes payées conformément à la loi *ultra vires*. Évidemment, si ces sommes

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titled to retain the money and there is nothing in the amended legislation to say that such payments must be applied against the new retroactive tax. The legislation does not require it nor was any claim of set-off made by the Crown. The Crown thus seeks legislatively to have its cake and eat it too. By confiscating the earlier payments it hopes to defeat the claim for their return. By not pleading a set-off it does not have to acknowledge any right on the part of the appellants to the return of such moneys. Instead, by imposing a retroactive tax it purports to create a new base of liability against which the confiscated payments may but do not have to be applied. The imposition of the retroactive tax in the exact amount of the payments made under the *ultra vires* legislation combined with the act of confiscation lead, in my opinion, to the inescapable conclusion that the intent of the province was to defeat any claim for the return of the moneys paid pursuant to the *ultra vires* legislation so as to achieve indirectly what it could not achieve directly, namely the imposition of an *ultra vires* tax. This, in my view, is a clear violation of the principle in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576 (hereinafter *Amax*). It is an attempt, through the combined effect of a retroactive tax and confiscation of the moneys already paid, to give effect to unconstitutional legislation.

In case I am wrong in this, I propose to consider, as does my colleague, whether the doctrine of mistake of law provides an alternate basis on which the appellants should succeed in their claim for repayment.

My colleague expresses the view that moneys paid under a mistake of law should, despite the traditional rule to the contrary, be in general recoverable unless there is some specific reason why they should not be. My colleague reaches this conclusion by discarding the traditional common

sont de toute façon irrécouvrables en droit, la disposition portant confiscation est superflue, car, à ce moment-là, la province a le droit de conserver ces fonds et il n'y a rien dans la version modifiée de la loi qui dise que les versements en question doivent être portés en diminution de la nouvelle taxe rétroactive. La loi ne l'exige pas; d'ailleurs, la Couronne n'a pas demandé qu'il y ait compensation. La Couronne cherche donc par la voie législative à gagner sur les deux tableaux. En confisquant les premiers versements, elle espère faire échouer toute réclamation visant à en obtenir le remboursement. En n'invoquant pas la compensation, elle évite d'avoir à reconnaître aux appelantes un droit à la restitution des sommes payées par elles. Au lieu de cela, par la création d'une taxe rétroactive, elle prétend établir une nouvelle base d'assujettissement à la taxe à laquelle les versements confisqués peuvent, mais ne doivent pas nécessairement, être imputés. La création d'une taxe rétroactive exactement égale aux paiements effectués en vertu de la loi *ultra vires* ainsi que la confiscation mènent inéluctablement, selon moi, à la conclusion que la province visait à faire échouer toute demande de remboursement des sommes payées en vertu de la loi *ultra vires*, de manière à faire indirectement ce qu'elle ne pouvait faire directement, savoir imposer une taxe qu'elle n'avait pas compétence pour imposer. À mon avis, cela va nettement à l'encontre du principe posé dans l'arrêt *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576 (ci-après *Amax*). Il s'agit d'une tentative, par l'effet combiné d'une taxe rétroactive et de la confiscation des sommes déjà versées, de rendre opérante une loi inconstitutionnelle.

Pour le cas où j'aurais tort en cela, je me propose d'examiner, comme mon collègue, si la doctrine de l'erreur de droit pourrait par ailleurs permettre de faire droit à la demande de remboursement présentée par les appelantes.

Mon collègue se dit d'avis que, malgré la règle traditionnelle contraire, des sommes versées par suite d'une erreur de droit devraient généralement pouvoir être recouvrées, à moins qu'il n'y ait une raison particulière de refuser le recouvrement. Pour arriver à cette conclusion, mon collègue

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law distinction between mistake of fact and mistake of law in favour of the equitable doctrine of unjust enrichment. Whatever the nature of the mistake, the key question, my colleague suggests, should be whether the respondent has been unjustly enriched at the appellants' expense or whether there is some specific reason which makes restitution inappropriate in the circumstances. My colleague concludes that there was unjust enrichment in this case but he finds two reasons why restitution is inappropriate. The first is that the appellants in all likelihood passed on the burden of the *ultra vires* tax to their customers; the unjust enrichment of the respondent was therefore not shown to be at the expense of the appellants. The second is that the general rule of recovery should, as a matter of policy, be reversed where the person unjustly enriched is a governmental body.

Before dealing with the suggested exceptions to the general rule I would like to address the underlying rationale for the traditional rule that moneys paid under a mistake of law are irrecoverable. I think it is clearly and succinctly expressed by Lord Ellenborough in *Bilbie v. Lumley* (1802), 2 East 469, 102 E.R. 448, at p. 472 and pp. 449-50 as follows:

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.

In other words, the underlying premise on which the rule is based is that ignorance of the law is no excuse. The citizen is deemed to know the contents of legislation. The appellants in this case knew the law, i.e., that the moneys were payable under the statute then in force and they paid. What they did not know was that the law was unconstitutional. It seems to me, however, that the appellants were entitled in making their payments to rely on the presumption of validity of the legislation and that, if the presumption was not by itself enough, they were entitled to rely on the representation as to its validity by the legislature enacting and administer-

écarte la distinction traditionnelle en *common law* entre l'erreur de fait et l'erreur de droit, et retient plutôt la doctrine d'*equity* de l'enrichissement illégitime ou enrichissement sans cause. Quelle que soit la nature de l'erreur, la question centrale, soutient mon collègue, devrait être de savoir si l'intimée s'est enrichie injustement aux dépens des appelantes ou s'il existe une raison particulière pour laquelle la restitution n'est pas appropriée dans les circonstances. Mon collègue conclut qu'il y a eu enrichissement illégitime en l'espèce, mais qu'il ne convient pas d'accorder la restitution pour deux raisons. La première est que, selon toute vraisemblance, les appelantes ont fait supporter la charge de la taxe *ultra vires* à leurs clients et, cela étant, il n'a pas été démontré que l'intimée s'est enrichie illégitimement aux dépens des appelantes. La seconde est que la règle générale permettant le recouvrement devrait être écartée, pour des raisons d'intérêt public, lorsque c'est un organisme gouvernemental qui s'est enrichi illégitimement.

Avant de traiter des exceptions proposées à la règle générale, je dirai quelques mots concernant la justification fondamentale de la règle traditionnelle voulant que les sommes versées par suite d'une erreur de droit soient irrécouvrables. Je crois que cette justification est clairement et succinctement exprimée par lord Ellenborough dans la décision *Bilbie v. Lumley* (1802), 2 East 469, 102 E.R. 448, à la p. 472 et aux pp. 449 et 450 où il dit:

> [TRADUCTION] Nul n'est censé ignorer la loi; sinon qui peut dire jusqu'où ira l'excuse d'ignorance. On la soulèverait dans presque tous les cas.

En d'autres termes, la règle repose sur le principe que la méconnaissance du droit applicable n'est pas une excuse. Chaque citoyen est censé connaître la teneur des lois. En l'espèce, les appelantes savaient ce que prévoyait la loi, c'est-à-dire le paiement des sommes en cause aux termes de la loi alors en vigueur et elles les ont payées. Mais elles ne savaient pas que la loi était inconstitutionnelle. Je crois toutefois que, lorsqu'elles ont fait les paiements, les appelantes étaient en droit de présumer la validité de la loi et, si cette présomption ne suffisait pas en elle-même, qu'elles pouvaient se fonder sur le fait que le législateur, en l'adoptant

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ing it. It would be my view that the mistake of law doctrine (if it is to be retained) should certainly not be extended to moneys paid under unconstitutional legislation. Otherwise taxpayers will be obliged to check out the constitutional validity of taxing legislation before they pay their taxes in pain of being unable to recover anything paid under unconstitutional laws. In my opinion, this is to place the onus of inquiry as to constitutionality in the wrong place.

et en l'appliquant, l'a présentée comme un texte valide. À mon sens, la doctrine de l'erreur de droit (si elle devait être retenue) ne devrait pas s'étendre aux sommes versées en vertu d'une loi inconstitutionnelle car, si elle l'était, les contribuables seraient obligés de vérifier la constitutionnalité d'une loi fiscale avant d'acquitter leurs impôts, sous peine d'être dans l'impossibilité d'obtenir le remboursement de sommes versées en vertu de lois inconstitutionnelles. J'estime que dans ce cas-là on imposerait aux mauvaises personnes la charge de vérifier la constitutionnalité.

If a valid distinction is to be made between payments made in error under perfectly valid legislation (as to which the mistake of law doctrine would seem clearly to apply) and payments made under unconstitutional legislation quite properly presumed by the taxpayer to be constitutional (as to which the doctrine of mistake of law has no application), it is unnecessary for me to consider whether the traditional rule as to the irrecoverability of moneys paid under a mistake of law should be abolished. However, I am in complete agreement with what my colleague has to say on this subject and, were it necessary for me to do so in order to dispose of this case, I would support the minority view expressed by Dickson J. in *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347.

Si on peut valablement faire une distinction entre les paiements effectués par erreur en vertu d'une loi parfaitement valide (paiements auxquels la doctrine de l'erreur de droit semble manifestement applicable) et les paiements faits en vertu d'une loi inconstitutionnelle que le contribuable, à juste titre, a présumée constitutionnelle (paiements auxquels la doctrine de l'erreur de droit ne s'applique pas), je n'ai pas à me demander s'il y a lieu d'abolir la règle traditionnelle rendant irrécouvrables les sommes versées par suite d'une erreur de droit. Toutefois, je partage entièrement l'avis de mon collègue sur ce point et, si cela était nécessaire pour trancher le pourvoi, je donnerais mon adhésion à l'opinion exprimée par le juge Dickson au nom de la minorité dans l'affaire *Hydro Electric Commission of Nepean c. Ontario Hydro*, [1982] 1 R.C.S. 347.

It is, however, my view that payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid

J'estime cependant que des paiements effectués en vertu d'une loi inconstitutionnelle ne sont pas «volontaires» dans un sens qui devrait préjudicier au contribuable. Celui-ci, supposant la loi valide, comme il est selon moi en droit de le faire, se considère comme tenu de payer. On s'attend des citoyens qu'ils soient respectueux des lois. On s'attend qu'ils acquittent leurs impôts. Payez d'abord, contestez après, telle est la règle générale. Les paiements sont faits par suite de ce que le contribuable conçoit comme une obligation de payer, obligation qui découle à la fois de la présomption de constitutionnalité d'une loi dûment adoptée et du fait que le législateur la présente comme valide. Dans de telles circonstances, je crois qu'il est tout à fait irréaliste de s'attendre que le contribuable fasse ses paiements «sous réserve». Tout contribua-

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TAB 12

1

RP-2003-0203

2

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

3

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing October 1, 2004

4

BEFORE:

5

Bob Betts
Presiding Member

6

Paul Sommerville
Member

7

Pamela Nowina
Member

8

PARTIAL DECISION WITH REASONS

9

August 31, 2004

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12

1 INTRODUCTION

13

1.1 THE APPLICATION

14

Enbridge Gas Distribution Inc.("EGDI", "Enbridge", the "Company" or the "Applicant") filed an application dated December 17, 2003 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998*, for an order or orders approving or fixing just and reasonable rates for the sale, distribution, transmission, and storage of gas for EGDI's 2005 fiscal year commencing October 1, 2004. The Board assigned file number RP-2003-0203 to the application.

15

The Settlement Conference commenced May 17, 2004 and a Settlement Proposal was filed with the Board on June 17, 2004.

16

The Board held an oral hearing commencing June 16, 2004 on the unsettled issues. On the last day of the hearing, August 3, 2004, the Board heard the Company's reply argument.

17

1.2 REQUEST FOR EARLY DECISION

18

During the Company's oral reply argument, the Company requested that the Board issue an early decision by the end of August 2004 on the partially settled rate design issues, specifically Issues 15.1 and 15.2. The Company said that it had committed, in the settlement proposal, to implement the various cost allocation changes for the start of its fiscal period on October 1, 2004. In addition, the prescribed QRAM timelines necessitated filing of the QRAM application and supporting evidence in the first week of September.

19

The Company explained that it would be preferable to begin the fiscal period with the implementation of any rate design changes in order to keep their revenue-neutral effect intact. The Company said that a later implementation date would be cumbersome from an administrative perspective and it would likely cause customer confusion.

20

Pollution Probe also asked the Board to consider an early decision on Issue 10.1, which relates to the proposal for a large boiler market transformation program with the necessary budget, so that the program could potentially be in place for January 1, 2005. Pollution Probe explained that this was a special circumstance, in that a number of customers can benefit from an early decision.

21

The Board indicated that it would endeavour to meet the early decision requests in the month of August 2004.

1.3 PARTIAL DECISION

22

23 This Partial Decision with Reasons will deal with the following issues :

24
- Issue 15.1 Rate Seasonality

25
- Issue 15.2 Rate 1 Customer Charge

26
- Issue 10.1 and 10.2 Demand Side Management - Industrial Boilers

27
- Issue 5.5 Long-Term System Gas

28
- Issue 11.2 Class Action Suit Deferral Account (CASDA)

29 The Board believes that it is expedient to deal with all of these issues now. The Board will address the remaining issues in its main decision which will be issued in due course.

30

1.4 SUBMISSIONS AND EXHIBITS

31 Copies of the evidence, exhibits, arguments, and transcripts of the proceeding are available for review at the Board's offices.

32 The Board has considered all of the evidence, submissions and arguments in the proceeding, but has summarized the evidence and the positions of the parties only to the extent necessary to provide context for its findings.

33

2 RATE DESIGN

34

The Board has been asked to consider two issues concerning the Company's rate design. The first is the Company's proposal to remove the rate seasonality feature from its rates and the second is the Company's proposal to increase the customer charge for its residential customers (Rate 1) from $10 to $11.25 per month. This increase is revenue neutral within the rate class because it represents a shifting of costs from the variable delivery charge to the fixed monthly charge.

35

2.1 BACKGROUND

36

The Company's proposal is to remove rate seasonality from its delivery charge for all rate classes except Rate 135, a rate which largely serves asphalt plants. Currently, the Company's delivery charges contain a small component that is seasonal in nature. At their inception a number of years ago, seasonal differentials were intended to reflect the incremental cost of delivering gas in the winter months, most notably the cost of storage. This means that there are two different sets of rates for most rate classes. The higher set is for the winter season and the lower set applies to the summer season. Certain of the Company's rate classes do not have seasonal rates because of the nature of the services that underpin those rates. These are Rate 9, the container service, Rate 300, firm transportation service, and Rate 305, interruptible transportation service. Rate 135, seasonal firm service, is unique in that it is designed as a seasonal service for summer load customers. Whatever the outcome of the Company's proposal, the seasonal aspect of Rate 135 will not change. The Company's proposal results from its commitment in the 2004 rates case to review the seasonal differential for all its rate classes.

37

The monthly customer charge is designed to recover a portion of the fixed costs related to serving the customer class. These are the customer-related costs such as meters and pipe, meter-reading costs and customer-related operations and maintenance costs, such as those for the call centre, billing, and credit and collections. For Rate 1 customers, the existing $10 per month customer charge recovers approximately 50% of these customer-related costs. The Company stated that from a pure rate design perspective, it would be desirable to have a higher proportion of the fixed costs recovered through a fixed charge in order to better match cost causality with cost recovery. The proposed $11.25 monthly customer charge would recover approximately 60% of the fixed costs of that rate class. The existing $10 customer charge has been in place since 2000 when it was increased from $9.

38

2.2 BOARD FINDINGS

39

Rate Seasonality

40

The Company has made a number of arguments in support of its proposal.

41

- The rates would have a simpler rate structure and therefore result in less customer confusion;

136 A number of parties argued against the Company's position, mainly on two grounds: first, that the proposal is premature; and second, that the establishment of a deferral account implies an eventual recovery of the amounts from ratepayers.

137 Two intervenors, the School Energy Coalition (SEC) and Union Gas (Union), supported the Company's proposal for inclusion of the judgement costs in the account. SEC argued in favour of the account on the ground that the issue is a broad and generic one that affects many companies in many industries. Union said the creation of the account would permit time for the Board to undertake a thorough analysis of the amounts and whether they should be recovered in rates.

138 The Board notes the position taken by all parties to the Settlement Proposal, stated as follows:

> 139 Parties acknowledge that the Garland decision of the Supreme Court has implications beyond the Company and will likely require repayment of late payment penalties which are in contravention of the Criminal Code by numerous other gas and electric utilities in Ontario. Whether such payments are properly recoverable in rates is a matter which parties agree is appropriate to be considered by the Board in a funded generic proceeding in which all stakeholders can participate.

140

4.3 BOARD FINDINGS

141 Over the years the Board has approved the creation and disposition of the CASDA related to the late payment policy litigation. Typically the deferral accounts encompassed the Company's costs in defending the action and not any amounts related to judgement costs. An exception arose in the atypical 2004 rates proceeding, and was the result of the broad settlement agreement between the Company and the Intervenors in that case.

142 The parties were unable to identify any definitive precedent governing or informing the Board's approval of deferral accounts or their constituent elements. It is clear to the Board that one principle that must apply in such determinations is that the Board must have a measure of confidence that the category of costs sought to be included in the deferral account is capable of a fairly definable scope and quantum. While it is in the nature of a deferral account that amounts captured in it may not be definitively assessed or forecast at the time the account is approved, there should be more than a general idea as to the amounts contemplated, and the means by which they will arise.

143 The Board is prepared to approve a CASDA for 2005 which includes the Company's legal costs, the costs of actuarial advice and the costs of analyzing historic billing records. However, the Board will not include the costs of any judgement against the Company, nor will it include the plaintiff’s costs. The Board does not regard the 2004 CASDA as having any precedential value for the 2005 rates case, and costs recorded in this account have not yet been approved for recovery from ratepayers.

144 The Board will not include the judgement costs, including any award of costs against the Company, in the 2005 CASDA for several reasons. First, such inclusion would be premature. One principle

that comes into play is the extent to which the amounts included in the account are likely to arise in the relevant period, which in this case is fiscal year 2005. The Board is not convinced of the Applicant's assertion of the likelihood that such costs will arise in 2005. The timing of the judgement and related orders and their implementation are unknown. The Board also considers that the degree of uncertainty respecting the quantum of damages, if any, and the method of arriving at them makes it inappropriate to include the judgement costs in the 2005 CASDA.

145

Further, the Board is concerned that by including judgement costs in a deferral account there is a heightened expectation of recovery. The Board wants to be clear though, that excluding these costs from the deferral account at this time does not suggest that the Board will not allow the judgement costs, if any, to be recovered from ratepayers when they arise. The question of ratepayer recovery remains open. The Board expects that there will be developments with respect to the ongoing court proceedings that will lead to a clearer understanding of any amounts and the reasons for them. This greater understanding should assist the Board and the parties in arriving at a determination in respect of a potential ratepayer, or shareholder, responsibility for judgement costs.

146

Several intervenors argued for a tracking account as opposed to a Board-sanctioned deferral account. The Board sees no reason to order the use of a tracking account. The Board assumes that the Company will have a mechanism for the tracking of any judgement costs for the Board's future consideration

147

In the Board's view, the Company's concern about earnings impacts is largely related to the timing of any Board decision on ratepayer recovery. The Board is not persuaded to establish a deferral account to ease the Company's concerns about the timing of earnings impacts.

148

When an appropriate level of detail becomes available regarding the nature and quantum of judgements, the Board will consider a further application by the Company; however, the Board will also consider the parties’ request for a Board funded generic proceeding to deal with the matter, as other utilities under the Board’s jurisdiction face similar issues.

149

The Board directs the Company to file a draft accounting order to reflect the Board's findings on this issue.

TAB 13

COURT OF APPEAL FOR ONTARIO

CITATION: Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912
DATE: 20161202
DOCKET: C60982

2016 ONCA 912 (CanLII)

Strathy C.J.O., Weiler and Watt JJ.A.

BETWEEN

Robert B. Shewchuk

Plaintiff (Appellant)

and

Blackmont Capital Inc.

Defendant (Respondent)

Joseph Groia and Kevin Richard, for the appellant

Nigel Campbell and Doug McLeod, for the respondent

Heard: September 9, 2016

On appeal from the judgment of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated August 14, 2015, with reasons reported at 2015 ONSC 5079.

Strathy C.J.O.:

A. INTRODUCTION

[1] The trial judge found that the parties' contract was ambiguous. He considered the factual circumstances surrounding the contract to interpret it and to resolve the ambiguity. The main question on this appeal is whether he erred in

also considering the parties' subsequent conduct – that is, their conduct after the formation of the contract.

[2] For the reasons that follow, I would dismiss the appeal. Because the contract was ambiguous, the trial judge properly considered the parties' subsequent conduct to assess their evidence about the intended scope of their contract. The appellant has not identified either a palpable and overriding error in the trial judge's factual findings about the parties' subsequent conduct or an extricable error of law in his interpretation of the contract.

B. THE FACTS

The parties

[3] The appellant, a successful stockbroker, was employed by the respondent[1] as an investment advisor ("IA") in its Calgary office. He was a member of the respondent's Retail Group brokers, whose clients were primarily individual investors. The respondent also had a Capital Markets group, based in Toronto, which procured financing for banks, public companies, and other institutional clients.

[1] During the material time, the respondent's name was Blackmont Capital Inc., but it is now owned by Richardson GMP. Richardson GMP defended the action at trial and responded to the appeal in this court.

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(1) The admissibility of evidence of subsequent conduct

[39] In *Sattva*, the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, at paras. 55-56; and *Seven Oaks Inn Partnership (c.o.b. Best Western Seven Oaks) v. Directcash Management Inc*., 2014 SKCA 106, 446 Sask. R. 89, at para. 13.

[40] The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.

[41] In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts <u>at the time of the execution of the contract</u>, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties <u>at or before the date of contracting</u>" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting

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parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55, at para. 11; and *King v. Operating Engineers Training Institute of Manitoba*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 72.

[42] There is an additional reason to distinguish subsequent conduct from the factual matrix – a reason rooted in the reliability of the evidence. In *Sattva*, the Supreme Court stated at para. 60 that consideration of the factual matrix enhances the finality and certainty of contractual interpretation. It sheds light on the meaning of a contract's written language by illuminating the facts known to the parties at the date of contracting. By contrast, as I will explain, evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language.

[43] There are some dangers associated with reliance on evidence of subsequent conduct. One danger, recognized in England where such evidence is inadmissible, is that the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time. Thus, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester Ltd.)*, [1970] A.C. 583 (H.L.), Lord Reid observed, at p. 603:

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> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reasons of subsequent events meant something different a month or a year later.

Indeed, in *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 (H.L.), at p. 261, Lord Wilberforce described reliance on subsequent conduct as “nothing but the refuge of the desperate.”

[44] Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd*. (1981), 34 O.R. (2d) 250 (C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, “the fact that a party does not enforce his strict legal rights does not mean that he never had them.” As a consequence of the potential ambiguity inherent in subsequent conduct, “some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it is unequivocal”: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 105.

[45] A third danger is that over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract.

[46] These dangers, together with the circumscription of a contract’s factual matrix to facts known at the time of its execution, militate against admitting

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evidence of subsequent conduct at the outset of the interpretive exercise. Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.

[47] This approach is consistent with the weight of authority: see *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306, at p. 307; *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 70 O.R. (2d) 737 (C.A.), at p. 745, leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 48; *Arthur Andersen Inc. v. Toronto-Dominion* (1994), 17 O.R. (3d) 363 (C.A.), at p. 372; *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.), at p. 108; and Hall, at p. 103. The leading Canadian case is *Re Canadian National Railways and Canadian Pacific Limited* (1978), 95 D.L.R. (3d) 242 (B.C. C.A.), aff'd, [1979] 2 S.C.R. 668, in which Lambert J.A. stated, at p. 262:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. …
>
> The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the

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TAB 14

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Ontario Energy Board

Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications

Chapter 2

Cost of Service

December 15, 2022

not be expected to be recorded in the account, unless otherwise directed by the OEB. However, further accounting guidance was issued for certain distributors who rebased and closed the variance account. The OEB confirmed that these distributors will be allowed to re-open the account.[55]

2.9.1.8 Disposition of Distributor-Specific Accounts

For any material, distributor-specific accounts requested for disposition (e.g., Account 1508 sub-accounts), the distributor must provide supporting evidence showing how the annual balance is derived and provide the relevant accounting order. For distributor-specific accounts requested for disposition that are not material, the distributor must provide a brief explanation for the account balance and the relevant accounting order.

2.9.2 Establishment of New Deferral and Variance Accounts

In the event a distributor seeks an accounting order to establish a new DVA, the distributor must file evidence demonstrating how the following eligibility criteria have been met:

- Causation: the forecast amount to be recorded in the proposed account must be clearly outside of the base upon which rates were derived.
- Materiality: the annual forecast amounts[56] to be recorded in the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, otherwise they must be expensed or capitalized in the normal course and addressed through organizational productivity improvements.
- Prudence: the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred, although the final determination of prudence will be made at the time of disposition. For any costs incurred, in terms of the quantum, this means that the distributor must provide evidence demonstrating that the option selected represented a cost-effective option (not necessarily least initial cost) for ratepayers.

[55] As noted in the OEB's December 16, 2021 Order and associated Accounting Guidance for Wireline Pole Attachment Charges, many distributors have rebased their rates since the issuance of the Pole Attachment Report, and reflected an updated pole attachment charge in their underlying rate structure. The OEB confirmed that these distributors who closed the variance account will be allowed to re-open the account effective January 1, 2021 to record any revenue shortfall resulting from the pole attachment charge for 2021 and 2022 as set by the Order and from the pole attachment charge set under the Regulation for subsequent years, until their next rebasing.
[56] Capital related amounts would reflect the revenue requirement impact.

Additionally, distributors must include a draft accounting order which must include a description of the mechanics of the account, and provide examples of general journal entries, and the proposed account duration.

2.9.3 Lost Revenue Adjustment Mechanism Variance Account

The LRAMVA is a retrospective adjustment designed to account for differences between forecast revenue loss attributable to CDM activity embedded in rates and actual revenue loss due to the impacts of CDM programs. The OEB established Account 1568 as the LRAMVA to capture the difference between the OEB-approved CDM forecast and actual results at the customer rate class level.[57] Treatment of the LRAMVA is documented in several versions of the CDM Guidelines (2012, 2015, 2021).

In July 2016, the OEB developed a generic LRAMVA work form to provide distributors with a consistent approach to calculate LRAMVA. The LRAMVA work form consolidates information that distributors have received from the IESO.

In December 2016, the OEB indicated in various decisions[58] that changes to an approved LRAMVA amount were not permitted. This policy affects the treatment of verified savings adjustments that may be claimed by distributors. If an LRAMVA amount was approved and disposed, the persistence of the savings adjustment(s) may only be claimed on a "go-forward" basis.[59] Distributors cannot seek recovery of LRAMVA amounts related to savings adjustments for a year in which the corresponding LRAMVA amount has been approved by the OEB on a final basis. For example, if a distributor has received approval of its 2014 LRAMVA balance, excluding 2014 savings adjustments, the distributor must forgo any LRAMVA amounts related to the 2014 savings adjustments as the 2014 LRAMVA balance was approved by the OEB on a final basis.

The 2021 CDM Guidelines provide updated direction regarding eligibility of CDM activities for LRAMVA claims. In preparing claims related to disposition of outstanding LRAMVA balances, distributors may seek to claim savings from Conservation First Framework (CFF) programs, and from programs they delivered through the Local Program Fund that was part of the Interim Framework. Distributors should provide sufficient supporting documentation on project savings to support their claim. Distributors are not eligible for LRAM for other IESO programs funded through the Interim Framework, or for CDM activities funded by the IESO through the 2021-2024

[57] EB-2012-0003, Guidelines for Electricity Distributor Conservation and Demand Management
[58] EB-2016-0075 (Guelph Hydro 2017 IRM) and EB-2016-0080 (Hydro One Brampton 2017 IRM)
[59] See EB-2016-0214 for an example (North Bay Hydro 2017 IRM)